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 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 their proposals.²

Other statutes, including the Federal Advisory Committee Act (FACA)³ and Negotiated Rulemaking Act,⁴ provide agencies with 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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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.\(^5\) The present Recommendation builds on these past recommendations and focuses on supplemental tools agencies can use to expand their public engagement efforts before or in conjunction with issuing NPRMs.

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 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 language and resource constraints.\(^6\)

Strategic planning focused specifically 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

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participate in notice and comment. Agencies can tailor their plans to specific rule proposals, reflecting the unique purposes, goals, and needs of each rulemaking. A well-designed plan will include a variety of techniques to obtain valuable information from diverse sources at each stage of the process.

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 who might not otherwise participate in the rulemaking and to 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 each of their public engagement efforts. Finally, with whatever public participation method an agency chooses, it should demonstrate a sincere desire to learn from those who participate and should display an open-mindedness about relevant issues.

This Recommendation highlights three main methods for supplementing the notice-and-comment process. First, agencies can publish “requests for information” (RFIs) or “advance

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7 For a discussion of general public engagement plans, see Sant’Ambrogio & Staszewski, supra note 1, at 128–133. For examples of general public engagement plans, see U.S. DEP’T OF THE INTERIOR, NATL’ PARK SERVS., 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, see Sant’Ambrogio & Staszewski, supra note 1, at 133–139.
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 costly or potentially 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, because they are published in the Federal Register, they 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 be unaware of or unable to participate effectively in the notice-and-comment process. To engage in targeted outreach, an agency identifies affected interests that are not likely to participate and undertakes efforts to notify those interests of the rulemaking and to 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.

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\(^9\) 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 Sant’Ambrogio & Staszewski, supra note 1, at 47–48, 60–61 (discussing the use of RFIs by the Department of Energy, the Consumer Financial Protection Bureau, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation).

\(^11\) For a discussion of the use of ANPRMs, see id. at 72–74. For example, the Department of Energy routinely issues ANPRMs to solicit public comments on preliminary proposals pursuant to its process rule. See id. at 132–33.

\(^12\) 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 49.
Third, agencies may also convene meetings of affected interests to obtain useful feedback on potential regulatory alternatives and to elicit information through a process of interactive dialogue. Meetings can educate participants and allow a variety of affected interests 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. They 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.\textsuperscript{13} An agency can structure a meeting to generate open-ended dialogue, allowing participants the opportunity to raise their own concerns or issues. Alternatively, an agency can structure a meeting so that the agency’s priorities dictate the agenda or discussion topics. Although meetings, whether designated as focus groups, workshops, hearings, or listening sessions, can vary in their format, they would not necessitate compliance with FACA or the Paperwork Reduction Act (PRA).\textsuperscript{14}

Agencies should make information about their individual rulemakings available on their websites. This will help ensure that members of the public are adequately informed about agencies’ rulemaking plans and can participate thoughtfully in response to RFIs, ANPRMs, meeting opportunities, and other forms of public engagement.\textsuperscript{15} As recommended below, any contemplated rule that an agency deems appropriate for enhanced public engagement should presumptively be listed on its own webpage or a section of a page on an agency’s website that

\textsuperscript{13} For a discussion of focus groups and listening sessions, see id. at 45–51 (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), 60–63 (discussing use of facilitated listening sessions by the Nuclear Regulatory Commission); see also id. at 75–76 (discussing public meetings in general and EPA’s use of shuttle diplomacy and technical workshops).

\textsuperscript{14} 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).

\textsuperscript{15} For example, the Consumer Financial Protection Bureau posted prototypes of disclosure forms on its website and sought targeted feedback when it developed rules governing disclosure requirements for home mortgages. See id. at 77.
can contain pertinent background information on the contemplated rule. Dedicated space on agencies’ websites for these rules can help agencies inform and engage affected interests throughout the rulemaking process.\textsuperscript{16}

**RECOMMENDATION**

**Public Engagement Planning**

1. Agencies should develop and make available on their webpages general plans for public engagement in their rulemaking. Such plans should include consideration of:

   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 type(s) of information the agency seeks from its public engagement;

   e. how this information is likely to be obtained;

   f. when public engagement efforts should occur;

   g. the range of methods for public engagement available to the agency; and

   h. what the agency will do with the information.

2. Agencies’ public engagement plans 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.

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;

\textsuperscript{16} See generally Recommendation 2011-8, supra note 5.
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 efforts 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 likely to have useful information, including the challenge of providing rulemaking materials in 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; and

i. whether additional legal constraints, for example, the Federal Advisory Committee Act or the Paperwork Reduction Act, might apply.

4. Agencies should consider assigning or retaining personnel with public engagement training and experience to participate in both the general public engagement planning process 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.


   a. Agencies should consider using requests for information (RFIs) and advance notices of proposed rulemaking (ANPRMs) when they need to:

   i. gather diffuse 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. communicate their open-mindedness with respect to the matters on which they seek public comments,

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.**
a. Agencies should consider convening meetings of 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 NPRMs. When conducting such meetings, agencies 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 they seek;
   iv. consider using a trained facilitator or moderator from inside the agency or hire one from 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 agencies need to make informed decisions;
   vii. determine whether and how to structure interactive dialogue among participants;
   viii. consider recording the session and make that recording available on a website dedicated to that rulemaking; and
   ix. prepare a report summarizing the results.

b. Agency representatives should take an open-minded stance during meetings with affected interests.

c. When a rulemaking is particularly important or controversial or the agency seeks to promote clarity and learning through dialogue, the agency should consider facilitating enhanced deliberation among interested persons by conducting meetings in a format that permits interactive discussion among participants.
Dedicated Webpages for Rulemaking Information

9. When agencies plan additional public engagement in connection with a rule, they should create a dedicated webpage for that rule, launched as early as possible. 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 to supplement more traditional written information in appropriate situations. Dedicated webpages for rules that involve enhanced public engagement should provide information such as:

   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. substantive information about the issues under consideration, presented in forms that are readable and comprehensible by non-experts; and
   d. summaries of any results of prior public engagement efforts.