ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

ANDREW FOIS
Chair

May 15, 2024

SENT VIA REGULATIONS.GOV

Ms. Loren Schulman
Associate Director
Office of Performance and Personnel Management
Office of Management and Budget

Mr. Samuel Berger
Associate Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

Re: Methods and Leading Practices for Advancing Public Participation and Community Engagement with the Federal Government, OMB-2024-0005, 89 Fed. Reg. 19,885

Dear Ms. Schulman and Mr. Berger:

I offer this comment on behalf of the Office of the Chair of the Administrative Conference of the United States (ACUS), an independent agency within the executive branch. *See* 5 U.S.C. § 591 *et seq*. Insofar as this comment sets views not contained in ACUS's formal recommendations, they reflect only the views of the Office of the Chair.

Congress established ACUS in 1964 to provide a forum through which federal agencies and outside experts could work cooperatively to improve administrative procedure, and in particular to "promote more effective public participation . . . in the rulemaking process." 5 U.S.C. § 591(2). To that end, ACUS is charged with studying federal administrative procedure and making such recommendations for action by federal agencies, the President, Congress, and the Judicial Conference of the United States. Recommendations are adopted by the Conference's 101-member Assembly, which includes 50 members designated by the heads of as many federal agencies and 40 experts from outside government, including members of the practicing bar and scholars in the field of administrative law or government.

Since its establishment, ACUS has adopted many recommendations identifying best practices that agencies can use to ensure that all individuals and organizations, including members of underserved communities, have a meaningful voice in federal agency rulemaking. These recommendations and related resources are available at acus.gov/public-participation. The Office of the Chair also maintains the Statement of Principles for Public Engagement in Agency Rulemaking, which concisely describes the principles and practices identified in these recommendations. Selected recommendations, along with a recently updated version of the Statement of Principles, are appended to this letter.

While this letter focuses primarily on public participation in agency rulemaking, public participation also serves an important purpose in many other types of agency decision-making, including in permitting and other adjudicative processes. Following issuance of Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, ACUS organized a forum that brought together government policymakers, community advocates, and scholars to discuss participation by underserved communities in regulatory policymaking, including both rulemaking and adjudication. More information about the forum, including a transcript of all six panels, is available at acus.gov/public-participation. ACUS is also currently undertaking a study of public participation in agency adjudication, which I expect will result in the adoption of formal recommendations later this year.

I submit answers to the following questions from OMB's Request for Information:

What types of content (e.g., methods, tools, definitions, research on the value of participation and engagement, promising practices) could the Office of Management and Budget (OMB) include in a federal framework for public participation and community engagement (PPCE) that would be effective and informative for Federal agencies to initiate or improve their participation and engagement activities, including those carried out with underserved communities?

Methods for Public Engagement. In developing a federal framework for PPCE, OMB may wish to provide guidance on methods, in addition to the notice-and-comment rulemaking process, that agencies can use to more meaningfully engage with members of the public, including (a) meetings with interested persons held episodically or as-needed based on rulemaking activities; (b) listening sessions; (c) internet and social media forums; (d) focus groups; (e) advisory committees, including those tasked with conducting negotiated rulemaking; (f) advance notices of proposed rulemaking; and (g) requests for information. Targeted outreach can provide an effective way for agencies to engage with individuals with relevant knowledge who do not typically participate in agency rulemaking and members of the public with relevant views that may not otherwise be represented. Petitions for rulemaking can also provide a useful way to improve communication between agencies and the public.

ACUS describes the benefits of different public engagement methods in Recommendation 2021-3, *Early Input on Regulatory Alternatives*; Recommendation 2018-7, *Public Engagement in Rulemaking*; Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*; Recommendation 2014-6, *Petitions for Rulemaking*; and Recommendation 2014-4, *"Ex Parte" Communications in Informal Rulemaking*.

Information and Guidance to the Public. OMB may wish to provide best practices that agencies can use to effectively explain their rulemaking process, the role of public participation, and the qualities of a useful comment to members of the public, particularly individuals and groups that do not typically participate in agency rulemaking. ACUS has identified best practices in Recommendation 2018-7 and Recommendation 2011-2, *Rulemaking Comments*.

Technology Use. OMB may wish to provide guidance on best practices for using technology to broaden public outreach, enable broader public participation, and manage public comments. For example, OMB may wish to:

- Identify best practices for using social media to increase public awareness of agency activities, including opportunities to contribute to policy setting, rule development, and the evaluation of existing regulatory regimes. Recommendation 2013-5, *Social Media in Rulemaking*, provides a set of best practices for using social media in rulemaking.

- Identify best practices for using video conferencing to enable broader public participation in agency policymaking, particularly among communities that historically have been underrepresented in such processes. Recommendation 2023-2, *Virtual Public Engagement in Agency Rulemaking*, provides a set of best practices for virtual public engagement in rulemaking.

- Identify best practices for managing mass, computer-generated, and falsely attributed comments. Recommendation 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, provides a set of best practices for managing such comments.

- Identify best practices for using agency websites to provide information about agency rulemaking processes and specific rulemaking initiatives in a user-friendly manner. ACUS identified best practices in Recommendation 2023-2 and Recommendation 2018-7.

Encouraging Intra-Agency Collaboration. Effective public engagement requires collaboration across agency components. ACUS recommends that agencies consider using personnel with public engagement training and experience to participate in both the development of their general public engagement policies as well as in planning for specific rules. ACUS describes best practices for intra-agency collaboration in Recommendation 2023-2 and Recommendation 2018-7.

What goals and objectives should OMB consider when developing a federal framework for PPCE?

Public participation in government decision-making can serve many purposes. As ACUS recognizes in the agency rulemaking context, "[b]y providing opportunities for public input and dialogue, agencies can obtain more comprehensive information, enhance the legitimacy and accountability of their decisions, and increase public support for their rules." *See* Recommendation 2018-7. OMB should consider these goals and objectives when developing a federal framework for PPCE.

At the same time, agencies face resource constraints and time pressures, and they often must make difficult choices among sometimes competing priorities. Agencies must also comply

with legal requirements and expectations regarding transparent decision-making. To ensure successful implementation by agencies, OMB must take these and other considerations into account when developing a federal framework for PPCE.

As ACUS recognizes, there is no one-size-fits-all approach to public engagement. In determining when and how to engage with the public during rulemaking, for example, agencies must consider a variety of factors, including: (a) the complexity of the rule; (b) the potential magnitude and distribution of the costs and benefits of the rule; (c) the interests that are likely to be affected and the extent to which they are likely to be affected; (d) the information needed and the potential value of experience or expertise from outside the agency; (e) whether specific forms of enhanced or targeted public engagement are likely to provide useful information, including from experts, individuals with knowledge germane to the proposed rule who do not typically participate in rulemaking, or individuals with relevant views that may not otherwise be expressed; (f) any challenges involved in obtaining informed participation from affected interests or other interested persons likely to have useful information, including the challenge of providing rulemaking materials in a language and form comprehensible to nonexperts whose participation is being sought; (g) whether the rule is likely to be controversial; (h) the time and resources available for enhanced or targeted public engagement as opposed to other uses; and (i) whether additional legal requirements, such as the Federal Advisory Committee Act or the Paperwork Reduction Act, might apply. *See* Recommendation 2018-7.

What guidance might OMB provide to agencies for developing their own goals and objectives for participation and engagement?

OMB should provide guidance on developing agency-specific PPCE plans and policies. As described in Recommendation 2018-7, ACUS encourages agencies to develop and make publicly available general policies for public engagement in their rulemakings. An agency's general policy should address how the agency will consider factors such as:

- The agency's goals and purposes in engaging the public;
- 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;
- How such types of individuals or organizations can be motivated to participate;
- What types of information the agency seeks from its public engagement;
- How this information is likely to be obtained;
- What the agency will do with the information;
- When public engagement should occur (e.g., as early as feasible in the rulemaking process, including when identifying problems and setting regulatory priorities); and
- The range of methods of public engagement available to the agency.

This general policy should be used to information public engagement with respect to specific rulemakings.

In co-developing a federal framework for PPCE, what specific steps should OMB take that involve the federal government and the public, especially engaging members of underserved communities, to ensure collaborative development of the framework?

In addition to soliciting input from members of the public, especially members of underserved communities, OMB should solicit input from federal agencies that regularly engage with the public. Effective planning for public engagement can require collaboration among many different entities, including multiple offices within an agency, such as program offices, legal offices, and offices that oversee communications, public engagement, and public affairs. Personnel with public engagement training and experience can be especially helpful in developing general public engagement policies and public engagement plans for specific rulemakings. Personnel at other agencies may also have useful information about best practices for public engagement. Agencies should, therefore, also consider sharing their public participation policies, data, and other information about the effectiveness of their public engagement outreach with other agencies. *See* Recommendation 2023-2. OMB is uniquely poised to bring agencies together in this space and to break down the barriers that exist both between and within agencies to improve the coordination of PPCE.

The Office of the Chair would welcome any questions OMB may have about the above-cited or other ACUS resources on public participation. Please have OMB staff direct any questions to Kazia Nowacki, Attorney Advisor, at knowacki@acus.gov.

Sincerely,

Andrew Fois
Chair

cc: Ms. Stephanie Tatham
ACUS Government Member from OMB

APPENDIX

Selected Recommendations and Publications of the Administrative Conference of the United States

Recommendation 2023-2, *Virtual Public Engagement in Agency Rulemaking*, 88 Fed. Reg. 42680 (July 3, 2023)

Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36082 (July 8, 2021)

Recommendation 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, 86 Fed. Reg. 36075 (July 8, 2021)

Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019)

Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017)

Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75117 (Dec. 17, 2014)

Recommendation 2014-4, *"Ex Parte" Communications in Informal Rulemaking*, 79 Fed. Reg. 35993 (June 25, 2014)

Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76269 (Dec. 17, 2013)

Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48791 (Aug. 9, 2011)

Statement of Principles for Public Engagement in Agency Rulemaking (rev. Sept. 1, 2023)

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2023-2

Virtual Public Engagement in Agency Rulemaking

Adopted June 15, 2023

The law often requires agencies to give interested persons an opportunity to participate in rulemakings.[1] Presidential directives, including Executive Order 14,094, *Modernizing Regulatory Review*, also instruct agencies to proactively engage a range of interested or affected persons, including underserved communities and program beneficiaries.[2] And as a matter of best practice, the Administrative Conference has encouraged agencies to consider additional opportunities for public engagement.[3]

Interested persons are often able to learn about participation opportunities through notice in the *Federal Register* and participate in the rulemaking by submitting written data, views, and arguments, typically after the agency has issued a notice of proposed rulemaking (NPRM).

Agencies may also provide opportunities for oral presentation, whether before or after an NPRM has been issued. This opportunity can take the form of a public hearing, meeting, or listening session—what this Recommendation refers to as a "public rulemaking engagement." Agencies may provide a public rulemaking engagement because a statute, presidential directive,

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[1] *See, e.g.*, 5 U.S.C. § 553(c).

[2] 88 Fed. Reg. 21,879 (Apr. 6, 2023).

[3] 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).

or agency rule or policy requires one or because such engagement would improve agency decision making and promote public participation in regulatory policymaking.[4] The Conference has encouraged agencies to hold public rulemaking engagements when it would be beneficial to do so and to explore more effective options for notice, to ensure interested persons are aware of and understand regulatory developments that affect them. Agencies also directly engage with people and organizations that are interested in and affected by their rules, and the Conference has encouraged them to do so consistent with rules governing the integrity of the rulemaking process.[5]

When agencies engage with the public, they must ensure that they meet all legal accessibility requirements.[6] Effective public engagement also requires that agencies identify and address barriers to participation, including geographical constraints, resource limitations, and language barriers. For example, to ensure that all people affected by a rulemaking are aware of the rulemaking and opportunities to participate, the Conference has recommended that agencies conduct outreach that targets members of the public with relevant views who do not typically participate in rulemaking or may otherwise not be represented.[7]

In recent years, and especially during the COVID-19 pandemic, agencies increasingly have used widely available, internet-based videoconferencing software to engage with the public.[8] By reducing some barriers that people—especially members of historically underserved communities—encounter, virtual public engagement can help broaden participation in agency

[4] Kazia Nowacki, Virtual Public Engagement in Agency Rulemaking 5–6 (May 25, 2023) (report to the Admin. Conf. of the U.S.).

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

[6] *See, e.g.*, Rehabilitation Act of 1973, § 508, 29 U.S.C. § 794d; Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861; Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021); Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000).

[7] *E.g.*, Admin. Conf. of the U.S., Recommendation 2021-3, *Early Public Input on Regulatory Alternatives*, ¶ 3, 86 Fed. Reg. 36,082, 36,082–36,083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, ¶ 1(b), 84 Fed. Reg. 2146, 2147 (Feb. 6, 2019).

[8] 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).

rulemakings.[9] At the same time, virtual engagements may present barriers to access for some people, such as low-income individuals for whom it may be difficult to obtain access to high-quality personal devices or private internet services, individuals in rural areas who lack access to broadband internet, individuals whose disabilities prevent effective engagement in virtual proceedings or make it difficult to set up and manage the necessary technology, and individuals with limited English proficiency. Some individuals may also have difficulty, feel uncomfortable, or lack experience using a personal device or internet-based videoconferencing software to participate in an administrative proceeding.[10]

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

RECOMMENDATION

Virtual Public Engagement Planning

1. Agencies that engage in rulemaking should, when feasible and appropriate, utilize internet-based videoconferencing software as a means of broadening engagement with

[9] Kazia Nowacki, Virtual Public Engagement in Agency Rulemaking (May 25, 2023) (report to the Admin. Conf. of the U.S.).

[10] *Cf.* Recommendation 2021-4, *supra* note 8.

interested persons in a cost-effective way, including through outreach that targets members of the public with relevant views who do not typically participate in rulemaking or may otherwise not be represented. As part of its overall policy for public engagement in rulemaking (described in Recommendation 2018-7, *Public Engagement in Rulemaking*), each agency should explain how it intends to use internet-based videoconferencing to engage with the public.

2. Each agency should ensure that its policies regarding informal communications between agency personnel and individual members of the public related to a rulemaking (described in Recommendation 2014-4, *"Ex Parte" Communications in Informal Rulemaking*) cover communications that take place virtually.
3. Each agency should prepare and post to a publicly available website guidance on the conduct of virtual public rulemaking engagements—that is, a meeting, hearing, listening session, or other live event that is rulemaking related and open to the general public—and ensure employees involved with such engagements are familiar with that guidance.
4. When an agency plans to hold a public rulemaking engagement, it should allow for interested persons to observe the engagement remotely and, when feasible, provide input and ask questions remotely.
5. When an agency decides to hold a public rulemaking engagement, rulemaking personnel should collaborate with personnel who oversee communications, public affairs, public engagement, and other relevant activities for the agency to ensure the engagement reaches the potentially interested members of the public and facilitates effective participation from those persons, including groups that are affected by the rulemaking and may otherwise have been underrepresented in the agency's administrative process.

Notice

6. An agency should include, as applicable, the following information in the public notices for a public rulemaking engagement with a virtual or remote component:
    a. The date and time of the engagement, at the beginning of the notice;

b. Options for remote attendance, including a direct link or instructions to obtain a direct link to the internet-based videoconference event and alternative remote attendance options for members of the public without access to broadband internet, at the beginning of the notice;
c. A plain-language summary of the rulemaking and description of the engagement's purpose and agenda and the nature of the public input, if any, the agency is seeking to obtain through the engagement;
d. A link to the webpage described in Paragraph 7;
e. Information about opportunities for members of the public to speak during the engagement, including any directions for requesting to speak and any moderation policies, such as limits on the time for speaking;
f. The availability of services such as closed captioning, language interpretation, and telecommunications relay services and access instructions;
g. The availability and location of a recording, a transcript, a summary, or minutes; and
h. Contact information for a person who can answer questions about the engagement or arrange accommodations.

7. To encourage participation in a public rulemaking engagement, the agency should create a dedicated webpage for each such engagement that includes the information described in Paragraph 6. The webpage should include, as applicable, a link to:
    a. The internet-based videoconferencing event, its registration page, or information for alternative remote attendance options for members of the public without access to broadband internet;
    b. The *Federal Register* notice;
    c. Any materials associated with the engagement, such as an agenda, a program, speakers' biographies, a draft rule, the rulemaking docket, or questions for participants;
    d. A livestream of the engagement for the public to observe while it is occurring; and

e. Any recording, transcript, summary, or minutes after the engagement has ended.

8. The Office of the Federal Register (OFR) should update the *Document Drafting Handbook* to provide agencies guidance on drafting *Federal Register* notices for public rulemaking engagements with virtual or remote components that include the information described in Paragraph 6.
9. OFR and the eRulemaking Program should update the "Document Details" sidebar on FederalRegister.gov and Regulations.gov to include, for any rulemaking in which there is a public rulemaking engagement, a link to the agency webpage described in Paragraph 7.

