



## 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,
  - 84 c. What type(s) of information the agency seeks from its public engagement,
  - 85 d. How this information is likely to be obtained,
  - 86 e. When public engagement efforts should occur,
  - 87 f. The range of methods for public engagement available to the agency, and

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



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

### **Methods of Public Engagement**

- 113           4. For rules that an agency determines are appropriate for additional forms of public  
114           engagement, the agency should generally involve the public at the earliest stages of the



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- 115 rulemaking process, including during agenda setting and rule development. In deciding  
116 whether to undertake additional public engagement and what methods to use, agencies  
117 should evaluate
- 118 a. The time and resources available,
  - 119 b. The information needed,
  - 120 c. The interests likely to be affected,
  - 121 d. The individuals or groups that may have relevant information,
  - 122 e. The need for or potential value of unaffiliated expertise from outside the agency,
  - 123 f. Whether there are individuals with situated knowledge germane to the regulation  
124 who do not typically participate in rulemaking and could provide useful  
125 information or views, and
  - 126 g. Whether additional legal constraints, for example, the Federal Advisory  
127 Committee Act, apply.
- 128 5. Agencies should also consider conducting carefully planned outreach that is targeted to  
129 reach and involve unaffiliated experts, individuals with situated knowledge germane to  
130 regulation who do not typically participate in rulemaking, and other citizens with relevant  
131 views that may not otherwise be expressed.
- 132 6. *Requests for Information and Advance Notices of Proposed Rulemaking.*
- 133 a. Agencies should publish requests for information (RFIs) or advance notices of  
134 proposed rulemaking (ANPRMs) in the *Federal Register* when they find that the  
135 additional information they can provide would be helpful to
    - 136 i. evaluate potential strategies to address a regulatory issue,
    - 137 ii. choose between more than one regulatory alternative, or
    - 138 iii. develop and refine a proposal rule.
  - 139 b. When using RFIs and ANPRMs, the agency should
    - 140 i. remain neutral regarding how it would or should resolve the matters on  
141 which it seeks public comments, and
    - 142 ii. either



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- 143                   1. pose detailed questions aimed at soliciting the information the  
144                   agency needs to make informed decisions, or  
145                   2. indicate that the agency is open to input on other questions and  
146                   concerns.
- 147           c. Agencies should review any comments they receive in response to RFIs and  
148           ANPRMs and, when issuing any proposed rule that follows such additional forms  
149           of public input, explain how the comments received may have informed or  
150           influenced the development of the agency's subsequent regulatory proposal.

### 151   7. *Facilitated Meetings.*

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

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



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- 169 8. When agencies plan additional public engagement in connection with a rule, they should  
170 create a dedicated webpage for that rule, launched as early as possible, providing up to  
171 date information on the status of the rulemaking initiative, opportunities to participate in  
172 the process, substantive information about the issues under consideration, and summaries  
173 of the results of prior public engagement efforts.