



## Public Engagement in Rulemaking

### Committee on Rulemaking

#### Proposed Recommendation for Committee | October 5, 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 decisions, and enhance public support for their rules.<sup>1</sup> Agencies, however, often face  
4 challenges in involving a variety of affected interests 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 their 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 representatives of identified  
10 interests in the rulemaking process. In most rulemakings, however, agencies rely considerably on  
11 notice-and-comment rulemaking procedures to solicit public input. Although agencies receive  
12 important information from the public during the notice-and-comment process, agencies can  
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, 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 issuing 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 affected  
26 interests with diverse experiences, information, and views throughout the rulemaking process,  
27 including nongovernmental experts and individuals with knowledge germane to the proposed  
28 rule who do not typically participate in notice and comment. Agencies can tailor their plans to  
29 specific rule proposals, reflecting the unique purposes, goals, and needs of each rulemaking. A  
30 well-designed plan will include a variety of techniques that will obtain valuable information  
31 from diverse sources at each stage of the process.

32           Not all rulemakings, however, warrant enhanced 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 affected interests in a variety of ways,  
36 or implicate controversial issues. In these cases, additional, well-designed public engagement

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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 may be worthwhile to obtain information from affected interests who might not otherwise  
38 participate in the rulemaking and encourage more informed participation from those who do.  
39 Agencies considering enhanced public engagement for a particular rule must carefully evaluate  
40 many factors, including resources and rule complexity, before deciding whether to undergo  
41 additional outreach. Once agencies decide to undertake enhanced public engagement efforts  
42 when developing their rules, they must decide what methods are best suited to accomplish their  
43 outreach goals. Each method may offer distinct benefits but come with varying costs or other  
44 limitations. Agencies should consider how a specific method of public engagement will assist  
45 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)<sup>6</sup> 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 agencies have 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 beneficial 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 potentially  
57 burdensome face-to-face engagement efforts.

58         Second, agencies may also convene and facilitate meetings of affected interests 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

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<sup>6</sup> Other agencies refer to documents similar to RFIs and ANPRMs under other names, including “notice of inquiry.”



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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  
65 affected interests, they can foster interactive discussion and dialogue that helps educate the  
66 participants, allowing them to consider and respond to differing views, while informing decision-  
67 makers. Agencies must carefully plan and tailor meetings to ensure that they obtain the type of  
68 information sought.

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, facilitated  
71 meeting requests, and other public engagement efforts, agencies should make rulemaking  
72 information available online. Any contemplated rule that agencies deem qualified for enhanced  
73 public engagement efforts should presumably be listed on a separate webpage or section of a  
74 page on an agency's website. Dedicated space on agencies' websites for contemplated rules will  
75 allow agencies to organize their public engagement efforts and to inform and engage affected  
76 interests throughout the rulemaking process.<sup>7</sup>

### RECOMMENDATION

#### Public Engagement Planning

- 77 1. Agencies should develop and make available on their webpages general plans for public  
78 engagement in their rulemaking. Such plans should include consideration of:
- 79 a. the agency's goals and purposes in engaging the public;
  - 80 b. the individuals or organizations with whom the agency seeks to engage, including  
81 nongovernmental experts and any affected interests that may be absent from or  
82 insufficiently represented in the notice-and-comment rulemaking process;
  - 83 c. how such individuals or organizations can be motivated to participate;
  - 84 d. what type(s) of information the agency seeks from its public engagement;
  - 85 e. how this information is likely to be obtained;

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<sup>7</sup> See generally Recommendation 2011-8, *supra* note 5.



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- 86 f. when public engagement efforts should occur;
- 87 g. the range of methods for public engagement available to the agency; and
- 88 h. what the agency will do with the information.
- 89 2. Agencies' public engagement plans should be used to inform public engagement with
- 90 respect to specific rulemakings. Planning for public engagement for specific rules would
- 91 best take place at the earliest feasible part of the rulemaking process.
- 92 3. In determining whether to enhance or target public engagement prior to the publication of
- 93 a specific proposed rule, and, if so, to determine which particular forms of public
- 94 engagement to use in a specific rulemaking, agencies should consider factors, such as:
- 95 a. the complexity of the rule;
- 96 b. the potential magnitude and distribution of the costs and benefits of the rule;
- 97 c. the interests that are likely to be affected and the extent to which they are likely to
- 98 be affected;
- 99 d. the information needed and the potential value of expertise from outside the
- 100 agency;
- 101 e. whether specific forms of enhanced or targeted public engagement efforts are
- 102 likely to provide useful information, including from nongovernmental experts,
- 103 individuals with knowledge germane to the proposed rule who do not typically
- 104 participate in rulemaking, or other individuals with relevant views that may not
- 105 otherwise be expressed;
- 106 f. any challenges involved in obtaining informed participation from affected
- 107 interests likely to have useful information;
- 108 g. whether the rule is likely to be controversial;
- 109 h. the time and resources available for enhanced or targeted public engagement; and
- 110 i. whether additional legal constraints, for example, the Federal Advisory
- 111 Committee Act or the Paperwork Reduction Act, might apply.
- 112 4. Agencies should consider assigning or retaining dedicated personnel with public
- 113 engagement training and experience to participate in both the general public engagement
- 114 planning process as well as in planning for specific rules. Agencies should support or



115 provide opportunities to train employees to understand and apply recognized best  
116 practices in engaging the public.