Managing Virtual Public Engagements

10. When feasible, each agency should allow interested persons to observe a livestream of the public rulemaking engagement remotely and should not require members of the public to register. Agencies may want to set a registration deadline for those wishing to speak or requiring accommodations.
11. To manage participants' expectations, an agency should communicate the following matters, among others, to participants at the beginning of the event:
    a. The purpose and goal of the engagement;
    b. The moderation policies, including those governing speaking time limits and whether or why the agency will or will not respond to oral statements made by participants;
    c. The management of the public speaking queue;
    d. Whether the chat function, if using an internet-based videoconferencing platform, will be disabled or monitored and, if monitored, whether the chat will be included in the record;
    e. How participants can access the rulemaking materials throughout the meeting; and
    f. Whether the event will be recorded or transcribed and where it will be made available.

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

Recordings and Transcripts

13. When an agency holds a public rulemaking engagement, it should record, transcribe, summarize, or prepare meeting minutes of the engagement unless doing so would adversely affect the willingness of public participants to provide input or ask questions.
14. Each agency should, in a timely manner, make any recording, transcript, summary, or minutes of a public rulemaking engagement available in any public docket associated with the rulemaking and on the webpage described in Paragraph 7.

Fees

15. Agencies should not assess fees on the public for virtual public engagement.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2021-3

Early Input on Regulatory Alternatives

Adopted June 17, 2021

Agency development of and outreach concerning regulatory alternatives prior to issuing a notice of proposed rulemaking (NPRM) on important issues often results in a better-informed notice-and-comment process, facilitates decision making, and improves rules. In this context, the term "regulatory alternative" is used broadly and could mean, among other things, a different method of regulating, a different level of stringency in the rule, or not regulating at all.[1] Several statutes and executive orders, including the National Environmental Policy Act (NEPA),[2] the Regulatory Flexibility Act (RFA),[3] and Executive Order 12866,[4] require federal agencies to identify and consider alternative regulatory approaches before proposing certain new rules. This Recommendation suggests best practices for soliciting early input during the process of developing regulatory alternatives, whether or not it is required by law or executive order, before publishing an NPRM. It also provides best practices for publicizing the alternatives considered when agencies are promulgating important rules.[5]

The Administrative Conference has previously recommended that agencies engage with the public throughout the rulemaking process, including by seeking input while agencies are still

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[1] *See* Christopher Carrigan & Stuart Shapiro, Developing Regulatory Alternatives Through Early Input 8 (June 4, 2021) (report to the Admin. Conf. of the U.S.).

[2] 42 U.S.C. § 4332(C)(iii) (requiring agencies to consider alternatives in environmental impact statements under NEPA).

[3] 5 U.S.C. § 603(c) (requiring agencies to consider alternatives in regulatory flexibility analyses conducted under the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act).

[4] Exec. Order No. 12866, § 1, 58 Fed. Reg. 51735, 51735–36 (Sept. 30, 1993).

[5] *See* Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, ¶ 6, 79 Fed. Reg. 75114, 75116–17 (Dec. 17, 2014).

in the early stages of shaping a rule.[6] Agencies might conduct this outreach while developing their regulatory priorities, including in the proposed regulatory plans agencies are required to prepare under Executive Order 12866.[7] Seeking early input before issuing a notice of proposed rulemaking can help agencies identify alternatives and learn more about the benefits, costs, distributional impacts,[8] and technical feasibility of alternatives to the proposal they are considering. Doing so is particularly important, even if not required by law or executive order, for a proposal likely to draw significant attention for its economic impact or other significance. It can also be especially valuable for agencies seeking early input on regulatory alternatives to reach out to a wide range of interested persons, including affected groups that often are underrepresented in the administrative process and may suffer disproportionate harms from a proposed rule.[9]

When seeking early input on regulatory alternatives, agencies might consider approaches modeled on practices that other agencies already use. In so doing, they might look at agency practices that are required by statute (e.g., the Small Business Regulatory Enforcement Fairness Act)[10] or agency rules (e.g., the Department of Energy's "Process Rule"),[11] or practices that

[6] *See* Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, ¶ 5, 84 Fed. Reg. 2146, 2148 (Feb. 6, 2019); s*ee also, e.g.,* Admin. Conf. of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, 50 Fed. Reg. 28364 (July 12, 1985); Michael Sant'Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking 62–77 (Nov. 19, 2018) (report to the Admin. Conf. of the U.S.).

[7] *See* Exec. Order No. 12866, *supra* note 4, § 4(c).

[8] A distributional impact is an "impact of a regulatory action across the population and economy, divided up in various ways (e.g., income groups, race, sex, industrial sector, geography)." OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS 14 (2003).

[9] *See* Exec. Order. No. 13985, 86 Fed. Reg 7009 (Jan. 25, 2021) (directing the Office of Management and Budget, in partnership with agencies, to ensure that agency policies and actions are equitable with respect to race, ethnicity, religion, income, geography, gender identity, sexual orientation, and disability); Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 26, 2021) (requiring the Office of Management and Budget to produce recommendations regarding improving regulatory review that, among other things, "propose procedures that take into account the distributional consequences of regulations . . . to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities").

[10] 5 U.S.C. § 609.

[11] 10 C.F.R. § 430, Subpart C, App. A.

agencies have voluntarily undertaken in the absence of any legal requirement.

Nevertheless, seeking early input on alternatives may not be appropriate in all cases and may trigger certain procedural requirements.[12] In some instances, the alternatives may be obvious. In others, the subject matter may be so obscure that public input is unlikely to prove useful. And in all cases, agencies face resource constraints and competing priorities, so agencies may wish to limit early public input to a subclass of rules such as those with substantial impact. Agencies will need to consider whether the benefits of early outreach outweigh the costs, including the resources required to conduct the outreach and any delays entailed. When agencies do solicit early input, they will still want to tailor their outreach to ensure that they are soliciting input in a way that is cost-effective, is equitable, and maximizes the likelihood of obtaining diverse, useful responses.

RECOMMENDATION

1. When determining whether to seek early input from knowledgeable persons to identify potential regulatory alternatives or respond to alternatives an agency has already identified, the agency should consider factors such as:
    a. The extent of the agency's familiarity with the policy issues and key alternatives;
    b. The extent to which the conduct being regulated or any of the alternatives suggested are novel;
    c. The degree to which potential alternatives implicate specialized technical or technological expertise;
    d. The complexity of the underlying policy question and the proposed alternatives;
    e. The potential magnitude of the costs and benefits of the alternatives proposed;
    f. The likelihood that the selection of an alternative will be controversial;
    g. The time and resources that conducting such outreach would require;
    h. The extent of the agency's discretion to select among alternatives, given the

[12] *See, e.g.*, Federal Advisory Committee Act, 5 U.S.C. App. 2 §§ 1–16.

statutory language being implemented;

i. The deadlines the agency faces, if any, and the harms that might occur from the delay required to solicit and consider early feedback;
j. The extent to which certain groups that are affected by the proposed regulation and have otherwise been underrepresented in the agency's administrative process may suffer adverse distributional effects from generally beneficial proposals; and
k. The extent to which experts in other agencies may have valuable input on alternatives.

2. In determining what outreach to undertake concerning possible regulatory alternatives, an agency should consider using, consistent with available resources and feasibility, methods of soliciting public input including:
    a. Meetings with interested persons held episodically or as-needed based on rulemaking activities;
    b. Listening sessions;
    c. Internet and social media forums;
    d. Focus groups;
    e. Advisory committees, including those tasked with conducting negotiated rulemaking;
    f. Advance notices of proposed rulemakings; and
    g. Requests for information.

    The agency should also consider how to ensure that its interactions with outside persons are transparent, to the maximum extent permitted by law.
3. An agency should consider whether the methods it uses to facilitate early outreach in its rulemaking process will engage a wide range of interested persons, including individuals and groups that are affected by the rule and are traditionally underrepresented in the agency's rulemaking processes. The agency should consider which methods would best facilitate such outreach, including providing materials designed for the target participants. For example, highly technical language may be appropriate for some, but not all, audiences. The agency should endeavor to make participation by interested persons who

have less time and fewer resources as easy as possible, particularly when those potential participants do not have experience in the rulemaking process. The agency should explain possible consequences of the potential rulemaking to help potential participants understand the importance of their input and to encourage their participation in the outreach.

4. If an agency is unsure what methods of soliciting public input will best meet its needs and budget, it should consider testing different methods to generate alternatives or receive input on the regulatory alternatives it is considering before issuing notices of proposed rulemaking (NPRMs). As appropriate, the agency should describe the outcomes of using these different methods in the NPRMs for rules in which they are used.
5. An agency should ensure that all of its relevant officials, including economists, scientists, and other experts, have an opportunity to identify potential regulatory alternatives during the early input process. As appropriate, the agency should also reach out to select experts in other agencies for input on alternatives.
6. An agency should consider providing in the NPRM a discussion of the reasonable regulatory alternatives it has considered or that have been suggested to it, including alternatives it is not proposing to adopt, together with the reasons it is not proposing to adopt those alternatives. To the extent the agency is concerned about revealing the identity of the individuals or groups offering proposed alternatives due to privacy or confidentiality concerns, it should consider characterizing the identity (e.g., industry representative, environmental organization, etc.) or listing the alternatives without ascribing them to any particular person.
7. When an agency discusses regulatory alternatives in the preamble of a proposed or final rule, it should also consider including a discussion of any reasonable alternatives suggested or considered through early public input, but which the agency believes are precluded by statute. The discussion should also include an explanation of the agency's views on the legality of those alternatives.
8. To help other agencies craft best practices for early engagement with the public, an agency should, when feasible, share data and other information about the effectiveness of

its efforts to solicit early input on regulatory alternatives.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2021-1

Managing Mass, Computer-Generated, and Falsely Attributed Comments

Adopted June 17, 2021

Under the Administrative Procedure Act (APA), agencies must give members of the public notice of proposed rules and the opportunity to offer their "data, views, or arguments" for the agencies' consideration.[1] For each proposed rule subject to these notice-and-comment procedures, agencies create and maintain an online public rulemaking docket in which they collect and publish the comments they receive along with other publicly available information about the proposed rule.[2] Agencies must then process, read, and analyze the comments received. The APA requires agencies to consider the "relevant matter presented" in the comments received and to provide a "concise general statement of [the rule's] basis and purpose."[3] When a rule is challenged on judicial review, courts have required agencies to demonstrate that they have considered and responded to any comment that raises a significant issue.[4] The notice-and-comment process is an important opportunity for the public to provide input on a proposed rule and the agency to "avoid errors and make a more informed decision" on its rulemaking.[5]

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[1] 5 U.S.C. § 553. This requirement is subject to a number of exceptions. *See id.*

[2] *See* E-Government Act § 206, 44 U.S.C. § 3501 note (establishing the eRulemaking Program to create an online system for conducting the notice-and-comment process); *see also* Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41358 (July 10, 2013) (distinguishing between "the administrative record for judicial review," "rulemaking record," and the "public rulemaking docket").

[3] 5 U.S.C. § 553.

[4] Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment.").

[5] Azar v. Allina Health Services, 139 S. Ct. 1804, 1816 (2019).

Technological advances have expanded the public's access to agencies' online rulemaking dockets and made it easier for the public to comment on proposed rules in ways that the Administrative Conference has encouraged.[6] At the same time, in recent high-profile rulemakings, members of the public have submitted comments in new ways or in numbers that can challenge agencies' current approaches to processing these comments or managing their online rulemaking dockets.

Agencies have confronted three types of comments that present distinctive management challenges: (1) mass comments, (2) computer-generated comments, and (3) falsely attributed comments. For the purposes of this Recommendation, mass comments are comments submitted in large volumes by members of the public, including the organized submission of identical or substantively identical comments. Computer-generated comments are comments whose substantive content has been generated by computer software rather than by humans.[7] Falsely attributed comments are comments attributed to people who did not submit them.

These three types of comments, which have been the subject of recent reports by both federal[8] and state[9] authorities, can raise challenges for agencies in processing, reading, and analyzing the comments they receive in some rulemakings. If not managed well, the processing

[6] *See* Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in eRulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48791 (Aug. 9, 2011).

[7] The ability to automate the generation of comment content may also remove human interaction with the agency and facilitate the submission of large volumes of comments in cases in which software can repeatedly submit comments via Regulations.gov.

[8] *See* PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, U.S. SENATE COMM. ON HOMELAND SECURITY AND GOV'T AFFAIRS, STAFF REPORT, ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS (2019); U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-413T, SELECTED AGENCIES SHOULD CLEARLY COMMUNICATE HOW THEY POST PUBLIC COMMENTS AND ASSOCIATED IDENTITY INFORMATION (2020); U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-483, SELECTED AGENCIES SHOULD CLEARLY COMMUNICATE PRACTICES ASSOCIATED WITH IDENTITY INFORMATION IN THE PUBLIC COMMENT PROCESS (2019).

[9] N.Y. STATE OFF. OF THE ATT'Y GEN., FAKE COMMENTS: HOW U.S. COMPANIES & PARTISANS HACK DEMOCRACY TO UNDERMINE YOUR VOICE (2021).

of these comments can contribute to rulemaking delays or can raise other practical or legal concerns for agencies to consider.

In addressing the three types of comments in a single recommendation, the Conference does not mean to suggest that agencies should treat these comments in the same way. Rather, the Conference is addressing these comments in the same Recommendation because, despite their differences, they can present similar or even overlapping management concerns during the rulemaking process. In some cases, agencies may also confront all three types of comments in the same rulemaking.

The challenges presented by these three types of comments are by no means identical. With mass comments, agencies may encounter processing or cataloging challenges simply as a result of the volume as well as the identical or substantively identical content of some comments they receive. Without the requisite tools, agencies may also find it difficult or time-consuming to digest or analyze the overall content of all comments they receive.

In contrast with mass comments, computer-generated comments and falsely attributed comments may mislead an agency or raise issues under the APA and other statutes. One particular problem that agencies may encounter is distinguishing computer-generated comments from comments written by humans. Computer-generated comments may also raise potential issues for agencies as a result of the APA's provision for the submission of comments by "interested persons."[10] Falsely attributed comments can harm people whose identities are appropriated and may create the possibility of prosecution under state or federal criminal law. False attribution may also deceive agencies or diminish the informational value of a comment, especially when the commenter claims to have situational knowledge or the identity of the commenter is otherwise relevant. The informational value that both of these types of comments

[10] 5 U.S.C. § 553.

provide to agencies is likely to be limited or at least different from comments that have been neither computer-generated nor falsely attributed.

This Recommendation is limited to how agencies can better manage the processing challenges associated with mass, computer-generated, and falsely attributed comments.[11] By addressing these processing challenges, the Recommendation is not intended to imply that widespread participation in the rulemaking process, including via mass comments, is problematic. Indeed, the Conference has explicitly endorsed widespread public participation on multiple occasions,[12] and this Recommendation should help agencies cast a wide net when seeking input from all individuals and groups affected by a rule. The Recommendation aims to enhance agencies' ability to process comments they receive in the most efficient way possible and to ensure that the rulemaking process is transparent to prospective commenters and the public more broadly.

Agencies can advance the goals of public participation by being transparent about their comment policies or practices and by providing educational information about public involvement in the rulemaking process.[13] Agencies' ability to process comments can also be enhanced by digital technologies. As part of its eRulemaking Program, for example, the General

[11] This Recommendation does not address what role particular types of comments should play in agency decision making or what consideration, if any, agencies should give to the number of comments in support of a particular position.

[12] *See* Recommendation 2018-7, *supra* note 6; Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75117 (Dec. 17, 2014); Recommendation 2013-5, *supra* note 6; Recommendation 2011-8, *supra* note 6; Admin. Conf. of the U.S., Recommendation 2011-7, *Federal Advisory Committee Act: Issues and Proposed Reforms*, 77 Fed. Reg. 2261 (Jan. 17, 2012); Recommendation 2011-2, *supra* note 6.

[13] For an example of educational information on rulemaking participation, see the "Commenter's Checklist" that the eRulemaking Program currently displays in a pop-up window for every rulemaking webpage that offers the public the opportunity to comment. *See Commenter's Checklist*, GEN. SERVS. ADMIN., https://www.Regulations.gov (last visited May 24, 2021) (navigate to any rulemaking with an open comment period; click comment button; then click "Commenter's Checklist"). In addition, the text of this checklist appears on the project page for this Recommendation on the ACUS website.

