Comments from the Consultants, Michael Sant’Ambrogio & Glen Staszewski
The opportunity for public engagement is vital to the rulemaking process, permitting agencies to obtain more comprehensive information, enhance the legitimacy and accountability of their regulations, and enhance public support for their rules. Agencies, however, often face challenges in involving a variety of interested parties 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 those proposals. Other statutes, including the Federal Advisory Committee Act (FACA) and Negotiated Rulemaking Act, provide agencies with other means to engage specific interested parties in the rulemaking process. In most rulemakings, however, agencies rely considerably on notice-and-comment rulemaking procedures to solicit public input. Although agencies receive important information from the public during the notice-and-comment process, agencies can sometimes benefit from additional public engagement outside of the notice-and-comment process, particularly before issuing a notice of proposed rulemaking, as they identify regulatory issues and develop proposals.

The Conference has previously adopted several Recommendations directed at expanding participation in the rulemaking process. These recommendations address a variety of issues, including rulemaking petitions, advisory committees, negotiated rulemaking, use of social media,

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contemplated rule that the agency deems qualified for enhanced public engagement efforts
should presumably be listed on a separate webpage or section of a page on an agency’s website.
Dedicated space on an agency’s website for contemplated rules will allow agencies to organize
their public engagement efforts and enable interested parties to remain engaged throughout the
rulemaking process.\(^6\)

**RECOMMENDATION**

**Public Engagement Planning**

1. Agencies should develop strategic plans for public engagement in their rulemaking, including agenda-setting, rule development, the notice-and-comment process, and retrospective review. Such strategies should require the agency to consider the full range of interested parties that may have information, views, or data relevant to the rulemaking, including unaffiliated experts and any interests that may be absent from or insufficiently represented in the notice-and-comment rulemaking process. In addition, agencies should consider:
   a. The agency’s goals and purposes in seeking to engage with the public,
   b. The individuals or organizations with whom the agency seeks to engage,
   c. What type(s) of information the agency seeks from its public engagement,
   d. How this information is likely to be obtained,
   e. When public engagement efforts should occur,
   f. The range of methods for public engagement available to the agency, and
   g. What the agency will do with the information.

2. An agency’s strategic plan should be used to inform individual plans for public engagement with respect to specific rulemakings, considering which rulemakings would be appropriate for additional forms of engagement. This individual planning would best take place at the earliest feasible part of the process as the agency begins to develop a new rule. Agencies should consider assigning or retaining dedicated personnel with public engagement training and experience to participate in this planning process.

\(^6\) See generally Recommendation 2011-8, supra note 5.
a. In determining whether a rule would be appropriate for additional forms of engagement, agencies should evaluate

i. The complexity of the rule,

ii. The magnitude of the costs and benefits of the rule,

iii. Whether the rule is likely to be controversial,

iv. The interests that are likely to be affected and the extent to which they are likely to be affected, and

v. Whether additional public engagement will provide additional useful information, including from unaffiliated experts, individuals with situated knowledge germane to the regulation who do not typically participate in rulemaking, and other citizens with relevant views that may not otherwise be expressed.

b. In evaluating these factors, agencies should consider any rule that qualifies as economically significant under Executive Order 12,866 as a presumptive candidate for additional engagement.

3. Agencies should maintain training materials and support opportunities to train employees responsible for public engagement activities to understand and apply recognized best practices in the field.

3.4. Agencies should publish their public engagement plans on their websites or otherwise make them readily available to the public.

Methods of Public Engagement

4.5. For rules that an agency determines are appropriate for additional forms of public engagement, the agency should generally involve the public at the earliest stages of the rulemaking process, including during agenda setting and rule development. In deciding whether to undertake additional public engagement and what methods to use, agencies should evaluate

a. The time and resources available,

b. The information needed,

c. The interests likely to be affected,

d. The individuals or groups that may have relevant information,
e. The need for or potential value of unaffiliated expertise from outside the agency,

f. Whether there are individuals with situated knowledge germane to the regulation
   who do not typically participate in rulemaking and could provide useful
   information or views, and

g. Whether additional legal constraints, for example, the Federal Advisory
   Committee Act, apply.

6. Agencies should also consider conducting carefully planned outreach that is targeted to
   reach and involve unaffiliated experts, individuals with situated knowledge germane to
   regulation who do not typically participate in rulemaking, and other citizens with relevant
   views that may not otherwise be expressed.

7. Agencies should consider establishing hotlines or suggestion boxes on their websites to
   help the public raise issues or concerns and submit suggestions related to the agency’s
   agenda. When establishing hotlines or suggestion boxes, agencies should ensure that
   they have the resources to provide a substantive response in a reasonably prompt manner.


a. Agencies should publish requests for information (RFIs) or advance notices of
   proposed rulemaking (ANPRMs) in the Federal Register when they find that the
   additional information they can provide would be helpful to

   i. evaluate potential strategies to address a regulatory issue,
   ii. choose between more than one regulatory alternative, or
   iii. develop and refine a proposal rule.

b. When using RFIs and ANPRMs, the agency should
   i. remain neutral regarding how it would or should resolve the matters on
      which it seeks public comments, and
   ii. either

      1. pose detailed questions aimed at soliciting the information the
         agency needs to make informed decisions, or
      2. indicate that the agency is 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 such additional forms
of public input, explain how the comments received may have informed or influenced the development of the agency’s subsequent regulatory proposal.

6-9. **Facilitated Meetings.**

a. When conducting meetings with the public, the agency should

i. Determine whether to target and invite specific participants and/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 it seeks;

iv. Provide a trained facilitator or moderator from inside the agency or hire one from outside the agency, as appropriate;

v. Prepare questions and disseminate them in advance;

vi. Provide background materials for the participants that clearly explain relevant issues and the primary policy alternatives;

vii. Conduct and record the session, and make that recording available on the agency’s dedicated website for that rulemaking; and

viii. Prepare a report summarizing the results.

b. Agency representatives should remain neutral during meetings and pose targeted questions aimed at soliciting specific information the agency needs to make informed decisions or open-ended questions on other questions and concerns.

b—Agencies should consider using enhanced deliberative methods that are more dialogic in nature than typical public meetings to supplement their traditional rulemaking processes in appropriate circumstances.

**Dedicated Webpages for Rulemaking Information**

7.10. 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, providing up to date information on the status of the rulemaking initiative, opportunities to participate in the process, substantive information about the issues under consideration, and summaries of the results of prior public engagement efforts. **Agencies should seek to**
make their webpages user-friendly for individuals and groups who do not typically participate in the rulemaking process.