### **Methods of Public Engagement**

117 5. Agencies should generally involve the public at the earliest stages of the rulemaking  
118 process, including during agenda setting and rule development.

119 6. *Requests for Information and Advance Notices of Proposed Rulemaking.*

120 a. When agencies seek additional input from affected interests that are likely to  
121 respond to notices published in the *Federal Register*, they should publish requests  
122 for information (RFIs) or advance notices of proposed rulemaking (ANPRMs) in  
123 the *Federal Register*. RFIs and ANPRMs can be particularly helpful to:

- 124 i. gather diffuse information or data about a regulatory problem,
- 125 ii. evaluate potential strategies to address a regulatory issue,
- 126 iii. choose between more than one regulatory alternative, or
- 127 iv. develop and refine a proposal rule.

128 b. When using RFIs and ANPRMs, agencies should

- 129 i. remain neutral regarding how they would or should resolve the matters on  
130 which they seek public comments,
- 131 ii. pose detailed questions aimed at soliciting the information they need, and
- 132 iii. indicate that they are open to input on other questions and concerns.

133 c. Agencies should review any comments they receive in response to RFIs and  
134 ANPRMs and, when issuing any proposed rule that follows an RFI or ANPRM,  
135 explain how the comments received may have informed or influenced the  
136 development of their subsequent regulatory proposals.

137 7. *Targeted Outreach.* When agencies believe that their public engagements efforts may not  
138 reach all affected interests, they should consider conducting carefully planned outreach  
139 that targets nongovernmental experts who are not already likely to be involved due to an  
140 affiliation with an affected interest, individuals with knowledge germane to proposed rule



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- 141 who do not typically participate in rulemaking, and members of the public with relevant  
142 views that may not otherwise be represented. These targeted outreach efforts should
- 143 a. Identify methods of proactively bringing the rulemaking to the attention of  
144 affected interests that do not normally monitor the agency's activities;
  - 145 b. Motivate participation by explaining the nature of the rulemaking process and  
146 how the agency will use public input; and
  - 147 c. Provide information about the issues and questions raised by the rulemaking in an  
148 accessible and comprehensible form, so that potential participants are able to  
149 provide focused, relevant, and useful input.
- 150 8. *Facilitated Meetings.*
- 151 a. When agencies seek the benefits of interactive dialogue with affected interests  
152 who normally participate, those who the agency believes merit targeted outreach,  
153 or both, the agency should consider facilitating meetings with these interests.
  - 154 b. When conducting meetings with the public, agencies should:
    - 155 i. determine whether to target and invite specific participants or open the  
156 meeting to any interested member of the general public;
    - 157 ii. determine whether to conduct the meeting in person, online, or both;
    - 158 iii. determine whether and how to provide opportunities for deliberation  
159 among participants;
    - 160 iv. recruit participants based on the nature of the rule at issue and the type of  
161 feedback that they seek;
    - 162 v. provide a trained facilitator or moderator from inside the agency or hire  
163 one from outside the agency, as appropriate;
    - 164 vi. prepare questions and disseminate them in advance;
    - 165 vii. determine whether and how to structure interactive dialogue between  
166 participants;
    - 167 viii. provide background materials for the participants that clearly explain  
168 relevant issues and the primary policy alternatives;





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- 169                   ix. conduct and record the session and make that recording available on the  
170                         website dedicated to that rulemaking; and  
171                   x. prepare a report summarizing the results.
- 172           c. Agency representatives should remain neutral during meetings and pose targeted  
173                 questions aimed at soliciting specific information they need to make informed  
174                 decisions or open-ended questions on other issues or concerns.

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

- 175           9. When agencies plan additional public engagement in connection with a rule, they should  
176                 create a dedicated webpage for that rule, launched as early as possible. Agencies should  
177                 seek to make their webpages accessible for individuals and groups that do not typically  
178                 participate in the rulemaking process, such as by using audiovisual materials to  
179                 supplement more traditional written information in appropriate situations. Dedicated  
180                 webpages for rules that involve enhanced public engagement should provide information  
181                 such as:
- 182                   a. the status of the rulemaking initiative and opportunities to participate in the  
183                         process;
- 184                   b. an explanation of the rulemaking process, the role of public participation, and the  
185                         qualities of a useful comment;
- 186                   c. substantive information about the issues under consideration, presented in forms  
187                         that are readable and comprehensible by non-experts; and
- 188                   d. summaries of any results of prior public engagement efforts.
- 189