Services Administration (GSA) has implemented technologies on the Regulations.gov platform that make it easier for agencies to verify that a commenter is a human being.[14] GSA's Regulations.gov platform also includes an application programming interface (API)—a feature of a computer system that enables different systems to communicate with it—to facilitate mass comment submission.[15] This technology platform allows partner agencies to better manage comments from identifiable entities that submit large volumes of comments. Some federal agencies also use a tool, sometimes referred to as de-duplication software, to identify and group identical or substantively identical comments.

New software and technologies to manage public comments will likely emerge in the future, and agencies will need to keep apprised of them. Agencies might also consider adopting alternative methods for encouraging public participation that augment the notice-and-comment process, particularly to the extent that doing so ameliorates some of the management challenges described above.[16] Because technology is rapidly changing, agencies will need to stay apprised of new developments that could enhance public participation in rulemaking.

Not all agencies will encounter mass, computer-generated, or falsely attributed comments. But some agencies have confronted all three, sometimes in the same rulemaking. In offering the best practices that follow, the Conference recognizes that agency needs and resources will vary. For this reason, agencies should tailor the best practices in this Recommendation to their particular rulemaking programs and the types of comments they receive or expect to receive.

[14] This software is distinct from identity validation technologies that force commenters to prove their identities.

[15] *See Regulations.gov API*, GEN. SERVS. ADMIN., https://open.gsa.gov/api/regulationsgov/ (last visited May 24, 2021).

[16] *See* Steve Balla, Reeve Bull, Bridget Dooling, Emily Hammond, Michael Herz, Michael Livermore, & Beth Simone Noveck, Mass, Computer-Generated, and Fraudulent Comments 43–48 (June 1, 2021) (report to the Admin. Conf. of the U.S.).

RECOMMENDATION

Managing Mass Comments

1. The General Services Administration's (GSA) eRulemaking Program should provide a common de-duplication tool for agencies to use, although GSA should allow agencies to modify the de-duplication tool to fit their needs or to use another tool, as appropriate. When agencies find it helpful to use other software tools to perform de-duplication or extract information from a large number of comments, they should use reliable and appropriate software. Such software should provide agencies with enhanced search options to identify the unique content of comments, such as the technologies used by commercial legal databases like Westlaw or LexisNexis.
2. To enable easier public navigation through online rulemaking dockets, agencies may welcome any person or entity organizing mass comments to submit comments with multiple signatures rather than separate identical or substantively identical comments.
3. Agencies may wish to consider alternative approaches to managing the display of comments online, such as by posting only a single representative example of identical comments in the online rulemaking docket or by breaking out and posting only non-identical content in the docket, taking into consideration the importance to members of the public to be able to verify that their comments were received and placed in the agency record. When agencies decide not to display all identical comments online, they should provide publicly available explanations of their actions and the criteria for verifying the receipt of individual comments or locating identical comments in the docket and for deciding what comments to display.
4. When an agency decides not to include all identical or substantively identical comments in its online rulemaking docket to improve the navigability of the docket, it should ensure that any reported total number of comments (such as in Regulations.gov or in the preambles to final rules) includes the number of identical or substantively identical comments. If resources permit, agencies should separately report the total number of

identical or substantively identical comments they receive. Agencies should also consider providing an opportunity for interested members of the public to obtain or access all comments received.

Managing Computer-Generated Comments

5. To the extent feasible, agencies should flag any comments they have identified as computer-generated or display or store them separately from other comments. If an agency flags a comment as computer-generated, or displays or stores it separately from the online rulemaking docket, the agency should note its action in the docket. The agency may also choose to notify the submitter directly if doing so does not violate any relevant policy prohibiting direct contact with senders of "spam" or similar communications.
6. Agencies that operate their own commenting platforms should consider using technology that verifies that a commenter is a human being, such as reCAPTCHA or another similar identity proofing tool. The eRulemaking Program should continue to retain this functionality.
7. When publishing a final rule, agencies should note any comments on which they rely that they know are computer-generated and state whether they removed from the docket any comments they identified as computer-generated.

Managing Falsely Attributed Comments

8. Agencies should provide opportunities (including after the comment deadline) for individuals whose names or identifying information have been attached to comments they did not submit to identify such comments and to request that the comment be anonymized or removed from the online rulemaking docket.
9. If an agency flags a comment as falsely attributed or removes such a comment from the online rulemaking docket, it should note its action in the docket. Agencies may also choose to notify the purported submitter directly if doing so does not violate any agency

policy.

10. If an agency relies on a comment it knows is falsely attributed, it should include an anonymized version of that comment in its online rulemaking docket. When publishing a final rule, agencies should note any comments on which they rely that are falsely attributed and should state whether they removed from the docket any falsely attributed comments.

Enhancing Agency Transparency in the Comment Process

11. Agencies should inform the public about their policies concerning the posting and use of mass, computer-generated, and falsely attributed comments. These policies should take into account the meaningfulness of the public's opportunity to participate in the rulemaking process and should balance goals such as user-friendliness, transparency, and informational completeness. In their policies, agencies may provide for exceptions in appropriate circumstances.
12. Agencies and relevant coordinating bodies (such as GSA's eRulemaking Program, the Office of Information and Regulatory Affairs, and any other governmental bodies that address common rulemaking issues) should consider providing publicly available materials that explain to prospective commenters what types of responses they anticipate would be most useful, while also welcoming any other comments that members of the public wish to submit and remaining open to learning from them. These materials could be presented in various formats—such as videos or FAQs—to reach different audiences. These materials may also include statements within the notice of proposed rulemaking for a given agency rule or on agencies' websites to explain the purpose of the comment process and explain that agencies seriously consider any relevant public comment from a person or organization.
13. To encourage the most relevant submissions, agencies that have specific questions or are aware of specific information that may be useful should identify those questions or such information in their notices of proposed rulemaking.

Additional Opportunities for Public Participation

14. Agencies and relevant coordinating bodies should stay abreast of new technologies for facilitating informative public participation in rulemakings. These technologies may help agencies to process mass comments or identify and process computer-generated and falsely attributed comments. In addition, new technologies may offer new opportunities to engage the public, both as part of or as a supplement to the notice-and-comment process. Such opportunities may help ensure that agencies receive input from communities that may not otherwise have an opportunity to participate in the conventional comment process.

Coordination and Training

15. Agencies should work closely with relevant coordinating bodies to improve existing technologies and develop new technologies to address issues associated with mass, computer-generated, and falsely attributed comments. Agencies and relevant coordinating bodies should share best practices and relevant innovations for addressing challenges related to these comments.
16. Agencies should develop and offer opportunities for ongoing training and staff development to respond to the rapidly evolving nature of technologies related to mass, computer-generated, and falsely attributed comments and to public participation more generally.
17. As authorized by 5 U.S.C. § 594(2), the Conference's Office of the Chairman should provide for the "interchange among administrative agencies of information potentially useful in improving" agency comment processing systems. The subjects of interchange might include technological and procedural innovations, common management challenges, and legal concerns under the Administrative Procedure Act and other relevant statutes.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2018-7

Public Engagement in Rulemaking

Adopted December 14, 2018

Robust public participation is vital to the rulemaking process. By providing opportunities for public input and dialogue, agencies can obtain more comprehensive information, enhance the legitimacy and accountability of their decisions, and increase public support for their rules.[1] Agencies, however, often face challenges in involving a variety of affected interests and interested persons in the rulemaking process.

The Administrative Procedure Act (APA) recognizes the value of public participation in rulemaking by requiring agencies to publish a notice of a proposed rulemaking (NPRM) in the *Federal Register* and provide interested persons an opportunity to comment on rulemaking proposals.[2] Other statutes, including the Federal Advisory Committee Act (FACA)[3] and Negotiated Rulemaking Act,[4] describe other means to engage representatives of identified interests in the rulemaking process. In many rulemakings, however, agencies rely primarily on notice-and-comment procedures to solicit public input. Although the notice-and-comment process generates important information, agencies can sometimes benefit from engaging the public at other points in the process and through other methods, particularly as they identify regulatory issues and develop potential options before issuing NPRMs.

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[1] Michael Sant'Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking 9–17 (Nov. 19, 2018) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/public-engagement-rulemaking-final-report.

[2] 5 U.S.C. § 553(b)–(c).

[3] Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2).

[4] Negotiated Rulemaking Act, Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified as amended at 5 U.S.C. §§ 561–70).

The Conference has previously adopted several recommendations directed at expanding participation in the rulemaking process. These previous recommendations address a variety of issues, including rulemaking petitions, advisory committees, negotiated rulemaking, social media, comment and reply periods, and plain language in regulatory drafting.[5] This Recommendation builds on these past recommendations and focuses on supplemental tools agencies can use to expand their public engagement.

For the purposes of this Recommendation, "public engagement" refers to activities by the agency to elicit input from the public. It includes efforts to enhance public understanding of agency rulemaking and foster meaningful participation in the rulemaking process by members of the public. Because some affected interests and other interested persons may not be aware of agency rulemakings or understand how to participate, effective public engagement may require agencies to undertake deliberate outreach and public education efforts to overcome barriers to participation, including geographical, language, resource, and other constraints.[6]

Strategic planning focused on public engagement can help agencies solicit and obtain valuable information from a greater number of affected interests with diverse experiences, information, and views throughout the rulemaking process, including experts, individuals, or entities with knowledge germane to the proposed rule who do not typically participate in the notice-and-comment process.[7] An agency should begin by developing a general policy for public

[5] *See* Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 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 2011-7, *Federal Advisory Committee Act: Issues and Proposed Reforms*, 77 Fed. Reg. 2261 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

[6] *See, e.g.*, Cary Coglianese, Federal Agency Use of Electronic Media in the Rulemaking Process 46–48 (Dec. 5, 2011) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-agency-innovations-report (discussing the "digital divide" and differing Internet usage among a variety of demographics).

[7] For a discussion of general public engagement policies, see Sant'Ambrogio & Staszewski, *supra* note 1, at 138–43. For examples of general public engagement policies, see U.S. DEP'T OF THE INTERIOR, NAT'L PARK SERV.,

engagement that identifies factors or establishes standards for the agency to use to design engagement efforts in individual rulemakings. The agency can then apply or tailor its general policy to specific rule proposals, reflecting the unique purposes, goals, and needs of each rulemaking. Well-designed planning for specific rulemakings will include consideration of a variety of methods to obtain valuable information from diverse sources at various stages during the rulemaking process.[8]

Not all rulemakings, however, warrant enhanced public engagement. Some rules hold little public salience or address narrow issues, so public engagement beyond the notice-and-comment process is unlikely to provide the agency with additional relevant information. On the other hand, some rules are complex, affect a wide range of interests in a variety of ways, or implicate controversial issues. For these rules, additional, well-designed public engagement may be worthwhile to obtain information from affected interests and other interested persons who might not otherwise participate in the rulemaking and encourage more useful participation from those who do. Agencies considering enhanced public engagement for a particular rule must carefully evaluate many factors, including agency resources, rule complexity, and the prevalence of otherwise missing information or views, before deciding whether to pursue additional outreach. Furthermore, even after agencies decide to undertake enhanced public engagement when developing their rules, they must decide what methods are best suited to accomplish their outreach goals. Each method may offer distinct benefits but come with varying costs or other limitations. Agencies should consider how a specific method of public engagement will assist them in obtaining the type of information and feedback they seek. Agencies should also consider the best timing for using a method of public engagement. Finally, with whatever public engagement method an agency chooses, it should demonstrate a sincere desire to learn from

DIRECTOR'S ORDER #75A: CIVIC ENGAGEMENT AND PUBLIC INVOLVEMENT POLICY (Aug. 30, 2007); ENVTL. PROT. AGENCY, PUBLIC INVOLVEMENT POLICY OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY (2003).

[8] For a discussion of specific public engagement plans for individual rulemaking initiatives, see Sant'Ambrogio & Staszewski, *supra* note 1, at 143–49.

those who participate and should display open-mindedness about the relevant issues presented by the rulemaking.

This Recommendation highlights three main methods for supplementing the notice-and-comment process. First, agencies can publish "requests for information" (RFIs) or "advance notices of proposed rulemaking" (ANPRMs) in the *Federal Register* to request data, comments, or other information on regulatory issues before proceeding with a specific regulatory proposal.[9] Although these two mechanisms are similar, RFIs are generally used when an agency is determining whether to proceed at all and, if so, what general approach to take.[10] ANPRMs are generally used when the agency has formulated one or more tentative regulatory options and seeks input on which option to propose.[11] RFIs and ANPRMs may be particularly beneficial when agencies seek additional information to identify areas of concern, compare potential approaches to problems, and evaluate and refine regulatory proposals. RFIs and ANPRMs provide agencies with additional opportunities to solicit information without organizing potentially costly or burdensome face-to-face engagement efforts.

Second, agencies may engage in targeted outreach to identify and engage affected interests that might not otherwise participate in the rulemaking.[12] RFIs and ANPRMs are useful tools to enhance participation early in the rulemaking process. However, RFIs and ANPRMs published in the *Federal Register* may only reach affected interests that are already likely to participate in the rulemaking. Targeted outreach efforts allow agencies to seek information from individuals and entities that may not read the *Federal Register* or otherwise would be unaware of or unable to participate effectively in the notice-and-comment process. To engage in targeted

[9] Some agencies refer to documents similar to RFIs and ANPRMs under other names, including "notice of inquiry."

[10] For a discussion of the use of RFIs during agenda setting and rule development, see *id.* at 50–52, 65 (discussing the use of RFIs by the Department of Energy, the Bureau of Consumer Financial Protection, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation).

[11] For a discussion of the use of ANPRMs, see *id.* at 78–80. For example, the Department of Energy routinely issues ANPRMs to solicit public comments on preliminary proposals pursuant to its process rule. *See id.* at 141–43.

[12] For example, the Forest Service conducted targeted outreach, including forums, roundtables, and consultation meetings, seeking the input of recreational users of forests, Native American tribal communities, and state and local government officials when developing its 2012 Planning Rule. *See id.* at 53.

outreach, an agency identifies affected interests that are not likely to participate and undertakes efforts to notify those interests of the rulemaking and encourage and facilitate their participation. Targeted outreach can take on a variety of forms, and agencies tailor these efforts to specific affected interests and rules.

Third, agencies may also convene meetings of affected interests and other interested persons to obtain useful feedback on potential regulatory alternatives and elicit information through a process of interactive dialogue. Meetings can educate participants and allow them to consider and respond to differing views, thereby informing decision-makers in the process. When all goes well, meetings can foster the generation of new ideas and creative solutions that would be missed when participants simply assert their existing positions. Meetings also can lead to some change in participants' positions in light of a greater understanding of others' concerns.

Agencies must carefully plan meetings to help ensure that they will elicit the type of information sought.[13] An agency can structure a meeting to generate open-ended dialogue, allowing participants the opportunity to raise their own concerns or issues.[14] Alternatively, an agency can structure a meeting so that the agency's priorities dictate the agenda or discussion topics. Although meetings, whether designated as workshops, hearings, or listening sessions, can vary in their format, they can be structured so that the requirements of FACA or the Paperwork Reduction Act (PRA) are not applicable.[15]

Agencies should make information available to the public about individual rulemakings and opportunities to participate. The availability of this information will help ensure that

[13] For a discussion of focus groups and listening sessions, see *id.* at 48–54 (discussing the use of focus groups by the National Highway Traffic Safety Administration to address public fears about airbags and potential labels on tire fuel efficiency), 65–68 (discussing use of facilitated listening sessions by the Nuclear Regulatory Commission), 80–82 (discussing public meetings in general and EPA's use of "shuttle diplomacy" and technical workshops).

[14] For a discussion of different techniques to facilitate enhanced deliberation, see *id.* at 128–138.

[15] These methods would not implicate FACA as long as they are structured so the group is not collaborating to offer a set of proposals to the agency. *See, e.g.*, Judicial Watch, Inc. v. Clinton, 76 F.3d 1232, 1233 (D.C. Cir. 1996). These methods also would not implicate the PRA so long as the agency is not circulating a structured set of inquiries. 44 U.S.C. § 3502(3) (2012).

members of the public are adequately informed and can participate meaningfully in response to RFIs, ANPRMs, meeting opportunities, and other forms of public engagement.[16] For example, an agency may list such information on a dedicated webpage or a section of a page on an agency's website. Doing so could help that agency inform and engage affected interests and other interested persons throughout the rulemaking process.[17]

RECOMMENDATION

Public Engagement Planning

1. Agencies should develop and make publicly available general policies for public engagement in their rulemakings. An agency's general policy should address how the agency will consider factors, such as:
    a. the agency's goals and purposes in engaging the public;
    b. 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;
    c. how such types of individuals or organizations can be motivated to participate;
    d. what types of information the agency seeks from its public engagement;
    e. how this information is likely to be obtained;
    f. what the agency will do with the information;
    g. when public engagement should occur; and
    h. the range of methods of public engagement available to the agency.
2. An agency's general policy for public engagement should be used to inform public engagement with respect to specific rulemakings. Planning for public engagement for specific rules would best take place at the earliest feasible part of the rulemaking process.

