Public Engagement in Rulemaking

Committee on Rulemaking

Proposed Recommendation for Committee | September 14, 2018

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

For the purposes of this Recommendation, “public engagement” includes efforts to enhance public understanding of agency rulemaking and foster meaningful participation in the rulemaking process by members of the public. Strategic planning focused specifically on public engagement efforts can help agencies solicit and obtain valuable information from more interested parties with diverse experiences, information, and views throughout the rulemaking process, including unaffiliated experts and individuals with situated knowledge who do not typically 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 that will obtain diverse information at each stage of the process.

Not all rulemakings, however, warrant additional public engagement efforts. Some rules garner little public interest or address narrow issues, so public outreach 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 interested parties in a variety of ways, or implicate controversial issues, so additional, well-designed public engagement may be

---

worthwhile to obtain information from interested parties who might not otherwise participate in the rulemaking and encourage more informed participation from those who do. Agencies considering additional public engagement for a particular rule must carefully evaluate many factors, including time, resources, and rule complexity, before deciding whether to undergo additional outreach. Once an agency decides to undertake additional efforts to engage the public when developing their rules, the agency 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.

This Recommendation highlights two main methods for supplementing the notice-and-comment process. First, agencies can publish “requests for information” (RFIs) or “advance 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. While similar, RFIs are generally used to solicit information before the agency has chosen an approach to take, and ANPRMs are generally used when agencies seek information on a tentative regulatory proposal or several alternative proposals. RFIs and ANPRMs may be particularly well-suited when agencies seek additional information to identify areas of concern, compare potential approaches to problems, and evaluate and refine regulatory proposals. Although RFIs and ANPRMs are formal outreach documents, they provide agencies with additional opportunities to solicit information without organizing costly or burdensome face-to-face engagement efforts.

Second, agencies may also convene and facilitate meetings of interested parties to obtain useful feedback on potential regulatory alternatives. These meetings, whether designated as focus groups, workshops, hearings or listening sessions, can vary in their format but will fall short of the kind of engagement that would necessitate compliance with FACA. Agencies can structure facilitated meetings to generate open-ended dialogue, allowing participants the opportunity to raise their own concerns or issues. Alternatively, agencies can structure meetings so that they dictate the agenda or discussion topics. Because meetings can include a variety of
interests, they can foster interactive discussion and dialogue that helps educate the participants, allowing them to consider and respond to differing views, while informing decision-makers. Meetings must be carefully planned and tailored to ensure that the agency obtains the type of information it seeks.

To help ensure that members of the public are adequately informed about agencies’ rulemaking plans and can participate thoughtfully in response to RFIs, ANPRMs, or facilitated meeting requests, agencies should make rulemaking information available online. Any 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. 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

---

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

   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.

Methods of Public Engagement

4. 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:

- The time and resources available,
- The information needed,
- The interests likely to be affected,
- The individuals or groups that may have relevant information,
- The need for or potential value of unaffiliated expertise from outside the agency,
- 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
- Whether additional legal constraints, for example, the Federal Advisory Committee Act, apply.

5. 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.


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

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

7. 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.

Dedicated Webpages for Rulemaking Information
8. 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.