

Attached are my comments on the draft recommendations. They focus on three points:

- The importance of proactive outreach strategies, because people/groups who do not typically participate in RM are often not watching the typical agency information outlets
- Providing info about the RM process – and the role of public participation in it – as both a motivator to participation (why someone should expend time and energy) and as a guide to the kind of participation that is effective and useful
- Providing substantive information in a readable, comprehensible form that new participants can, and will, engage with

I hope that these points will also get some attention in the text preceding the recommendations. Wider and better participation won't come from simply adding a Notice of Inquiry or public meeting unless the agency also (1) works hard to get new people/groups into the real or virtual room and (2) supplies substantive info in a manner much different than conventional rulemaking materials. Based on the CeRI experience with RegulationRoom, my concern is that more stages of formal process are unlikely to broaden useful participation without significant changes in how agencies publicize rulemakings and participation opportunities, as well as in how they provide information about the relevant issues and questions.

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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.<sup>1</sup> 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.<sup>2</sup>  
8 Other statutes, including the Federal Advisory Committee Act (FACA)<sup>3</sup> and Negotiated  
9 Rulemaking Act,<sup>4</sup> 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.

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<sup>1</sup> 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>.

<sup>2</sup> 5 U.S.C. § 553(b)–(c) (2012).

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

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



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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,  
19 comment and reply periods, and plain language in regulatory drafting.<sup>5</sup> This Recommendation  
20 builds on these past recommendations and focuses on supplemental tools agencies can use to  
21 expand their public engagement efforts before they issue NPRMs.

22 For the purposes of this Recommendation, “public engagement” includes efforts to  
23 enhance public understanding of agency rulemaking and foster meaningful participation in the  
24 rulemaking process by members of the public. Strategic planning focused specifically on public  
25 engagement efforts can help agencies solicit and obtain valuable information from more  
26 interested parties with diverse experiences, information, and views throughout the rulemaking  
27 process, including unaffiliated experts and individuals with situated knowledge who do not  
28 typically participate in notice and comment. Agencies can tailor their plans to specific rule  
29 proposals, reflecting the unique purposes, goals, and needs of each rulemaking. A well-designed  
30 plan will include a variety of techniques that will obtain diverse information at each stage of the  
31 process.

32 Not all rulemakings, however, warrant additional public engagement efforts. Some rules  
33 garner little public interest or address narrow issues, so public outreach beyond the notice-and-  
34 comment process is unlikely to provide the agency with additional relevant information. On the  
35 other hand, some rules are complex, affect a wide-range of interested parties in a variety of ways,  
36 or implicate controversial issues, so additional, well-designed public engagement may be

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<sup>5</sup> See Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728, 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. 31,039, 31,040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,114, 75,117 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269, 76,269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2257, 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-7, *Federal Advisory Committee Act: Issues and Proposed Reforms*, 77 Fed. Reg. 2257, 2261 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,789, 48,791 (Aug. 9, 2011).



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37 worthwhile to obtain information from interested parties who might not otherwise participate in  
38 the rulemaking and encourage more informed participation from those who do. Agencies  
39 considering additional public engagement for a particular rule must carefully evaluate many  
40 factors, including time, resources, and rule complexity, before deciding whether to undergo  
41 additional outreach. Once an agency decides to undertake additional efforts to engage the public  
42 when developing their rules, the agency must decide what methods are best suited to accomplish  
43 their outreach goals. Each method may offer distinct benefits but come with varying costs or  
44 other limitations. Agencies should consider how a specific method of public engagement will  
45 assist them in obtaining the type of information and feedback they seek.

46 This Recommendation highlights two main methods for supplementing the notice-and-  
47 comment process. First, agencies can publish “requests for information” (RFIs) or “advance  
48 notices of proposed rulemaking” (ANPRMs) in the *Federal Register* to request data, comments,  
49 or other information on regulatory issues before proceeding with a specific regulatory proposal.  
50 While similar, RFIs are generally used to solicit information before the agency has chosen an  
51 approach to take, and ANPRMs are generally used when agencies seek information on a  
52 tentative regulatory proposal or several alternative proposals. RFIs and ANPRMs may be  
53 particularly well-suited when agencies seek additional information to identify areas of concern,  
54 compare potential approaches to problems, and evaluate and refine regulatory proposals.  
55 Although RFIs and ANPRMs are formal outreach documents, they provide agencies with  
56 additional opportunities to solicit information without organizing costly or burdensome face-to-  
57 face engagement efforts.