[16] For example, the Bureau of Consumer Financial Protection posted prototypes of disclosure forms on its website and sought targeted feedback when it developed rules governing disclosure requirements for home mortgages. *See* Sant'Ambrogio & Staszewski, *supra* note 1, at 83–84.

[17] *See generally* Recommendation 2011-8, *supra* note 5.

3. In determining whether and how to enhance or target public engagement prior to the publication of a specific proposed rule, agencies should consider factors such as:
    a. the complexity of the rule;
    b. the potential magnitude and distribution of the costs and benefits of the rule;
    c. the interests that are likely to be affected and the extent to which they are likely to be affected;
    d. the information needed and the potential value of experience or expertise from outside the agency;
    e. whether specific forms of enhanced or targeted public engagement are likely to provide useful information, including from experts, individuals with knowledge germane to the proposed rule who do not typically participate in rulemaking, or other individuals with relevant views that may not otherwise be expressed;
    f. any challenges involved in obtaining informed participation from affected interests or other interested persons likely to have useful information, including the challenge of providing rulemaking materials in a language and form comprehensible to nonexperts whose participation is being sought;
    g. whether the rule is likely to be controversial;
    h. the time and resources available for enhanced or targeted public engagement as opposed to other uses; and
    i. whether additional legal requirements, such as the Federal Advisory Committee Act or the Paperwork Reduction Act, might apply.
4. Agencies should consider using personnel with public engagement training and experience to participate in both the development of their general public engagement policies as well as in planning for specific rules. Agencies should support or provide opportunities to train employees to understand and apply recognized best practices in public engagement.

Timing and Methods of Public Engagement

5. Public engagement should generally occur as early as feasible in the rulemaking process, including when identifying problems and setting regulatory priorities.
6. *Requests for Information and Advance Notices of Proposed Rulemaking.*
    a. Agencies should consider using requests for information (RFIs) or advance notices of proposed rulemaking (ANPRMs) when they need to:
        i. gather information or data about the existence, magnitude, and nature of a regulatory problem;
        ii. evaluate potential strategies to address a regulatory issue;
        iii. choose between more than one regulatory alternative; or
        iv. develop and refine a proposed rule.
    b. When using RFIs and ANPRMs, agencies should:
        i. sufficiently convey their receptivity to input;
        ii. pose detailed questions aimed at soliciting the information they need; and
        iii. indicate that they are open to input on other questions and concerns.
    c. Agencies should review any comments they receive in response to RFIs and ANPRMs and, when issuing any proposed rule that follows an RFI or ANPRM, explain how these comments informed or influenced the development of the subsequent proposal.
7. *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; or
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.

8. *Meetings with Affected Interests and Other Interested Persons.*
    a. Agencies should consider convening meetings of affected interests and other interested persons to obtain feedback on their priorities and potential regulatory alternatives, particularly when they are unlikely to obtain the same information from written responses to RFIs, ANPRMs, or notices of proposed rulemaking (NPRMs). When conducting a meeting, the agency should:
        i. determine whether to target and invite specific participants or open the meeting to any interested member of the general public;
        ii. determine whether to conduct the meeting in person, online, or both;
        iii. recruit participants based on the nature of the rule at issue and the type of feedback that the agency seeks;
        iv. consider using a trained facilitator or moderator from inside or outside the agency, as appropriate;
        v. provide background materials for the participants that clearly explain relevant issues and the primary policy alternatives in language and form comprehensible to all types of participants the agency seeks to engage;
        vi. disseminate questions to participants in advance, including either open-ended questions or questions aimed at soliciting specific information the agency needs to make informed decisions;
        vii. determine whether and how to structure interactive dialogue among participants;

viii. consider recording the session and making that recording publicly available; and

ix. prepare a summary of the meeting.

b. Agency representatives should convey their receptivity to input during meetings with affected interests and other interested persons.

c. The agency should consider structuring its meetings in a manner to promote enhanced input from affected interests and other interested persons.

Public Availability of Rulemaking Information

9. To support public engagement prior to the publication of the NPRM, agencies should consider affirmative steps to make publicly available relevant information about the rulemaking, such as by creating a dedicated webpage. Agencies should seek to make rulemaking information comprehensible for individuals and groups that do not typically participate in the rulemaking process, such as by using audiovisual materials or other media to supplement more traditional written information in appropriate situations. Information to make available could include:

    a. the status of the rulemaking initiative and opportunities to participate in the process;

    b. an explanation of the rulemaking process, the role of public participation, and the qualities of a useful comment;

    c. an identification of the issues under consideration and related information, presented in forms that are readable and comprehensible by non-experts; and

    d. summaries of public engagement efforts, including any information received from the public or a description of the impact of those efforts.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2017-2

Negotiated Rulemaking and Other Options for Public Engagement

Adopted June 16, 2017

Since the enactment of the Administrative Procedure Act (APA) in 1946, public input has been an integral component of informal rulemaking. The public comment process gives agencies access to information that supports the development of quality rules and arguably enhances the democratic accountability of federal agency rulemaking. As early as the 1960s, however, many agencies reported that notice-and-comment rulemaking "had become increasingly adversarial and formalized."[1]

Starting in the late 1970s, as legal reform advocates sought to expand the use of alternative dispute resolution (ADR) to reduce the incidence of litigation in the civil courts, administrative law scholars began to consider whether importing ADR norms into the rulemaking process might promote a more constructive, collaborative dynamic between agencies and those persons interested in or affected by agency rules. Eventually, the Administrative Conference conducted a study and recommended an alternative procedure that came to be known as "negotiated rulemaking." Negotiated rulemaking brings together an advisory committee[2]

[1] Administrative Conference of the United States, Recommendation 85-5, *Procedures for Negotiating Proposed Regulations*, 50 Fed. Reg. 52,893, 52,895 (Dec. 27, 1985).

[2] Negotiated rulemaking committees are advisory committees that must comply with the Federal Advisory Committee Act (FACA), unless otherwise provided by statute. 5 U.S.C § 565(a).

composed of representatives of identifiable affected interests,[3] agency officials, and a "neutral"[4] trained in mediation and facilitation techniques who would meet to try to reach consensus on a proposed rule.[5] The Administrative Conference twice issued recommendations supporting the use of negotiated rulemaking in appropriate circumstances. The first, Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, represented an early effort to articulate the steps agencies should take to use the process successfully.[6] The second, Recommendation 85-5, which had the same title, identified suggested practices based on agency experience with negotiated rulemaking in the preceding years.[7]

Congress formally authorized the use of regulatory negotiation where it would enhance rulemaking by enacting the Negotiated Rulemaking Act of 1990.[8] Congress had found that

[3] The Negotiated Rulemaking Act provides that an agency, when determining the need for negotiated rulemaking, should among other factors consider whether "there are a limited number of identifiable interests that will be significantly affected by the rule." *Id.* § 563(a)(2). The Act further defines an "interest" to mean "with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner." *Id.* § 562(5).

[4] Here, a "neutral" refers to an expert with experience in ADR techniques who actively supports the negotiation and consensus-building process, without taking a position on the substantive outcome. Both convenors and facilitators are neutrals who may support the process at various stages. As defined by the Negotiated Rulemaking Act of 1996, a convenor is "a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking," whereas a facilitator is "a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule." *Id.* § 562.

[5] In practice, negotiated rulemaking committees may work to reach consensus on the text of a proposed rule or may instead seek consensus on a term sheet or other document covering the major issues of the rulemaking. Although negotiated rulemaking committees meet to seek consensus on proposed rules, they may remain constituted until the promulgation of the final rule. *Id.* § 567. Some agencies have used committee meetings to obtain further feedback during the development of the final rule.

[6] Administrative Conference of the United States, Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, 47 Fed. Reg. 30,701 (July 15, 1982). These recommendations were based on Professor Philip Harter's report to the Administrative Conference (Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982)). The procedural steps proposed in Recommendation 82-4 formed the basis of the Negotiated Rulemaking Act.

[7] Recommendation 85-5, *supra* note 1. The present recommendation is intended to supplement, rather than supersede, the Conference's prior recommendations on negotiated rulemaking.

[8] 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).

traditional informal rulemaking "may discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation."[9] Congress found that negotiated rulemaking could "increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court" and that negotiation could "shorten the amount of time needed to issue final rules."[10]

Executive Order 12,866, signed by President Clinton and retained by subsequent presidents, directs agencies to "explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."[11] In addition, Congress has occasionally mandated the use of negotiated rulemaking when passing new legislation that directs agencies to address certain problems.[12] However, negotiated rulemaking was never designed to be used by agencies in the vast majority of agency rulemaking.[13] By the early 2000s,

[9] 5 U.S.C § 561.

[10] *Id.*

[11] Exec. Order 12,866, § 6(a)(1), 58 Fed. Reg. 51,735 (Oct. 4, 1993). In addition, President Clinton directed each agency to identify at least one rulemaking to develop through negotiated rulemaking or to explain why negotiated rulemaking would not be feasible. *See* Presidential Memorandum for Exec. Dept's & Selected Agencies, Administrator, Office of Info. & Reg. Affairs, Negotiated Rulemaking (Sept. 30, 1993), *available at* http://govinfo.library.unt.edu/npr/library/direct/memos/2682.html.

[12] Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1256, 1268 (1997) [hereinafter Coglianese, *Assessing Consensus*]. Over a dozen such statutes were passed before 1997, including the Student Loan Reform Act of 1993 (Pub. L. No. 103-66, § 4021, 107 Stat. 341, 353) and the Native American Housing Assistance and Self-Determination Act of 1996 (Pub. L. No. 104–330, § 106(b), 110 Stat. 4016, 4029). Congress has continued to mandate that agencies use negotiated rulemaking under some programs. For a list of statutes mandating or strongly encouraging negotiated rulemaking, see Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, *in* ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 93–113 (Eric Orts & Kurt Deketeaere eds., 2001). More recent examples include the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458, § 7212, 118 Stat. 3638, 2829) and the Patient Protection and Affordable Care Act (Pub. L. No. 111-148, § 5602, 124 Stat. 119, 677). For a case study of the congressionally mandated use of negotiated rulemaking by the U.S. Department of Education, see Jeffrey S. Lubbers, *Enhancing the Use of Negotiated Rulemaking by the U.S. Department of Education* (Dec. 5, 2014), *in* RECALIBRATING REGULATION OF COLLEGES AND UNIVERSITIES, REPORT OF THE TASK FORCE ON FEDERAL REGULATION OF HIGHER EDUCATION 90 (2015), *available at* http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf.

[13] Coglianese, *Assessing Consensus*, *supra* note 12, at 1276.

negotiated rulemaking was being used less frequently than anticipated.[14] Over the past few years, the process appears to have received a modest increase in attention and use by some agencies.

In part, the infrequent use of negotiated rulemaking may be due to the availability of alternative public engagement options, such as advance notices of proposed rulemaking, requests for input, technical workshops, or listening sessions, that allow agencies to gain many of the benefits of direct feedback early in the policymaking process while retaining greater procedural flexibility. Indeed, such alternatives can effectively elicit public input while avoiding the delays and procedural complexities associated with chartering a negotiated rulemaking committee under the Federal Advisory Committee Act (FACA).[15] In addition, over the years, some criticisms about the effectiveness of negotiated rulemaking in practice have been raised. For example, agencies need to ensure that representatives of affected interests can be selected in a way that does not give unequal power to one or more members.[16] There are clearly instances in which negotiated rulemaking should not be used. Nevertheless, where an agency concludes that its goals would best be served by developing a consensus-based proposed rule—or where the relevant policy issues, or relationships with interested persons or groups, are suitably complex—negotiated rulemaking may very well be a worthwhile procedural option to consider.

[14] Documentation of the early use, decline, and recent uptick in the use of negotiated rulemaking can be found in Cheryl Blake & Reeve T. Bull, Negotiated Rulemaking (June 5, 2017), 3–12, *available at* https://www.acus.gov/sites/default/files/documents/Negotiated%20Rulemaking_Final%20Report_June%205%202017.pdf. *See also* Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 1001 (2008); Peter H. Schuck & Steven Kochevar, *Reg Neg Redux: The Career of a Procedural Reform*, 15 THEORETICAL INQUIRIES IN LAW 417, 439 (2014); Reeve T. Bull, *The Federal Advisory Committee Act: Issues and Proposed Reforms* 52 & app. A (Sept. 12, 2011), *available at* https://www.acus.gov/sites/default/files/documents/COCG-Reeve-Bull-Draft-FACA-Report-9-12-11.pdf.

[15] Agencies have cited FACA's chartering and other procedural requirements as a challenge to undertaking negotiated rulemaking. See Lubbers, *supra* note 14, at 1001; Blake & Bull, *supra* note 14, at 28–31. Of course, agencies should be aware that even alternative public input forums that are not formally designated as advisory committees could nevertheless become subject to FACA should the dynamic of any meetings with members of the public trend toward "group advice" rather than individual input. Blake & Bull, *supra* note 14, at 21.

[16] Blake & Bull, *supra* note 14, at 8–11.

To guide agencies in choosing among the various kinds of public engagement methods they may use to meet their goals, and to offer suggestions on how agencies might enhance the probability of success when choosing to undertake negotiated rulemaking, the Administrative Conference recommends the considerations and practices outlined below.[17] These recommendations begin with the initial choice agencies confront—namely selecting from among various public engagement options and deciding when to use negotiated rulemaking—before turning to recommendations for those occasions when agencies use negotiated rulemaking.

RECOMMENDATION

Selecting the Optimal Approach to Public Engagement in Rulemaking

1. Negotiated rulemaking is one option of several that agencies should consider when seeking input from interested persons on a contemplated rule. In addition to negotiated rulemaking, agencies should consider the full range of public engagement options to best meet their objectives. For example:
    a. Notice-and-comment rulemaking by itself is often effective to obtain documentary information and other input from a wide array of interested persons.
    b. When seeking to facilitate a two-way exchange of information or ideas, agencies should consider meeting with a variety of interested persons reflecting a balance of perspectives.
    c. In situations in which an agency is interested in input from various interested persons or entities but does not seek collective advice or a consensus position, the agency should consider gathering groups of interested persons to provide individual input through more than one public or private meeting, dialogue session, or other forum.
    d. Where an agency seeks collective advice, the agency should use an advisory committee, observing all applicable requirements prescribed by FACA.

[17] When gathering input outside of the notice-and-comment process, agencies should consider the best practices outlined in Administrative Conference of the United States, Recommendation 2014-4, *"Ex Parte" Communications in Informal Rulemaking*, 79 Fed. Reg. 35,988 (June 25, 2014).

Deciding When to Use Negotiated Rulemaking

2. An agency should consider using negotiated rulemaking when it determines that the procedure is in the public interest, will advance the agency's statutory objectives, and is consistent with the factors outlined in the Negotiated Rulemaking Act. Specifically, such factors include whether:
    - "there are a limited number of identifiable interests that will be significantly affected by the rule;"[18]
    - "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;"[19]
    - there is adequate time to complete negotiated rulemaking and the agency possesses the necessary resources to support the process;[20] and
    - "the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment."[21]
3. In light of the broad range of highly specific factors that need to be considered when determining whether to use negotiated rulemaking, the choice should generally reside within the agency's discretion.

[18] 5 U.S.C. § 563(a)(2).

[19] *Id.* § 563(a)(3).

[20] *See id.* §§ 563(a)(4)–(6) (providing that "there is a reasonable likelihood that the committee will reach consensus on the proposed rule within a fixed period of time"; "the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule"; and "the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee").

[21] *Id.* § 563(a)(7).

4. As a general matter, agency officials should clearly define the charge of the negotiated rulemaking committee at the outset. This involves explicitly managing expectations and stating any constraints on the universe of options the committee is authorized to consider, including any legal prohibitions or non-negotiable policy positions of the agency. Agency officials should inform the committee members of the use to which the information they provide will be put and should notify them that negotiated rulemaking committee meetings will be made open to the public and documents submitted in connection therewith generally will be made available to the public.
5. Agencies should appoint an official with sufficient authority to speak on behalf of the agency to attend all negotiated rulemaking committee meetings and to participate in them to the extent the agency deems suitable.
6. Agencies should work with convenors or facilitators to define clearly the roles they should play in negotiated rulemakings.[22] Generally, agencies should draw upon the convenor's expertise in selecting committee members, defining the issues the committee will address, and setting the goals for the committee's work. Similarly, agencies should use a facilitator to assist the negotiation impartially and to make that impartiality clear to the members of the committee.
7. Agencies should keep in mind the role of the Office of Information and Regulatory Affairs (OIRA) in the rulemaking process when conducting negotiated rulemaking and inform committee members of that role. An agency should notify its OIRA desk officer of the opportunity to observe the committee meetings and, upon request, provide him or her with briefings on the meetings. An agency should also discuss whether or how the committee process might be used to support the development of the elements needed to

[22] Notably, while such neutrals may be hired by an agency, they support the overall process impartially (rather than on behalf of, or in favor of, the agency). For more details on the roles of convenors and facilitators, see Recommendation 85-5, *supra* note 1, at recommendations 5–8 and the discussion in note 4, *supra*. The roles may be filled by the same person or by two different individuals, who may be agency employees or external professionals.

comply with relevant analytical requirements, including the rule's regulatory impact analysis.

