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Public Engagement in Rulemaking

Committee on Rulemaking

Proposed Recommendation for Committee | September 14, 2018

1 The opportunity for public engagement is vital to the rulemaking process, permitting
2 agencies to obtain more comprehensive information, enhance the legitimacy and accountability
3 of their regulations, and enhance public support for their rules.¹ Agencies, however, often face
4 challenges in involving a variety of interested parties in the rulemaking process.

5 The Administrative Procedure Act (APA) recognizes the value of public participation in
6 rulemaking by requiring agencies to publish a notice of a proposed rulemaking (NPRM) in the
7 *Federal Register* and provide interested persons an opportunity to comment on those proposals.²
8 Other statutes, including the Federal Advisory Committee Act (FACA)³ and Negotiated
9 Rulemaking Act,⁴ provide agencies with other means to engage specific interested parties in the
10 rulemaking process. In most rulemakings, however, agencies rely considerably on notice-and-
11 comment rulemaking procedures to solicit public input. Although agencies receive important
12 information from the public during the notice-and-comment process, agencies can sometimes
13 benefit from additional public engagement outside of the notice-and-comment process,
14 particularly before issuing a notice of proposed rulemaking, as they identify regulatory issues
15 and develop proposals.

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

¹ Michael Sant’Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking 8–15 (Aug. 24, 2018) (draft report to the Admin. Conf. of the U.S.) <https://www.acus.gov/report/public-engagement-rulemaking-draft-report>.

² 5 U.S.C. § 553(b)–(c) (2012).

³ Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2 (2012)).

⁴ See Negotiated Rulemaking Act, Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified as amended at 5 U.S.C. §§ 561–570 (2012)).

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

RECOMMENDATION

Public Engagement Planning

- 77 1. Agencies should develop strategic plans for public engagement in their rulemaking,
78 [including agenda-setting, rule development, the notice-and-comment process, and](#)
79 [retrospective review](#). Such strategies should require the agency to consider the full range
80 of interested parties that may have information, views, or data relevant to the rulemaking,
81 including unaffiliated experts and any interests that may be absent from or insufficiently
82 represented in the notice-and-comment rulemaking process. In addition, agencies should
83 consider:
- 84 a. The agency’s goals and purposes in seeking to engage with the public,
 - 85 b. The individuals or organizations with whom the agency seeks to engage,
 - 86 c. What type(s) of information the agency seeks from its public engagement,
 - 87 d. How this information is likely to be obtained,
 - 88 e. When public engagement efforts should occur,
 - 89 f. The range of methods for public engagement available to the agency, and
 - 90 g. What the agency will do with the information.
- 91 2. An agency’s strategic plan should be used to inform individual plans for public
92 engagement with respect to specific rulemakings, considering which rulemakings would
93 be appropriate for additional forms of engagement. This individual planning would best
94 take place at the earliest feasible part of the process as the agency begins to develop a
95 new rule. Agencies should consider assigning or retaining dedicated personnel with
96 public engagement training and experience to participate in this planning process.

⁶ See generally Recommendation 2011-8, *supra* note 5.

- 97 a. In determining whether a rule would be appropriate for additional forms of
98 engagement, agencies should evaluate
99 i. The complexity of the rule,
100 ii. The magnitude of the costs and benefits of the rule,
101 iii. Whether the rule is likely to be controversial,
102 iv. The interests that are likely to be affected and the extent to which they are
103 likely to be affected, and
104 v. Whether additional public engagement will provide additional useful
105 information, including from unaffiliated experts, individuals with situated
106 knowledge germane to the regulation who do not typically participate in
107 rulemaking, and other citizens with relevant views that may not otherwise
108 be expressed.
- 109 b. In evaluating these factors, agencies should consider any rule that qualifies as
110 economically significant under Executive Order 12,866 as a presumptive
111 candidate for additional engagement.

112 [3.](#) Agencies should maintain training materials and support opportunities to train employees
113 responsible for public engagement activities to understand and apply recognized best
114 practices in the field.

115 [3.4.](#) Agencies should publish their public engagement plans on their websites or otherwise
116 make them readily available to the public.

Methods of Public Engagement

117 [4.5.](#) For rules that an agency determines are appropriate for additional forms of public
118 engagement, the agency should generally involve the public at the earliest stages of the
119 rulemaking process, including during agenda setting and rule development. In deciding
120 whether to undertake additional public engagement and what methods to use, agencies
121 should evaluate

- 122 a. The time and resources available,
123 b. The information needed,
124 c. The interests likely to be affected,
125 d. The individuals or groups that may have relevant information,

- 126 e. The need for or potential value of unaffiliated expertise from outside the agency,
127 f. Whether there are individuals with situated knowledge germane to the regulation
128 who do not typically participate in rulemaking and could provide useful
129 information or views, and
130 g. Whether additional legal constraints, for example, the Federal Advisory
131 Committee Act, apply.

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

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

140 5.8. *Requests for Information and Advance Notices of Proposed Rulemaking.*

- 141 a. Agencies should publish requests for information (RFIs) or advance notices of
142 proposed rulemaking (ANPRMs) in the *Federal Register* when they find that the
143 additional information they can provide would be helpful to
144 i. evaluate potential strategies to address a regulatory issue,
145 ii. choose between more than one regulatory alternative, or
146 iii. develop and refine a proposal rule.
147 b. When using RFIs and ANPRMs, the agency should
148 i. remain neutral regarding how it would or should resolve the matters on
149 which it seeks public comments, and
150 ii. either
151 1. pose detailed questions aimed at soliciting the information the
152 agency needs to make informed decisions, or
153 2. indicate that the agency is open to input on other questions and
154 concerns.
155 c. Agencies should review any comments they receive in response to RFIs and
156 ANPRMs and, when issuing any proposed rule that follows such additional forms

157 of public input, explain how the comments received may have informed or
158 influenced the development of the agency's subsequent regulatory proposal.

159 6.9.Facilitated Meetings.

- 160 a. When conducting meetings with the public, the agency should
- 161 i. Determine whether to target and invite specific participants and/or open
 - 162 the meeting to any interested member of the general public;
 - 163 ii. Determine whether to conduct the meeting in person, online, or both;
 - 164 iii. Recruit participants based on the nature of the rule at issue and the type of
 - 165 feedback that it seeks;
 - 166 iv. Provide a trained facilitator or moderator from inside the agency or hire
 - 167 one from outside the agency, as appropriate;
 - 168 v. Prepare questions and disseminate them in advance;
 - 169 vi. Provide background materials for the participants that clearly explain
 - 170 relevant issues and the primary policy alternatives;
 - 171 vii. Conduct and record the session, and make that recording available on the
 - 172 agency's dedicated website for that rulemaking; and
 - 173 viii. Prepare a report summarizing the results.
- 174 b. Agency representatives should remain neutral during meetings and pose targeted
- 175 questions aimed at soliciting specific information the agency needs to make
- 176 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

177 7.10. When agencies plan additional public engagement in connection with a rule, they
178 should create a dedicated webpage for that rule, launched as early as possible, providing
179 up to date information on the status of the rulemaking initiative, opportunities to
180 participate in the process, substantive information about the issues under consideration,
181 and summaries of the results of prior public engagement efforts. Agencies should seek to

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make their webpages user-friendly for individuals and groups who do not typically

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participate in the rulemaking process.