58 Second, agencies may also convene and facilitate meetings of interested parties to obtain  
59 useful feedback on potential regulatory alternatives. These meetings, whether designated as  
60 focus groups, workshops, hearings or listening sessions, can vary in their format but will fall  
61 short of the kind of engagement that would necessitate compliance with FACA. Agencies can  
62 structure facilitated meetings to generate open-ended dialogue, allowing participants the  
63 opportunity to raise their own concerns or issues. Alternatively, agencies can structure meetings  
64 so that they dictate the agenda or discussion topics. Because meetings can include a variety of



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65 interests, they can foster interactive discussion and dialogue that helps educate the participants,  
66 allowing them to consider and respond to differing views, while informing decision-makers.  
67 Meetings must be carefully planned and tailored to ensure that the agency obtains the type of  
68 information it seeks.

69 To help ensure that members of the public are adequately informed about agencies'  
70 rulemaking plans and can participate thoughtfully in response to RFIs, ANPRMs, or facilitated  
71 meeting requests, agencies should make rulemaking information available online. Any  
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.<sup>6</sup>

### RECOMMENDATION

#### Public Engagement Planning

- 77 1. Agencies should develop strategic plans for public engagement in their rulemaking. Such  
78 strategies should require the agency to consider the full range of interested parties that  
79 may have information, views, or data relevant to the rulemaking, including unaffiliated  
80 experts and any interests that may be absent from or insufficiently represented in the  
81 notice-and-comment rulemaking process. In addition, agencies should consider:
- 82 a. The agency's goals and purposes in seeking to engage with the public,
  - 83 b. The individuals or organizations with whom the agency seeks to engage and how  
84 they can be motivated to participate,
  - 85 c. What type(s) of information the agency seeks from its public engagement,
  - 86 d. How this information is likely to be obtained,
  - 87 e. When public engagement efforts should occur,

<sup>6</sup> See generally Recommendation 2011-8, *supra* note 5.



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- 88 f. The range of methods for public engagement available to the agency, and  
89 g. What the agency will do with the information.
- 90 2. An agency's strategic plan should be used to inform individual plans for public  
91 engagement with respect to specific rulemakings, considering which rulemakings would  
92 be appropriate for additional forms of engagement. This individual planning would best  
93 take place at the earliest feasible part of the process as the agency begins to develop a  
94 new rule. Agencies should consider assigning or retaining dedicated personnel with  
95 public engagement training and experience to participate in this planning process.
- 96 a. In determining whether a rule would be appropriate for additional forms of  
97 engagement, agencies should evaluate
- 98 i. The complexity of the rule,  
99 ii. The magnitude of the costs and benefits of the rule,  
100 iii. Whether the rule is likely to be controversial,  
101 iv. The interests that are likely to be affected and the extent to which they are  
102 likely to be affected, and  
103 v. Whether additional public engagement will provide additional useful  
104 information, including from unaffiliated experts, individuals with situated  
105 knowledge germane to the regulation who do not typically participate in  
106 rulemaking, and other citizens with relevant views that may not otherwise  
107 be expressed.
- 108 b. In evaluating these factors, agencies should consider any rule that qualifies as  
109 economically significant under Executive Order 12,866 as a presumptive  
110 candidate for additional engagement.
- 111 3. Agencies should maintain training materials and support opportunities to train employees  
112 responsible for public engagement activities to understand and apply recognized best  
113 practices in the field.