Considerations Associated with FACA

8. Congress should exempt negotiated rulemaking committees from FACA's chartering and reporting requirements.[23] If Congress exempts negotiated rulemaking committees from FACA entirely, it should amend the Negotiated Rulemaking Act to require comparable transparency, such as by requiring that negotiated rulemaking committee meetings be noticed in advance and open to the public.
9. For greater flexibility within the framework of FACA, agencies should consider maintaining standing committees from which a negotiated rulemaking subcommittee or working group can be formed on an as-needed basis to obviate the need to charter a new committee each time the agency undertakes a negotiated rulemaking.[24] Regardless of whether Congress exempts negotiated rulemaking from certain FACA requirements, agencies should strive to minimize unnecessary procedural burdens associated with the advisory committee process.

[23] Administrative Conference of the United States, Recommendation 2011-7, *The Federal Advisory Committee Act – Issues and Proposed Reforms*, 77 Fed. Reg. 2257 (Jan. 17, 2012).

[24] Both the Department of Energy and Department of Transportation (Federal Aviation Administration and Federal Railroad Administration) have standing committees that at times have been used to support negotiated rulemaking or other rulemaking activities. When seeking to negotiate a proposed rule, these agencies will form subcommittees or working groups (sometimes wholly comprising standing committee members, while other times comprising both standing committee and new members). For more details on the structure of these arrangements and their potential benefits, see Blake & Bull, *supra* note 14, at 29–30. Note, however, that some components in the Department of Transportation do prepare FACA charters for each new negotiated rulemaking committee, rather than using the standing committee/subcommittee model just described.

Administrative Conference Recommendation 2014-6

Petitions for Rulemaking

Adopted December 5, 2014

Under the Administrative Procedure Act (APA), federal agencies are required to "give . . . interested person[s] the right to petition for the issuance, amendment, or repeal of a rule."[1] The statute generally does not establish procedures agencies must observe in connection with petitions for rulemaking. It does, however, require agencies to respond to petitions for rulemaking "within a reasonable time,"[2] and to give petitioners "prompt notice" when a petition is denied in whole or in part, along with "a brief statement of the grounds for denial."[3] Beyond the APA's general right to petition, Congress has occasionally granted more specific rights to petition under individual statutes, such as the Clean Air Act.[4] Although agency denials of petitions for rulemaking are subject to judicial review, the "courts have properly limited their scope of review in this context."[5]

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[1] 5 U.S.C. § 553(e). This provision ensures that the people's right to petition the government, which is protected by the First Amendment, *see* U.S. Const. amend. I, is also an important part of the rulemaking process. Although certain matters are exempt from the requirements of 5 U.S.C. § 553, *see* U.S.C. § 553(a), the Administrative Conference has previously taken the position that public participation in agency rulemaking on these matters, including through petitions for rulemaking, may be beneficial. *See* Administrative Conference of the United States, Recommendation 86-6, *Petitions for Rulemaking*, 51 Fed. Reg. 46,988 n.2 (Dec. 30, 1986).

[2] 5 U.S.C. § 555(b).

[3] 5 U.S.C. § 555(e). The APA exempts agencies from the requirement of providing a "brief statement of the grounds for denial" when it is "affirming a prior denial or when the denial is self-explanatory." *Id.*

[4] *See, e.g.*, 42 U.S.C. §§ 7671a(c)(3), 7671e(b), 7671j(e). Statutory petition provisions such as these may impose additional procedural requirements beyond those contained in the APA or identify substantive requirements that must be met before the agency can act.

[5] Administrative Conference of the United States, Recommendation 95-3, *Review of Existing Agency Regulations*, 60 Fed. Reg. 43,109 (Aug. 18, 1995). In general, courts do not require agencies to respond to every individual issue raised in a petition (let alone every issue raised in comments on petitions), so long as the administrative record demonstrates a reasoned response on the whole. *Cf.* Nader v. FAA, 440 F.2d 292, 294 (D.C. Cir. 1971); WildEarth Guardians v. Salazar, 741 F. Supp. 2d 89, 104 n.21 (D.D.C. 2012). In *Connecticut v. Daley*, a district court raised the "question whether the [agency] must respond in detail to each and every comment received, or if [it] is only required

The Administrative Conference has previously recommended basic procedures to help agencies meet the APA's minimum requirements and respond promptly to petitions for rulemaking.[6] An Administrative Conference study of agency procedures and practices with respect to petitions for rulemaking has revealed, however, that further improvement is warranted.[7] Nearly thirty years after the Administrative Conference first examined this issue, few agencies have in place official procedures for accepting, processing, and responding to petitions for rulemaking.[8] How petitions are received and treated varies across—and even within—agencies. In some cases, agency personnel do not even know what their agency's procedures are for handling petitions. Although 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. Some petitioners report that it can be difficult to learn the status of a previously filed petition, agency communication throughout the process can be poor, response times can be slow, and agency explanations for denials can be minimal and predominantly non-substantive.[9]

Although the right to petition can be important and valuable, making the process work well requires a difficult balancing of competing interests. On the one hand, the APA grants to the

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to respond to what was raised in the actual petition for rule making." 53 F. Supp. 2d 147, 170 (D. Conn. 1999). Although the court did not resolve that question, it noted that 5 U.S.C. § 555(e) requires agencies to briefly explain only why a "*petition*" was denied, impliedly not extending the required response to comments on petitions (citing WWHT, Inc. v. FCC, 656 F.2d 807, 813 (D.C. Cir. 1981) (emphasis added by D. Conn.)).

[6] *See* Administrative Conference of the United States, Recommendation 86-6, *Petitions for Rulemaking*, 51 Fed. Reg. 46,988 (Dec. 30, 1986); *see also* Administrative Conference of the United States, Recommendation 95-3, ¶ VI(B) ("Agencies should establish deadlines for their responses to petitions; if necessary, the President by executive order or Congress should mandate that petitions be acted upon within a specified time.").

[7] *See* Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking*, Final Report to the Administrative Conference of the United States (Nov. 5, 2014), *available at* http://www.acus.gov/report/petitions-rulemaking-final-report.

[8] *See id.* at 46; *see also* William V. Luneburg, *Petitions for Rulemaking: Federal Agency Practice and Recommendations for Improvement,*, 1986 ACUS 493, 510 (1986) (observing that, with respect to agency procedures governing petitions for rulemaking, "[s]ome have none; others largely mirror, without elaborating much on, statutory procedures; and still others have adopted rather detailed requirements . . . going considerably beyond the procedures expressly mandated by statute").

[9] *See* Schwartz & Revesz, *supra* note 7, at 40-64.

public the right to petition for rulemaking and requires agencies to provide a decision on the merits within a reasonable period of time. To be sure, agencies often receive suggestions for new regulations and feedback regarding needed changes to existing regulations via informal channels, such as through meetings with regulated parties and stakeholders or interactions during inspections or other enforcement activities. Petitions provide another important avenue for such input—one that in theory is more broadly accessible to interested persons who do not regularly interact with agency personnel. Nonetheless, petitions for rulemaking may adversely affect an agency's ability to control its agenda and make considered, holistic judgments about regulatory priorities, particularly in the face of limited resources. And thoughtfully evaluating petitions and defending denials on judicial review may consume already scarce agency resources.

Greater transparency, improved communication between agencies and petitioners, and more prompt and explanatory petition responses may help to balance these competing interests.[10] Agencies should educate the public about how petitions fit with the other (often more informal) mechanisms through which agencies receive feedback from regulated and other interested persons on regulatory priorities and related issues. Petitioners and agency personnel alike would also 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,[11] whether or when public comment will be invited, and how long it may take to resolve a petition. Better internal coordination may reduce the possibility that a petition will be forgotten or will not reach the appropriate agency office for decision. Encouraging communication between prospective or current petitioners and the agency can provide an efficient way to improve the quality of petitions and the overall experience for all participants in the process. Readily available information on the status of pending petitions and more prompt disposition of petitions may improve understanding between the agency and the public and reduce the likelihood of litigation.

[10] *See generally id.*

[11] This could be similar to the information some agencies provide on their websites to help the public understand the characteristics of an effective rulemaking comment.

This recommendation seeks to ensure that the public's right to petition is a meaningful one, while still respecting the need for agencies to retain decisional autonomy. Building upon the Administrative Conference's previous work, it provides more guidance to agencies, identifying best practices that may make the petitioning process more useful for agencies, petitioners, and other members of the public. Moreover, electronic rulemaking dockets and agency websites provide new opportunities for agencies to achieve these goals in a cost-effective manner.[12] This recommendation should help agencies reevaluate and revise their existing policies and procedures to make the petitioning process work better for all.

RECOMMENDATION

Agency Policy on Petitions for Rulemaking

1. Each agency that has rulemaking authority should have procedures, embodied in a written and publicly available policy statement or procedural rule, explaining how the agency receives, processes, and responds to petitions for rulemaking filed under the Administrative Procedure Act.

(a) If an agency also has more specific regulations that govern petitions filed under other statutes or that apply to specific sub-agencies, the agency's procedures should cross-reference those regulations.

(b) If an agency rarely receives petitions for rulemaking, its procedures may simply designate an agency contact who can provide guidance to prospective petitioners.

(c) The procedures should explain how petitions relate to the various other options available to members of the public for informally engaging with agency personnel on the need to issue, amend, or repeal rules.

[12] *See, e.g.*, Administrative Conference of the United States, Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2257, 2264-65 (Jan. 17, 2012).

2. The procedures should indicate how the agency will coordinate the consideration of petitions with other processes and activities used to determine agency priorities, such as the Unified Agenda and retrospective review of existing rules.

3. The procedures should explain what type of data, argumentation, and other information make a petition more useful and easier for the agency to evaluate. The procedures should also identify any information that is statutorily required for the agency to act on a petition.

Receiving and Processing Petitions

4. Agencies should accept the electronic submission of petitions, via email or through Regulations.gov (such as by maintaining an open docket for the submission of petitions for rulemaking) or their existing online docketing system.

5. Agencies should designate a particular person or office to receive and distribute all petitions for rulemaking to ensure that each petition for rulemaking is expeditiously directed to the appropriate agency personnel for consideration and disposition. This designation may be especially important for agencies that have multiple regions or offices.

Communicating with Petitioners

6. Agencies should encourage and facilitate communication between agency personnel and petitioners, both prior to submission and while petitions are pending disposition. For example, agencies should consider asking petitioners to clarify requests or submit additional information that will make the petition easier to evaluate. Agencies should consider also alerting petitioners to recent developments that may warrant a petition's modification or withdrawal.

7. Agencies should provide a way for petitioners and other interested persons to learn the status of previously filed petitions. Agencies should:

(a) Use online dockets to allow the public to monitor the status of petitions; and

(b) Designate a single point of contact authorized to provide information about the status of petitions.

Soliciting Public Comment on Petitions

8. 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. Inviting public comment may be particularly appropriate when:

(i) A petition addresses a question of policy or of general interest; or

(ii) Evaluating a petition's merits may require the agency to consider information the agency does not have, or the agency believes that the information provided by the petitioner may be in dispute or is incomplete.

9. If an agency anticipates that it will consider but not respond to all comments on a petition for rulemaking, it should say so in its request for comments.

Responding to Petitions for Rulemaking

10. Agencies should docket each decision with the petition to which it responds.

11. If an agency denies a petition, where feasible and appropriate, it should provide a reasoned explanation beyond a brief statement of the grounds for denial. Agencies should not reflexively cite only resource constraints or competing priorities.

12. Agencies must respond to petitions within a reasonable time. To that end, each agency should:

(a) Adopt in its procedures an expectation that it will respond to all petitions for rulemaking within a stated period (e.g., within 6, 12, or 18 months of submission); and/or

(b) Establish and make publicly available an individual target timeline for responding to that petition.

13. If an agency is unable to respond to a petition by the target timeline it has established, it should provide the petitioner and the public with a brief explanation for the delay, along with a reasonable new target timeline. The explanation may include a request for new or additional information if the agency believes it would benefit from that or the facts or circumstances relevant to the petition may have changed while the petition was pending.

Providing Information on Petitions for Rulemaking

14. Agencies should maintain a summary log or report listing all petitions, the date each was received, and the date of disposition or target timeline for disposition (where necessary, this should include the brief explanation for any delay in disposition and the reasonable new target timeline). The log or report should be described in the agency's procedures (*see* paragraph 1) and made publicly available on the agency's website. It should be updated at least semi-annually. Agencies should create and maintain the summary log or report beginning on the date of this recommendation and should also include or otherwise publicly provide, to the extent feasible, historic information about petitions for rulemaking that have been resolved.

15. The Office of Information and Regulatory Affairs should request that agencies include in their annual regulatory plan information on petitions for rulemaking that have been resolved during that year or are still pending.

Using Electronic Tools to Improve the Petitioning Process

16. Agencies should use available online platforms, including their websites and Regulations.gov, to implement this recommendation as effectively and efficiently as possible, 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.

Administrative Conference Recommendation 2014-4

"Ex Parte" Communications in Informal Rulemaking

Adopted June 6, 2014

Informal communications between agency personnel and individual members of the public have traditionally been an important and valuable aspect of informal rulemaking proceedings conducted under section 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553. Borrowing terminology from the judicial context, these communications are often referred to as "ex parte" contacts.[1] Although the APA prohibits ex parte contacts in formal adjudications and formal rulemakings conducted under the trial-like procedures of 5 U.S.C. §§ 556 and 557,[2] 5 U.S.C. § 553 imposes no comparable restriction in the context of informal rulemaking. The term "ex parte" does not entirely fit in this non-adversarial context, and some agencies do not use it. This recommendation uses the term because it is commonly used and widely understood in connection with informal rulemaking. As used in this recommendation, "ex parte communications" means: (i) written or oral communications; (ii) regarding the substance of an anticipated or ongoing rulemaking; (iii) between the agency personnel and interested persons; and (iv) that are not placed in the rulemaking docket at the time they occur. It bears emphasizing that such communications "are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness."[3]

[1] In the judicial context, "ex parte" contacts are those that are related to the subject of a lawsuit and occur between just one of the parties involved and the presiding judge, usually "without notice to or argument from the adverse party." BLACK'S LAW DICTIONARY (9th ed. 2009). Unless otherwise authorized by law, such contacts are generally viewed as highly unethical.

[2] *See* 5 U.S.C. § 557(d).

[3] Home Box Office, Inc. v. Federal Commc'ns Comm'n, 567 F.2d 9, 57 (D.C. Cir. 1977); *see also* Sierra Club v. Costle, 657 F.2d 298, 400-01 (D.C. Cir. 1981).

In Recommendation 77-3,[4] the Conference expressed the view that a general prohibition on ex parte communications in the context of informal rulemaking proceedings would be undesirable, as it would tend to undermine the flexible and non-adversarial procedural framework established by 5 U.S.C. § 553.[5] At the same time, the Conference concluded, it may be appropriate for agencies to impose certain restraints on ex parte communications to prevent potential or perceived harm to the integrity of informal rulemaking proceedings. Although the law has evolved since Recommendation 77-3 was adopted, these basic principles remain valid. Over the past several decades, agencies have implemented Recommendation 77-3 by experimenting with procedures designed to capture the benefits of ex parte communications while reducing or eliminating their potential harm. This recommendation draws on this substantial experience to identify best practices for managing ex parte communications received in connection with informal rulemakings.

Ex parte communications, which may be oral or written, convey a variety of benefits to both agencies and the public. Although the rulemaking process has largely transitioned to electronic platforms in recent years, most ex parte contacts continue to take the form of oral communications during face-to-face meetings. These meetings can facilitate a more candid and potentially interactive dialogue of key issues and may satisfy the natural desire of interested persons to feel heard. In addition, if an agency engages in rulemaking in an area that implicates sensitive information, ex parte communications may be an indispensable avenue for agencies to obtain the information necessary to develop sound, workable policies.[6]

[4] Recommendation 77-3 emerged from a select committee the Conference convened in response to the D.C. Circuit's groundbreaking decision in *Home Box Office*. *See* Nathaniel L. Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 ADMIN. L. REV. 377, 377 (1978). Following the recommendation's adoption, the Supreme Court decided *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978), admonishing federal courts not to impose on administrative agencies procedural requirements beyond those contained in the APA. *See* Nathanson, 30 ADMIN L. REV. at 406-08.

[5] *See* Admin. Conf. of the United States, Recommendation 77-3*, Ex Parte Communications in Informal Rulemaking Proceedings*, 42 Fed. Reg. 54,253 (Oct. 5, 1977).

[6] In such areas, interested persons may be willing to share essential information with the agency only through face-to-face, private conversations, and agency personnel may be subject to severe penalties for not keeping the

On the other hand, ex parte communications can pose several different kinds of harm (both real and perceived) to the integrity of the rulemaking process. One difficulty is that certain people or groups may have, or be perceived to have, greater access to agency personnel than others. This unfairness, whether real or perceived, may be exacerbated if agency personnel do not have the time and resources to meet with everyone who requests a face-to-face meeting. Another concern is that agency decisionmakers may be influenced by information that is not in the public rulemaking docket. The mere possibility of non-public information affecting rulemaking creates problems of perception and undermines confidence in the rulemaking process. When it becomes reality, it creates different and more serious problems. Interested persons may be deprived of the opportunity to vet the information and reply to it effectively. And reviewing courts may be deprived of information that is necessary to fully and meaningfully evaluate the agency's final action.

Best practices for preventing the potential harms of ex parte communications may vary depending on the stage of the rulemaking process during which the communications occur. Before an agency issues a Notice of Proposed Rulemaking (NPRM), few if any restrictions on ex parte communications are desirable.[7] Communications during this early stage of the process are less likely to pose the harms described above and can help an agency gather essential information, craft better regulatory proposals, and promote consensus building among interested persons.[8] After an NPRM has been issued and during the comment period, there may be a heightened expectation that information submitted to the agency will be made available to

information shared with them confidential. *See, e.g.*, 26 U.S.C. § 6103 (addressing confidentiality and disclosure of tax returns and tax return information). Of course, agencies may protect information from disclosure only to the extent permitted or required by law.

[7] Recognizing these principles, the Clinton Administration directed agencies "to review all . . . administrative ex parte rules and eliminate any that restrict communication prior to the publication of a proposed rule," with the limited exception of "rules requiring the simple disclosure of the time, place, purpose, and participants of meetings." *See* Memorandum for Heads of Departments and Agencies, Regulatory Reinvention Initiative (Mar. 4, 1995), *available at* http://www.acus.gov/memorandum/regulatory-reinvention-initiative-memo-1995. This memorandum, which has never been revoked, continues to inform agency practice.

[8] *See id.*

the public. Indeed, during this time period, an agency's comment policy and its policy addressing ex parte communications may both apply.[9] Finally, once the comment period closes, the dangers associated with agency reliance on privately-submitted information become more acute. Interested persons may be particularly keen to discuss with the agency information provided in comments by other persons filed at or near the close of the comment period. Agencies have in some circumstances disclosed significant new information received through such communications and reopened the comment period. This solution is not costless, however, and has the potential to significantly delay a proceeding.

This recommendation focuses on how agencies can best manage ex parte communications in the context of informal rulemaking proceedings, including those that involve "quasi-adjudication among 'conflicting private claims to valuable privilege.'"[10] It does not address several related or peripheral issues. First, it does not evaluate formal or hybrid rulemakings or proceedings in which agencies voluntarily use notice-and-comment procedures to develop guidance documents. Second, it does not address ex parte communications in the executive review process, including before the Office of Information and Regulatory Affairs (OIRA).[11] Third, it does not examine interagency communications outside the process of executive review. Fourth, it does not address intraagency interactions between an agency's staff and its decisionmakers.[12] Finally, it does not address unique issues that may arise in connection with communications between agencies and members of Congress, foreign governments, or state and local governments.

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[9] The Conference recently addressed agency comment policies. *See* Admin. Conf. of the United States, Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

[10] *Sierra Club*, 657 F.2d at 400 (quoting Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959)). In such "quasi-adjudicatory" rulemakings, due process considerations may justify insulating the decisionmaker from ex parte contacts. *See id.*

[11] *See* Admin. Conf. of the United States, Recommendation 88-9, *Presidential Review of Agency Rulemaking*, 54 Fed. Reg. 5207 (Feb. 2, 1989); Admin. Conf. of the United States, Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,407 (Dec. 31, 1980).

[12] *See* 5 U.S.C. § 557(d).

RECOMMENDATION

"Ex Parte" Policies

1. Each agency that conducts informal rulemaking under 5 U.S.C. § 553 should have a written policy explaining how the agency handles what this recommendation refers to as nongovernmental "ex parte" communications, even if the agency does not use that term.

2. Agency ex parte policies should:

(a) Provide guidance to agency personnel on how to respond to requests for private meetings to discuss issues related to a rulemaking.

(b) Explain the scope of their coverage, which should be limited to communications on substantive matters and should exclude non-substantive inquiries, such as those regarding the status of a rulemaking or the agency's procedures.

(c) Establish procedures for ensuring that, after an NPRM has been issued, the occurrence and content of all substantive oral communications, whether planned or unplanned, are included in the appropriate rulemaking docket.

(d) Establish procedures for ensuring that, after an NPRM has been issued, all substantive written communications are included in the appropriate rulemaking docket.

(e) Explain how the agency will treat significant new information submitted to the agency after the comment period has closed.

(f) Identify deadlines for all required or requested disclosures of ex parte communications.

(g) Explain how the agency will treat sensitive information submitted in an ex parte communication.

(h) Explain how the agency's ex parte communications policy interacts with its comment policy.

3. In formulating policies governing ex parte communications in informal rulemaking proceedings, agencies should consider the following factors:

(a) The stage of the rulemaking proceeding during which oral or written communications may be received.

(b) The need to ensure that access to agency personnel is provided in a balanced, viewpoint-neutral manner.

(c) Limitations on agency resources, including staff time, that may affect the ability of agency personnel to accept requests for face-to-face meetings or prepare summaries of such meetings.

(d) The likelihood that protected information will be submitted to the agency through oral or written ex parte communications.

(e) The possibility that, even if an agency discourages ex parte communications during specified stages of the rulemaking process, such communications may nonetheless occur.

(f) The potential need to give agency personnel guidance about whether or to what extent to provide information to persons not employed by the agency during a face-to-face meeting.

Communications before an NPRM Is Issued

4. Agencies should not impose restrictions on ex parte communications before an NPRM is issued.

5. Agencies may, however, disclose, in accordance with ¶ 8 of this recommendation, the occurrence or content of ex parte communications received before an NPRM is issued, as follows:

(a) In the preamble of the later-issued NPRM or other rulemaking document; or

(b) In the appropriate rulemaking docket once it is opened.

Communications after an NPRM Has Been Issued

6. If an agency cannot accommodate all requests for in-person meetings after an NPRM has been issued, it should consider holding a public meeting (which may be informal) in lieu of or in addition to individual, private meetings.

7. After an NPRM has been issued, agencies should disclose to the public:

(a) The occurrence of all oral ex parte communications, including the identity of those involved in the discussion and the date and location of the meeting.

(b) The content of all oral ex parte communications through a written summary filed in the appropriate rulemaking docket. Agencies may either:

(i) Direct their own personnel to prepare and submit the necessary summary; or

(ii) Request or require private persons to prepare and submit the necessary summary of meetings in which they have participated, although it remains the agency's responsibility to ensure adequate disclosure.

(c) All written submissions, in the appropriate rulemaking docket.

Additional Considerations after the Comment Period Has Closed

8. Agencies should determine whether, and under what circumstances, ex parte communications made after the close of the comment period should be permitted and, if so, how they should be considered.

9. If an agency receives, through an ex parte communication, any significant new information that its decisionmakers choose to consider or rely upon, it should disclose the

information and consider reopening the comment period, to provide the public with an opportunity to respond.

10. When an agency receives a large number of requests for ex parte meetings after the comment period has closed, it should consider using a reply comment period or offering other opportunities for receiving public input on submitted comments. *See* Admin. Conf. of the United States, Recommendation 2011-2, *Rulemaking Comments* ¶ 6, 76 Fed. Reg. 48,791 (Aug. 9, 2011) (encouraging the use of reply comment periods and other methods of receiving public input on previously submitted comments).

Quasi-Adjudicatory Rulemakings

11. If an agency conducts "quasi-adjudicatory" rulemakings that involve conflicting private claims to a valuable privilege, its ex parte communications policy should clearly and distinctly articulate the principles and procedures applicable in those rulemakings.

12. Agencies should explain whether, how, and why they are prohibiting or restricting ex parte communications in quasi-adjudicatory rulemakings. Agencies may conclude that ex parte communications in this context require a different approach from the one otherwise recommended here.

13. Agencies should explain and provide a rationale for any additional procedures applicable to ex parte communications received in quasi-adjudicatory rulemakings.

Accommodating Digital Technology

14. Agencies should consider how digital technology may aid the management or disclosure of ex parte communications. For example, agencies may be able to use technological tools such as video teleconferencing as a cost effective way to engage with interested persons.

15. Agencies should avoid using language that will inadvertently exclude ex parte communications made via digital or other new technologies from their policies.

16. Agencies should state clearly whether they consider social media communications to be ex parte communications and how they plan to treat such communications. Agencies should ensure consistency between policies governing ex parte communications and the use of social media.

Administrative Conference Recommendation 2013-5

Social Media in Rulemaking

Adopted December 5, 2013

In the last decade, the notice-and-comment rulemaking process has changed from a paper process to an electronic one. Many anticipated that this transition to "e-Rulemaking"[1] would precipitate a "revolution," making rulemaking not just more efficient, but also more broadly participatory, democratic, and dialogic. But these grand hopes have not yet been realized. Although notice-and-comment rulemaking is now conducted electronically, the process remains otherwise recognizable and has undergone no fundamental transformation.

At the same time, the Internet has continued to evolve, moving from static, text-based websites to dynamic multi-media platforms that facilitate more participatory, dialogic activities and support large amounts of user-generated content. These "social media" broadly include any online tool that facilitates two-way communication, collaboration, interaction, or sharing between agencies and the public. Examples of social media tools currently in widespread use include Facebook, Twitter, Ideascale, blogs, and various crowdsourcing[2] platforms. But technology evolves quickly, continuously, and unpredictably. It is a near certainty that the tools so familiar to us today will evolve or fade into obsolescence, while new tools emerge.[3]

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[1] The Conference has previously defined "e-Rulemaking" as "the use of digital technologies in the development and implementation of regulations before or during the informal process, i.e., notice-and-comment rulemaking under the Administrative Procedure Act (APA)." Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789, 48,789 (Aug. 9, 2011) (internal quotation marks and footnote omitted).

[2] "Crowdsourcing" is an umbrella term that includes various techniques for distributed problem-solving or production, drawing on the cumulative knowledge or labor of a large number of people. Wikipedia, the development of the Linux operating system, Amazon.com's "Mechanical Turk" platform, and public and private challenges that award a prize to the best solution to a particular problem are all examples of crowdsourcing.

[3] One type of emerging technology includes structured argumentation tools. These tools may take the form of, for example, interactive feedback forms that ask direct and progressively more focused questions in sequence or in response to input, thereby generating more targeted and substantively useful input from users.

The accessible, dynamic, and dialogic character of social media makes it a promising set of tools to fulfill the promise of e-Rulemaking. Thus, for example, the e-Rulemaking Program Management Office, which operates the federal government's primary online rulemaking portal, Regulations.gov, has urged agencies to "[e]xplore the use of the latest technologies, to the extent feasible and permitted by law, to engage the public in improving federal decision-making and help illustrate the impact of emerging Internet technologies on the federal regulatory process."[4] The Conference has similarly, albeit more modestly, recommended that "[a]gencies should consider, in appropriate rulemakings, using social media tools to raise the visibility of rulemakings."[5]

Federal agencies have embraced social media to serve a variety of non-rulemaking purposes,[6] but few have experimented with such tools in the rulemaking context. One explanation for this reluctance is uncertainty about how the Administrative Procedure Act (APA) and other requirements of administrative law apply to the use of social media, particularly during the process governed by the APA's informal rulemaking requirements, beginning when the Notice of Proposed Rulemaking (NPRM) has been issued, through the

[4] E-RULEMAKING PROGRAM MANAGEMENT OFFICE, IMPROVING ELECTRONIC DOCKETS ON REGULATIONS.GOV AND THE FEDERAL DOCKET MANAGEMENT SYSTEM: BEST PRACTICES FOR FEDERAL AGENCIES 8 (2010), available at http://exchange.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf.

[5] Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2257, 2265 (Jan. 17, 2012). The Conference has consistently supported full and effective public participation in rulemaking, as well as the use of new technologies to enhance such participation. In Recommendation 95-3, *Review of Existing Agency Regulations*, the Conference encouraged agencies to "provide adequate opportunity for public involvement in both the priority-setting and review processes," including by "requesting comments through electronic bulletin boards or other means of electronic communication." 60 Fed. Reg. 43,108, 43,109 (Aug. 18, 1995).

[6] For example, agencies have enthusiastically embraced social media, including Facebook and Twitter, as an effective tool for pushing information out to the public, from general information about an agency and its mission to more specific notifications of services, benefits, or employment opportunities that are available from an agency. Agencies have also used social media in more interactive ways, such as when nearly three dozen agencies used Ideascale to engage the public in the process of developing the agencies' Open Government Plans, or to collect metadata, such as when the Consumer Financial Protection Bureau used "heat maps" generated from click-based online user reviews of prototype disclosure forms to illustrate which sections of the forms elicited the strongest reactions.

comment period, and until the agency issues a final rule.[7] In particular, agencies are uncertain whether public contributions to a blog or Facebook discussion are "comments" for purposes of the APA, thus triggering the agencies' obligations to review and respond to the contributions and include them in the rulemaking record. Other concerns include how the Paperwork Reduction Act applies to agency inquiries through social media,[8] whether the First Amendment might limit an agency from moderating a social media discussion, and how individual agencies' "ex parte" communications policies might apply to the use of social media.

Apart from legal concerns are doubts as to whether, when, and how social media will benefit rulemaking. These doubts arise with respect to two distinct issues that often overlap. First, can social media be used to generate more useful public input in rulemaking? Second, is increased lay participation in rulemaking likely to be valuable? Experience suggests that both the quality of comments and the level of participation in social media discussions are often much lower than one might hope. A third-party facilitator may be able to help an agency address these issues by encouraging public participation, helping participants understand the rulemaking process and the agency's proposal, asking follow-up questions to produce more substantive input, and actively facilitating engagement among participants. Regardless of whether a third-party facilitator is used, however, creating the conditions necessary to foster a meaningful, productive dialogue among participants requires commitment, time, and thoughtful design. Since this kind of innovation can be costly, agencies are understandably reluctant to expend scarce resources in pursuit of uncertain benefits. Agencies also face a variety of practical questions. One such question is whether to require participants to identify themselves in agency-sponsored social media discussions. Another concern is that the use of

[7] The Conference recently addressed legal issues related to e-rulemaking in Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, *see supra* note 1, but did not delve into the unique concerns that arise when agencies use social media to support rulemaking activities.

[8] The Office of Management and Budget has issued helpful guidance on these issues. *See* Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to the Heads of Executive Departments and Independent Regulatory Agencies regarding Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act (Apr. 7, 2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

ranking or voting tools may mislead some to believe that rulemaking is a plebiscite or allow some participants to improperly manipulate the discussion.

Social media can be valuable during the notice-and-comment phase of rulemaking, but on a selected basis. For example, if an agency needs to reach an elusive audience or determine public preferences or reactions in order to develop an effective regulation, social media may enable the collection of information and data that are rarely reflected in traditional rulemaking comments. Success requires an agency to thoughtfully identify the purpose(s) of using social media, carefully select the appropriate social media tool(s), and integrate those tools into the traditional notice-and-comment process. In addition, agencies must clearly communicate to the public how the social media discussion will be used in the rulemaking. Although the APA allows agencies the flexibility to be innovative, attention should be given to how the APA or other legal requirements will apply in the circumstances of a particular rulemaking.

Agencies may find, however, that it is both easier and more often valuable to use social media in connection with rulemaking activities, but outside the notice-and-comment process. For example, social media can be effective for 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. The use of social media may also be particularly appropriate during the pre-rulemaking or policy-development phase. Here, 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. For the same reasons, social media may be an effective way for agencies to seek input on retrospective review of existing regulations. It also may be helpful in connection with a negotiated rulemaking,[9] where these tools may make it easier for the diverse interests to collaborate during and between meetings on a solution to the problem being addressed.