### **Methods of Public Engagement**



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- 114 4. For rules that an agency determines are appropriate for additional forms of public  
115 engagement, the agency should generally involve the public at the earliest stages of the  
116 rulemaking process, including during agenda setting and rule development. In deciding  
117 whether to undertake additional public engagement and what methods to use, agencies  
118 should evaluate
- 119 a. The time and resources available,
  - 120 b. The information needed,
  - 121 c. The interests likely to be affected,
  - 122 d. The individuals or groups that may have relevant information and any challenges  
123 involved in obtaining their informed participation,
  - 124 e. The need for or potential value of unaffiliated expertise from outside the agency,
  - 125 f. Whether there are individuals with situated knowledge germane to the regulation  
126 who do not typically participate in rulemaking and could provide useful  
127 information or views, and
  - 128 g. Whether additional legal constraints, for example, the Federal Advisory  
129 Committee Act, apply.
- 130 5. Agencies should also consider conducting carefully planned outreach that is targeted to  
131 reach and involve unaffiliated experts, individuals with situated knowledge germane to  
132 regulation who do not typically participate in rulemaking, and other citizens with relevant  
133 views that may not otherwise be expressed. These targeted outreach efforts should
- 134 a. Identify methods of proactively bringing the rulemaking to the attention of  
135 individuals and groups that do not normally monitor the agency's activities;
  - 136 b. Motivate participation by explaining the nature of the rulemaking process and  
137 how the agency will use their input;
  - 138 c. Provide information about the issues and questions raised by the rulemaking in an  
139 accessible and comprehensible form, so that potential participants are able to  
140 provide focused, relevant, and useful input.
- 141 5.6. *Requests for Information and Advance Notices of Proposed Rulemaking.*

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- 142 a. Agencies should publish requests for information (RFIs) or advance notices of  
143 proposed rulemaking (ANPRMs) in the *Federal Register* when they find that the  
144 additional information they can provide would be helpful to
- 145 i. evaluate potential strategies to address a regulatory issue,
  - 146 ii. choose between more than one regulatory alternative, or
  - 147 iii. develop and refine a proposal rule.
- 148 b. When using RFIs and ANPRMs, the agency should
- 149 i. remain neutral regarding how it would or should resolve the matters on which  
150 it seeks public comments, and
  - 151 ii. either
    - 152 1. pose detailed questions aimed at soliciting the information the agency  
153 needs to make informed decisions, or
    - 154 2. indicate that the agency is open to input on other questions and  
155 concerns.
  - 156 c. Agencies should review any comments they receive in response to RFIs and  
157 ANPRMs and, when issuing any proposed rule that follows such additional forms of  
158 public input, explain how the comments received may have informed or influenced  
159 the development of the agency's subsequent regulatory proposal.
- 160 6.7 *Facilitated Meetings.*
- 161 d. When conducting meetings with the public, the agency should
- 162 i. Determine whether to target and invite specific participants and/or open the  
163 meeting to any interested member of the general public;
  - 164 ii. Determine whether to conduct the meeting in person, online, or both;
  - 165 iii. Recruit participants based on the nature of the rule at issue and the type of  
166 feedback that it seeks;
  - 167 iv. Provide a trained facilitator or moderator from inside the agency or hire one  
168 from outside the agency, as appropriate;
  - 169 v. Prepare questions and disseminate them in advance;

**Commented [CRF2]:** I don't understand posing these as exclusive alternatives. Why wouldn't an agency do both? Questions help to focus comments, but part of the point of the exercise is that there may be things the agency is missing or doesn't know about.





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- 170 vi. Provide background materials for the participants that clearly explain relevant  
171 issues and the primary policy alternatives;
- 172 vii. Conduct and record the session, and make that recording available on the  
173 agency's dedicated website for that rulemaking; and
- 174 viii. Prepare a report summarizing the results.
- 175 e. Agency representatives should remain neutral during meetings and pose targeted  
176 questions aimed at soliciting specific information the agency needs to make informed  
177 decisions or open-ended questions on other questions and concerns.

### **Dedicated Webpages for Rulemaking Information**

- 178 8. When agencies plan additional public engagement in connection with a rule, they should  
179 create a dedicated webpage for that rule, launched as early as possible, providing
- 180 a. up to date information on the status of the rulemaking initiative;
- 181 b. opportunities to participate in the process;
- 182 c. ; an explanation of the rulemaking process, the role of public participation, and  
183 the qualities of a useful comment;
- 184 d. substantive information about the issues under consideration, presented in a form  
185 that is readable and comprehensible by non-experts;and
- 186 a-e. summaries of the results of prior public engagement efforts.