[9] *See, e.g.*, Recommendation 85-5, *Procedures for Negotiating Proposed Regulations* (Dec. 13, 1985).

This recommendation provides guidance to agencies on whether, how, and when social media might be used both lawfully and effectively to support rulemaking activities. It seeks to identify broad principles susceptible of application to any social media tool that is now available or may be developed in the future. It is intended to encourage innovation and facilitate the experimentation necessary to develop the most effective techniques for leveraging the strengths of social media to achieve the promises of e-Rulemaking.

RECOMMENDATION

1. Agencies should explore in the rulemaking process the use of social media—online platforms that can provide broad opportunities for public consultation, discussion, and engagement.

Public Outreach

2. Agencies should use social media to inform and educate the public about agency activities, their rulemaking process in general, and specific rulemakings. Agencies should take an expansive approach to alerting potential participants to upcoming rulemakings by posting to the agency website and sending notifications through multiple social media channels. Social media may provide an effective means to reach interested persons who have traditionally been underrepresented in the rulemaking process (including holders of affected interests that are highly diffused).

3. Agencies should recognize that raising awareness among missing stakeholders (those directly affected by the proposed rule who are historically unlikely to participate in the traditional comment process) and other potential new participants in the rulemaking process will require new outreach strategies beyond simply giving notice in the *Federal Register*, Regulations.gov, and the agency website. Social media may be particularly effective for successful outreach, and agencies using it for this purpose in connection with rulemaking should consider:

(a) Developing one or more 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. These plans should be evenhanded and designed to encourage all types of stakeholders to participate.

(b) In outreach messages, clearly explaining 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.

(c) Encouraging public response by being clear and specific about how the proposed rule would affect the targeted participants and what input will be most useful to the agency.

(d) Asking all interested organizations to spread the participation message to members or followers. Agencies should be prepared to explain why individual participation can be beneficial, and to encourage organizations to solicit substantive, individualized comments from their members.

(e) Using multilingual social media outlets where appropriate.

4. The General Services Administration, the e-Rulemaking Program Management Office, and other federal agencies, either individually or (preferably) collaboratively, should use social media to create and distribute more robust educational programs about rulemaking. These efforts could include: producing videos about the rulemaking process and how to effectively participate through commenting and posting on an agency website or video-sharing website; hosting webinars in which agency personnel discuss how to draft useful and helpful comments; maintaining an online database of exemplary rulemaking comments; or conducting an online class or webinar or providing explanatory materials in which officials review a draft comment and suggest ways to improve it.

5. Agencies should explore ways to publicize, and allow members of the public to receive, regular, automated updates on developments in, at a minimum, significant rulemakings.

6. Agencies should consider using social media prior to the publication of an NPRM or proposed policy where the goal is to understand the current state of affairs, collect dispersed knowledge, or identify problems. To enhance the amount and value of public input, an agency seeking to engage the public for these purposes should, to the maximum extent possible, make clear the sort of information it is seeking and how the agency intends to use public input received in this way. The agency should also directly engage with participants by acknowledging submissions, asking follow-up questions, and providing substantive responses.

7. Agencies should consider using social media in support of retrospective review of existing regulations, particularly to learn what actual experience has been under the relevant regulation(s).

Using Social Media in Notice-and-Comment Rulemaking

8. Although the use of social media may not be appropriate and productive in all rulemakings, agencies may use social media to supplement or improve the traditional commenting process. Before using social media in connection with a particular rulemaking, agencies should identify the specific goals they expect to achieve through the use of social media and carefully consider the potential costs and benefits.

9. Agencies should use the social media tools that best fit their particular purposes and goals and should carefully consider how to effectively integrate those tools into the traditional rulemaking process.

Effective Approaches for Using Social Media in Rulemaking

10. For each rulemaking, agencies should consider maintaining a blog or other appropriate social media site dedicated to that rulemaking for purposes of providing

information, updates, and clarifications regarding the scope and progress of the rulemaking. Agencies may also wish to explore using such a site to generate a dialogue.

11. When an agency sponsors a social media discussion in connection with a notice-and-comment rulemaking, it should determine and prominently indicate to the public how the discussion will be treated under the APA (for administrative record purposes). The agency may decide, for example:

(a) To include all comments submitted via an agency-administered social media discussion in the rulemaking record. Agencies should consider using an application programming interface (API) or other appropriate technological tool to efficiently transfer content from social media to the rulemaking record.

(b) That no part of the social media discussion will be included in the rulemaking docket, that the agency will not consider the discussion in developing the rule, and that the agency will not respond to the discussion. An agency that selects this option should communicate the restriction clearly to the public through conspicuous disclaimers on the social media site itself, provide instructions on how to submit an official comment to the rulemaking docket, and provide a convenient mechanism for doing so. It is especially important in these circumstances that the agency clearly explain the purpose of a social media discussion the agency does not intend to consider in the rulemaking.

12. When soliciting input through a social media platform, agencies should provide a version of the NPRM that is "friendly" and clear to lay users. This involves, for example, breaking preambles into smaller components by subject, summarizing those components in plain language, layering more complete versions of the preamble below the summaries, and providing hyperlinked definitions of key terms. In doing this, the agency should either:

(a) Publish both versions of the NPRM in the *Federal Register*; or

(b) Cross-reference the user-friendly version of the NPRM in the published NPRM and cross-reference the published NPRM in the user-friendly version of the NPRM.

13. Agencies should consider, in appropriate rulemakings, retaining facilitator services to manage rulemaking discussions conducted through social media. Appropriate rulemakings may include those in which:

(a) Targeted users are inexperienced commenters who may need help to prepare an effective comment (e.g., providing comments that give reasons rather than just reactions); or

(b) The issues will predictably produce sharply divided or highly emotional reactions.

14. Agencies should realize that not all rulemakings will be enhanced by a crowdsourcing approach. However, when the issue to be addressed is the public or user response itself (e.g., when the agency seeks to determine the best format for a consumer notice), direct submission to the public at large may lead to useful information. In addition, agencies should consider encouraging, and being receptive to, comments from lay stakeholders with "situated knowledge" arising out of their real world experience.

15. Agencies should consider experimenting with collaborative drafting platforms, both internally and, potentially, externally, for purposes of producing regulatory documents.

16. If an agency chooses to use voting or ranking tools, the agency should explain to the public how it intends to use the input generated through those tools (e.g., to help it decide which of several potential forms is easiest to use).

17. Agencies should use social media to notify and educate the public about the final agency action produced through a rulemaking.

18. In appropriate circumstances, agencies should also use social media to provide compliance information. For example, an agency might use social media to inform and educate the public about paperwork requirements associated with a rule or the availability of regulatory guidance.

19. Agencies should collaborate to identify best practices for addressing issues that arise in connection with the use of social media in rulemaking.

Direct Final Rulemaking

20. Agencies should consider using social media before or in connection with direct final rulemaking to quickly identify whether there are significant or meaningful objections that are not initially apparent.

Key Legal Considerations

21. Agencies have maximum flexibility under the APA to use social media before an NPRM is issued or after a final rule has been promulgated.

22. Agencies should consider how the First Amendment applies to facilitating or hosting social media discussions, such as by making it clear through a posted comment policy that all discussions and comments on any given agency social media site will be moderated in a uniform, viewpoint-neutral manner. Through this posted policy, agencies may decide to define or restrict the topics of discussion, impose reasonable limitations to preserve decorum, decency, and prevent spam or, alternatively, terminate a social media discussion altogether.

23. Agencies that have "ex parte" contact policies for information obtained in connection with rulemaking should review those policies to ensure they address communications made through social media.

Administrative Conference Recommendation 2011-2

Rulemaking Comments

Adopted June 16, 2011

One of the primary innovations associated with the Administrative Procedure Act ("APA") was its implementation of a comment period in which agencies solicit the views of interested members of the public on proposed rules.[1] The procedure created by the APA has come to be called "notice-and-comment rulemaking," and comments have become an integral part of the overall rulemaking process.

In a December 2006 report titled "Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century," the Subcommittee on Commercial and Administrative Law of the United States House of Representatives' Committee on the Judiciary identified a number of questions related to rulemaking comments as areas of possible study by the Administrative Conference.[2] These questions include:

- Should there be a required, or at least recommended, minimum length for a comment period?
- Should agencies immediately make comments publicly available? Should they permit a "reply comment" period?
- Must agencies reply to all comments, even if they take no further action on a rule for years? Do comments eventually become sufficiently "stale" that they could not support a final rule without further comment?

[1] 5 U.S.C. § 553; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989) (describing the "notice-and-comment procedures for rulemaking" under the APA as "probably the most significant innovation of the legislation").

[2] SUBCOMM. ON COMMERCIAL & ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REP. ON THE ADMIN. LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY at 3–5 (Comm. Print 2006).

- Under what circumstances should an agency be permitted to keep comments confidential and/or anonymous?
- What effects do comments actually have on agency rules?

The Conference has studied these questions and other, related issues concerning the "comment" portion of the notice-and-comment rulemaking process. The Conference also has a concurrent recommendation that deals with separate matters, focusing specifically on legal issues implicated by the rise of e-rulemaking. *See* Administrative Conference of the United States, Recommendation 2011-1, *Legal Considerations in e-Rulemaking*.

The Conference believes that the comment process established by the APA is fundamentally sound. Nevertheless, certain innovations in the commenting process could allow that process to promote public participation and improve rulemaking outcomes more effectively. In this light, the Conference seeks to highlight a series of "best practices" designed to increase the opportunities for public participation and enhance the quality of information received in the commenting process. The Conference recognizes that different agencies have different approaches to rulemaking and therefore recommends that individual agencies decide whether and how to implement the best practices addressed.

In identifying these best practices, the Conference does not intend to suggest that it has exhausted the potential innovations in the commenting process. Individual agencies and the Conference itself should conduct further empirical analysis of notice-and-comment rulemaking, should study the effects of the proposed recommendations to the extent they are implemented, and should adjust and build upon the proposed processes as appropriate.

RECOMMENDATION

1. To promote optimal public participation and enhance the usefulness of public comments, the eRulemaking Project Management Office should consider publishing a document explaining what types of comments are most beneficial and listing best practices for parties submitting comments. Individual agencies may publish supplements to the common document describing the qualities of effective comments. Once developed, these documents should be made publicly available by posting on the agency website, Regulations.gov, and any other venue that will promote widespread availability of the information.

2. Agencies should set comment periods that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted efficiently. As a general matter, for "[s]ignificant regulatory action[s]" as defined in Executive Order 12,866, agencies should use a comment period of at least 60 days. For all other rulemakings, they should generally use a comment period of at least 30 days. When agencies, in appropriate circumstances, set shorter comment periods, they are encouraged to provide an appropriate explanation for doing so.[3]

3. Agencies should adopt stated policies of posting public comments to the Internet within a specified period after submission. Agencies should post all electronically submitted comments on the Internet and should also scan and post all comments submitted in paper format.[4]

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[3] *See also* Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking* (1993) ("Congress should consider amending section 553 of the APA to . . . . [s]pecify a comment period of 'no fewer than 30 days.'"); Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,821–22 (Jan. 18, 2011) ("To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.").

[4] *See also* Office of Information & Regulatory Affairs, Memorandum for the President's Management Council on Increasing Openness in the Rulemaking Process—Improving Electronic Dockets at 2 (May 28, 2010) ("OMB expects agencies to post public comments and public submissions to the electronic docket on Regulations.gov in a timely

4. The eRulemaking Project Management Office and individual agencies should establish and publish policies regarding the submission of anonymous comments.

5. Agencies should adopt and publish policies on late comments and should apply those policies consistently within each rulemaking. Agencies should determine whether or not they will accept late submissions in a given rulemaking and should announce the policy both in publicly accessible forums (*e.g.*, the agency's website, Regulations.gov) and in individual Federal Register notices including requests for comments. The agency may make clear that late comments are disfavored and will only be considered to the extent practicable.[5]

6. Where appropriate, agencies should make use of reply comment periods or other opportunities for receiving public input on submitted comments, after all comments have been posted. An opportunity for public input on submitted comments can entail a reply period for written comments on submitted comments, an oral hearing, or some other means for input on comments received.[6]

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manner, regardless of whether they were received via postal mail, email, facsimile, or web form documents submitted directly via Regulations.gov.").

[5] *See, e.g.*, Highway-Rail Grade Crossing; Safe Clearance, 76 Fed. Reg. 5,120, 5,121 (Jan. 28, 2011) (Department of Transportation notice of proposed rulemaking announcing that "[c]omments received after the comment closing date will be included in the docket, and we will consider late comments to the extent practicable").

[6] *See also* Administrative Conference of the United States, Recommendation 76-3, *Procedures in Addition to Notice & the Opportunity for Comment in Informal Rulemaking* (1976) (recommending a second comment period in proceedings in which comments or the agency's responses thereto "present new and important issues or serious conflicts of data"); Administrative Conference of the United States, Recommendation 72-5, *Procedures for the Adoption of Rules of General Applicability* (1972) (recommending that agencies consider providing an "opportunity for parties to comment on each other's oral or written submissions); Office of Information & Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, on Executive Order 13,563, M-11-10, at 2 (Feb. 2, 2011) ("[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.").

7. Although agencies should not automatically deem rulemaking comments to have become stale after any fixed period of time, agencies should closely monitor their rulemaking dockets, and, where an agency believes the circumstances surrounding the rulemaking have materially changed or the rulemaking record has otherwise become stale, consider the use of available mechanisms such as supplemental notices of proposed rulemaking to refresh the rulemaking record.

STATEMENT OF PRINCIPLES FOR PUBLIC ENGAGEMENT IN AGENCY RULEMAKING

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
OFFICE OF THE CHAIR

This Statement was prepared by the Office of the Chair of the Administrative Conference of the United States (ACUS) based on recommendations adopted by the ACUS Assembly. The Statement was not adopted by the ACUS Assembly and does not necessarily reflect the views of ACUS (including its Council, committees, or members).

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Federal agencies issue rules to implement, interpret, and prescribe the laws and policies they administer and to describe their organization, procedure, and practice requirements.[1] Public engagement—defined as "activities by [an] agency to elicit input from the public"[2]—is an integral part of agency rulemaking. As the Administrative Conference of the United States (ACUS) has recognized: "By providing opportunities for public input and dialogue, agencies can obtain more comprehensive information, enhance the legitimacy and accountability of their decisions, and increase public support for their rules."[3]

Several statutes set forth the basic framework for public engagement in agency rulemaking. Most notably, the Administrative Procedure Act (APA) generally requires that agencies engage with the public through the notice-and-comment process. Under this process, before an agency issues, amends, or repeals a rule, an agency provides notice of its proposal and "give[s] interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments."[4]

Agencies are not required to use this process for all rules. Under the APA, for example, notice-and-comment rulemaking is not required for interpretive rules or general statements of policy (together called "guidance documents") or for rules of agency organization, procedure, or practice. There can also be "good cause" for agencies to forgo notice-and-comment rulemaking in certain circumstances. Many other statutes set forth alternative or supplemental requirements for specific types of rules.

These laws establish only the minimum procedural requirements for agencies. Policymakers have learned a great deal about the value of public engagement since 1946, when the APA was enacted. Drawing on this experience, Congress has devised additional methods for agencies to engage with the public, for example under the Federal Advisory Committee Act and the Negotiated Rulemaking Act. Many presidents have adopted additional requirements to improve the effectiveness of public engagement, particularly with members of communities that have been historically underrepresented in agency rulemakings, and the Office of Information and Regulatory Affairs has issued guidance implementing presidential directives.[5] Agencies are also free to adopt additional practices as appropriate, and many have done so.

Congress established ACUS, in part, to "promote more effective public participation . . . in the rulemaking process."[6] ACUS has adopted dozens of recommendations, listed in the Appendix, to help agencies efficiently, equitably, and effectively provide opportunities for public input and

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[1] 5 U.S.C. § 551.
[2] Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Agency Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).
[3] *Id.*
[4] 5 U.S.C. § 553.
[5] A list of rulemaking requirements from the Executive Office of the President is available in the *Federal Administrative Procedure Sourcebook*, which is published jointly by ACUS and the American Bar Association's Section of Administrative Law and Regulatory Practice. The *Sourcebook* is available at https://sourcebook.acus.gov.
[6] 5 U.S.C. § 591(2).

dialogue when they issue, amend, and repeal rules. These recommendations identify principles and best practices for effective public engagement. They also recognize that there is no single approach to public engagement that will work for every agency in every rulemaking. To engage with the public efficiently, equitably, and effectively, agencies must consider a range of factors, including the complexity of a rule, the impact of a rule, the people likely to be affected by a rule, and available resources.[7]

The ACUS Office of the Chair prepared this Statement of Principles to concisely describe principles and best practices identified in recommendations adopted by ACUS. The Office of the Chair will update this Statement from time to time as ACUS adopts new recommendations that address public participation in agency rulemaking.

[7] Recommendation 2018-7, *supra* note 2, ¶ 3.

STATEMENT OF PRINCIPLES

PLANNING FOR PUBLIC ENGAGEMENT

1 Because the public may have valuable information concerning the impact and effectiveness of agency rules, agencies should engage broadly with the public in their rulemaking processes—including during regulatory planning and prioritization, notice-and-comment rulemaking, and retrospective review—even when they are not required to do so by law.[1]

2 Agencies should develop general policies for public engagement in their rulemakings and make those policies publicly available.[2] An agency's general policies should address:

a. Its goals and purposes in engaging the public;

b. The types of individuals or organizations with whom it seeks to engage and the methods for communicating with them and encouraging them to participate;

c. How such individuals and organizations can participate in the rulemaking process;

d. The agency personnel or offices to whom members of the public can direct questions related to the rulemaking process;

e. The types of information it seeks from public engagement;

f. How the information from public engagement will inform the rulemaking process or be used;

g. When public engagement should occur;

h. The range of available methods for public engagement, such as those listed in Principle 13;

i. Records and other information, such as upcoming opportunities for public engagement, it will include in the public rulemaking docket and on the agency's website;

j. How it will handle nongovernmental ex parte communications (i.e., written or oral communications regarding the substance of an anticipated or ongoing rulemaking between agency personnel and people outside the agency that are not placed in the public rulemaking docket at the time they occur);

k. Practices for managing comments received during the notice-and-comment process, including mass, computer-generated, and falsely attributed comments; comments

that include personal or confidential commercial information; and comments received after the comment period has ended; and

l. Plans to periodically evaluate the effectiveness of public engagement policies.

3 Agencies should use their general policies to inform public engagement for specific rulemakings. Planning should take place as early as possible during a rulemaking.[3]

4 Effective planning for public engagement can require collaboration among many different people, including multiple offices within an agency, including program offices, legal offices, and offices that oversee communications, public engagement, and public affairs. Personnel with public engagement training and experience can be especially helpful in developing general public engagement policies and public engagement plans for specific rulemakings. Personnel at other agencies may also have useful information about best practices for public engagement. Agencies should, therefore, also consider sharing their public participation policies, data, and other information about the effectiveness of their public engagement outreach with other agencies.[4]

5 Agencies should train employees to understand and apply recognized best practices in public engagement, including the use of technologies that may broaden public participation or help them manage public comments—including mass, computer-generated, and falsely attributed comments—more effectively.[5]

6 Agencies should develop resources that educate the public on the rulemaking process, describe the role of public participation, provide guidance on submitting effective comments, clarify how the agency will consider public input provided outside the notice-and-comment process, and provide easy access to ongoing rulemakings.[6]

7 Agencies should periodically evaluate the effectiveness of their public engagement policies, including by soliciting feedback and suggestions for improvement from the public, and update them as needed.[7]

THE PUBLIC WITH WHOM TO ENGAGE

8 Agencies should engage with a wide range of people interested in or affected by their rulemakings, including experts and members of communities that historically have been underrepresented in agency rulemakings, and be deliberate and proactive in their outreach.[8]

WHEN TO ENGAGE WITH THE PUBLIC

9 Agencies should engage with the public throughout the rulemaking process, not just during the notice-and-comment process. Public engagement is especially valuable during the early stages of the rulemaking process, before an agency has developed a proposed rule, and public engagement should generally occur as early as feasible in the rulemaking process. Agencies should engage with the public to identify problems, set regulatory priorities, and consider regulatory alternatives.[9]

10 Public engagement can also help agencies assess adopted rules and decide whether to revisit them. Agencies should consider opportunities to solicit input from the public on the impact and effectiveness of adopted rules, for example as part of retrospective review, post-promulgation comment processes (especially when there was no pre-promulgation opportunity for public participation), and through more informal engagement methods.[10]

HOW TO ENGAGE WITH THE PUBLIC

11 Agencies should ensure that all people and groups interested in or affected by their rulemakings are aware of opportunities for public participation and can meaningfully access and effectively participate in them. They should consider economic, geographic, linguistic, educational, technological, and other barriers to effective participation that interested and affected parties, including members of historically underrepresented groups, may face.[11]

12 Agencies should manage the notice-and-comment process so that interested persons can effectively participate in agency rulemakings and so that agencies can obtain comprehensive information and conduct their rulemakings efficiently. For example, agencies should generally use a comment period of at least 30 days and at least 60 days for "significant regulatory actions" as defined in Executive Order 12,866.[12]

13 In addition to the notice-and-comment process, agencies may use many different methods to engage with the public depending on their needs.[13] Each has its benefits and costs. Agencies should consider a broad range of methods for public engagement, including:

a. Formalizing a process for members of the public to petition for the issuance, amendment, or repeal of a rule under 5 U.S.C. § 553(e);

b. Hosting internet and social media forums;

c. Using focus groups;

d. Issuing requests for information and advance notices of proposed rulemaking;

e. Meeting with and conducting targeted outreach to interested and affected parties, consistent with laws and policies on ex parte communications;

f. Using ombuds;

g. Using advisory committees, including those tasked with conducting negotiated rulemaking;

h. Holding public meetings, hearings, and listening sessions (and including opportunities for remote participation) with interested and affected parties; and

i. Providing supplemental opportunities for members of the public to reply to comments submitted during the notice-and-comment process.

14 When agencies provide opportunities for public participation, they should notify interested and affected parties about those opportunities using media that are likely to reach them. In addition to providing notice in the *Federal Register*, agencies should:

a. Create dedicated webpages that include key information about rulemaking initiatives and engagements;

b. Use social media and email alerts to notify interested and affected parties about opportunities for public participation; and

c. Work with relevant state and local governments and intermediary organizations (e.g., trade associations, professional associations, community organizations, advocacy groups) that can help provide effective notice to interested persons.[14]

15 Agencies should provide information about rulemaking initiatives so that interested and affected parties, including members of historically underrepresented groups, can understand them. Agencies should:

a. Write rulemaking documents in terms that the relevant audience can understand;

b. Provide plain-language summaries of rules;

c. Identify issues under consideration so that non-specialists can understand them;

d. Use audiovisual materials or other media to supplement more traditional written information, when appropriate; and

e. Provide relevant information in languages other than English, when appropriate.[15]

16 Interested and affected parties can participate most effectively in a rulemaking when they can review records and information that may inform the agency's decision-making process. During the notice-and-comment process, in particular, agencies should maintain an online rulemaking docket that allows the public to review:

a. Notices pertaining to the rulemaking;

b. Comments received in response to a notice of proposed rulemaking;

c. Ex parte communications after a notice of proposed rulemaking has been issued;

d. Intragovernmental communications which contain material factual information (as opposed to indications of government policy);

e. Transcripts or recordings, if any, of oral presentations made during the rulemaking;

f. Reports or recommendations of any relevant advisory committees;

g. Other materials required by law to be considered or made public in connection with the rulemaking; and

h. Any other materials considered by the agency during the rulemaking.[16]

ENDNOTES & APPENDIX

[1] Recommendations 2018-7, ¶¶ 6–8; 2017-6, ¶ 3; 2014-5, ¶ 13; 80-3, ¶ 3; 76-3, ¶ 1; 71-6, ¶ A; *see e.g.*, Recommendations 2022-2, ¶¶ 4, 6; 2021-3, ¶¶ 3–4; 2020-1, ¶ 5; 2019-3, ¶ 6; 2018-7, ¶¶ 2, 5, 8(a); 2017-6, ¶ 3; 2017-2, ¶ 1; 2014-5, ¶¶ 5, 13; 2013-4 ¶ 2; 2012-7, ¶ 6; 2012-5, ¶ 3(b); 2012-4, ¶ 1(a); 2010-1, ¶ 5; 95-3, ¶ IV(A); 91-1, ¶¶ 7–8; 87-1, ¶ 1(c); 84-5, ¶¶ 3, 4; 84-1, ¶ B(4).

[2] Recommendations 2023-2, ¶¶ 1–7, 11, 13–14; 2022-2, ¶¶ 6, 13–19, 22(d); 2021-3, ¶¶ 2–7; 2021-2, ¶ 5; 2021-1, ¶ 11; 2020-2, ¶¶ 1–2, 4; 2020-1, ¶¶ 1–5; 2019-3, ¶¶ 1(b)(i), 11; 2018-7, ¶¶ 1–2, 3(i), 9; 2017-6, ¶¶ 1, 3; 2014-6, ¶ 1; 2014-4, ¶¶ 2–3; 2013-5, ¶ 3; 2013-4, ¶ 2; 2011-8, ¶¶ 2, 4; 2011-2, ¶¶ 1, 3; 2010-1, ¶ 7; 95-3, ¶ IV(A); 93-4, ¶ V; 89-7, ¶ 3(c); 86-6, ¶¶ 1–2; 84-5, ¶¶ 3–4; 84-1, ¶ B(2); 80-3, ¶ 3; 76-3, ¶ 1; 71-6, ¶ E; 71-3; 68-5, ¶ A(2).

[3] Recommendations 2022-2, ¶¶ 2, 3, 7; 2018-7, ¶ 7; 2013-5, ¶ 3(a).

[4] Recommendations 2023-2, ¶ 5; 2022-2, ¶¶ 22–23; 2021-3, ¶ 8; 2021-1, ¶¶ 15, 17; 2018-7, ¶ 4; 2017-6, ¶ 1; 2013-5, ¶ 4; 2012-5, ¶¶ 1–2; 2012-4, ¶¶ 7–8.

[5] Recommendations 2023-2, ¶¶ 1, 3–4, 7, 10, 12; 2022-2, ¶¶ 10–11, 13–16, 20, 22; 2021-1, ¶¶ 11, 14, 16; 2018-7, ¶¶ 4, 9; 2017-3, ¶ 4; 2014-4, ¶¶ 14–16; 2013-5, ¶¶ 1–3; 2012-4, ¶¶ 2, 8; 2011-8, ¶¶ 1–3; 2011-7, ¶ 10; 2011-2, ¶ 3; 2011-1, ¶¶ 1, 4–5; 90-5, ¶ 1; 88-10, ¶ H; 72-1, ¶ A(1).

[6] Recommendations 2023-2, ¶ 3; 2021-3, ¶ 3; 2021-1, ¶ 11; 2020-1, ¶¶ 2, 4; 2018-7, ¶¶ 7, 9; 2014-4, ¶¶ 1–2; 2013-5, ¶¶ 2–4, 6, 17.

[7] Recommendations 2022-2, ¶¶ 6, 22(d); 2020-1, ¶ 2(f); 2017-6, ¶¶ 1, 3; 2017-3, ¶ 7.

[8] Recommendations 2023-2, ¶¶ 1, 5; 2022-2, ¶ 7(c); 2021-3, ¶ 3; 2021-2, ¶¶ 5, 9; 2020-1, ¶ 4; 2018-7, ¶¶ 3, 7–8; 2016-5, ¶ 15; 2013-5, ¶¶ 2–3; 2012-4, ¶ 7; 2011-8, ¶ 6; 2010-1, ¶¶ 5–6; 90-2, ¶ 6; 84-5, ¶¶ 3, 4; 71-6, ¶¶ A, E; 68-5, ¶ A(1)–(2).

[9] Recommendations 2023-2, ¶ 7; 2021-3, ¶¶ 1–3; 2021-2, ¶¶ 5, 9; 2018-7, ¶¶ 2, 5, 6(a), 8(a); 2017-2, ¶¶ 1–2; 2014-4, ¶ 4; 2014-5, ¶¶ 5, 13; 2013-5, ¶¶ 1, 3, 6; 2012-4, ¶¶ 1, 4; 95-3, ¶ III–IV(A); 93-5, ¶ III(A); 93-4, ¶ (V)(F); 87-1, ¶ 1(c)(1)–(2); 85-5, ¶ 3; 85-2, ¶ 5(c); 84-1, ¶ 4; 82-4, ¶¶ 1, 4, 7; 80-3, ¶ 3.

[10] Recommendations 2021-2, ¶ 9; 2019-1, ¶¶ 2, 4, 8–10, 13–14; 2017-6, ¶ 3; 2017-5, ¶¶ 2, 7(e), 8–11; 2016-5, ¶ 1; 2014-4, ¶¶ 6, 8–10; 2013-5, ¶¶ 5, 10; 2011-2, ¶¶ 5–6; 95-4, ¶¶ I(B)(3), II(D); 92-2, ¶¶ II(A)–(B); 90-2, ¶ A(3); 83-2, ¶¶ 1, 2; 80-6, ¶ 2; 76-5, ¶¶ 1–2; 76-3, ¶ 1.

[11] Recommendations 2023-2, ¶¶ 1, 5; 2022-2, ¶¶ 1–3, 5, 7, 19; 2021-3, ¶ 3; 2021-2, ¶¶ 5, 9; 2018-7, ¶¶ 3(e)–(f), 7, 9; 2017-3, ¶¶ 1–2; 2013-5, ¶¶ 2–3; 2013-3, ¶ 9; 2012-4, ¶ 7; 2011-8, ¶ 6; 90-2, ¶ 6; 68-5, ¶ A(1).

[12] Recommendation 2011-2, ¶ 2.

[13] Recommendations 2021-3 ¶ 2; 2022-2, ¶¶ 14–19; 2021-2, ¶¶ 5, 9; 2017-6, ¶ 3; 2016-5, ¶¶ 1(a), 15; 2014-6, ¶¶ 1–3, 6–9; 2014-4, ¶¶ 6, 10; 2013-5, ¶¶ 5, 10, 17; 2011-2, ¶ 6; 90-2, ¶ A(1), (3); 86-6, ¶¶ 1–2; 76-3, ¶ 1; 68-5, ¶ A(1)–(2). For examples of factors agencies should consider, see 2021-3, ¶ 1; 2018-7, ¶ 6(b); 2017-2, ¶ 2; 2013-5, ¶¶ 2–3, 6; 82-4, ¶¶ 4(c), 7.

[14] Recommendations 2023-2, ¶¶ 1, 4–5, 7; 2022-2, ¶¶ 8, 10–11, 13–18, 21; 2021-2, ¶ 6; 2020-1, ¶ 3; 2018-7, ¶ 9; 2013-5, ¶¶ 1–3, 5; 2011-8, ¶¶ 1–3; 2011-7, ¶ 10; 2010-1, ¶ 7; 84-5, ¶¶ 3–4; 84-1, ¶ 3; 76-3, ¶ 1; 71-6, ¶ E.

[15] Recommendations 2018-7, ¶¶ 3(f), 7, 8(a)(v), 9; 2017-3, ¶¶ 1, 6–7; 2013-5, ¶¶ 3, 12.

[16] Recommendations 2023-2, ¶¶ 6–7, 13–14; 2020-1, ¶ 2(d); 2014-4, ¶¶ 5, 7, 9; 2013-4, ¶ 2; 2011-2, ¶ 3; 93-4, ¶ V(E); 77-3, ¶¶ 2–3; 76-3, ¶ 1(c).

APPENDIX

68-5, *Representation of the Poor in Agency Rulemaking of Direct Consequence to Them*
71-3, *Articulation of Agency Policies*
71-6, *Public Participation in Administrative Hearings*
72-1, *Broadcast of Agency Proceedings*
76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*
76-5, *Interpretive Rules of General Applicability and Statements of General Policy*
77-3, *Ex Parte Communications in Informal Rulemaking Proceedings*
80-3, *Interpretation and Implementation of the Federal Advisory Committee Act*
82-4, *Procedures for Negotiating Proposed Regulations*
83-2, *The "Good Cause" Exemption from APA Rulemaking Requirements*
84-1, *Public Regulation of Siting of Industrial Development Projects*
84-5, *Preemption of State Regulation by Federal Agencies*
85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*
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86-6, *Petitions for Rulemaking*
87-1, *Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration*
88-10, *Federal Agency Use of Computers in Acquiring and Releasing Information*
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90-5, *Federal Agency Electronic Records Management and Archives*
91-1, *Federal Agency Cooperation with Foreign Government Regulators*
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2016-5, *The Use of Ombuds in Federal Agencies*
2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*
2017-3, *Plain Language in Regulatory Drafting*

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2019-3, *Public Availability of Agency Guidance Documents*
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2021-1, *Managing Mass, Computer-Generated, and False Comments*
2021-2, *Periodic Retrospective Review*
2021-3, *Early Input on Regulatory Alternatives*
2022-2, *Improving Notice of Regulatory Changes*
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