Public Engagement in Rulemaking

Committee on Rulemaking

Proposed Recommendation for Committee | October 5, 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 decisions, and enhance public support for their rules.¹ Agencies, however, often face challenges in involving a variety of affected interests 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 their proposals.² Other statutes, including the Federal Advisory Committee Act (FACA)³ and Negotiated Rulemaking Act,⁴ provide agencies with other means to engage representatives of identified interests 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 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, 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 issuing 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 affected interests with diverse experiences, information, and views throughout the rulemaking process, including nongovernmental experts and individuals with knowledge germane to the proposed rule 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 valuable information from diverse sources at each stage of the process.

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

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may be worthwhile to obtain information from affected interests who might not otherwise participate in the rulemaking and encourage more informed participation from those who do. Agencies considering enhanced public engagement for a particular rule must carefully evaluate many factors, including resources and rule complexity, before deciding whether to undergo additional outreach. Once agencies decide to undertake enhanced public engagement efforts when developing their rules, they 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)\(^6\) 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 agencies have 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 beneficial 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 potentially burdensome face-to-face engagement efforts.

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

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\(^6\) Other agencies refer to documents similar to RFIs and ANPRMs under other names, including “notice of inquiry.”
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 affected 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. Agencies must carefully plan and tailor meetings to ensure that they obtain the type of information sought.

To help ensure that members of the public are adequately informed about agencies’ rulemaking plans and can participate thoughtfully in response to RFIs, ANPRMs, facilitated meeting requests, and other public engagement efforts, agencies should make rulemaking information available online. Any contemplated rule that agencies deem 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 agencies’ websites for contemplated rules will allow agencies to organize their public engagement efforts and to inform and engage affected interests throughout the rulemaking process.7

RECOMMENDATION

Public Engagement Planning

1. Agencies should develop and make available on their webpages general plans for public engagement in their rulemaking. Such plans should include consideration of:

   a. the agency’s goals and purposes in engaging the public;
   b. the individuals or organizations with whom the agency seeks to engage, including nongovernmental experts and any affected interests that may be absent from or insufficiently represented in the notice-and-comment rulemaking process;
   c. how such individuals or organizations can be motivated to participate;
   d. what type(s) of information the agency seeks from its public engagement;
   e. how this information is likely to be obtained;

7 See generally Recommendation 2011-8, supra note 5.
f. when public engagement efforts should occur;
g. the range of methods for public engagement available to the agency; and
h. what the agency will do with the information.

2. Agencies’ public engagement plans should be used to inform public engagement with respect to specific rulemakings. Planning for public engagement for specific rules would best take place at the earliest feasible part of the rulemaking process.

3. In determining whether to enhance or target public engagement prior to the publication of a specific proposed rule, and, if so, to determine which particular forms of public engagement to use in a specific rulemaking, agencies should consider factors, such as:
   a. the complexity of the rule;
b. the potential magnitude and distribution of the costs and benefits of the rule;
c. the interests that are likely to be affected and the extent to which they are likely to be affected;
d. the information needed and the potential value of expertise from outside the agency;
e. whether specific forms of enhanced or targeted public engagement efforts are likely to provide useful information, including from nongovernmental experts, individuals with knowledge germane to the proposed rule who do not typically participate in rulemaking, or other individuals with relevant views that may not otherwise be expressed;
f. any challenges involved in obtaining informed participation from affected interests likely to have useful information;
g. whether the rule is likely to be controversial;
h. the time and resources available for enhanced or targeted public engagement; and
i. whether additional legal constraints, for example, the Federal Advisory Committee Act or the Paperwork Reduction Act, might apply.

4. Agencies should consider assigning or retaining dedicated personnel with public engagement training and experience to participate in both the general public engagement planning process as well as in planning for specific rules. Agencies should support or
provide opportunities to train employees to understand and apply recognized best practices in engaging the public.

**Methods of Public Engagement**

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

   a. When agencies seek additional input from affected interests that are likely to respond to notices published in the *Federal Register*, they should publish requests for information (RFIs) or advance notices of proposed rulemaking (ANPRMs) in the *Federal Register*. RFIs and ANPRMs can be particularly helpful to:
      i. gather diffuse information or data about a regulatory problem,
      ii. evaluate potential strategies to address a regulatory issue,
      iii. choose between more than one regulatory alternative, or
      iv. develop and refine a proposal rule.
   b. When using RFIs and ANPRMs, agencies should
      i. remain neutral regarding how they would or should resolve the matters on which they seek public comments,
      ii. pose detailed questions aimed at soliciting the information they need, and
      iii. indicate that they are 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 an RFI or ANPRM, explain how the comments received may have informed or influenced the development of their subsequent regulatory proposals.

7. *Targeted Outreach.* When agencies believe that their public engagements efforts may not reach all affected interests, they should consider conducting carefully planned outreach that targets nongovernmental experts who are not already likely to be involved due to an affiliation with an affected interest, individuals with knowledge germane to proposed rule
who do not typically participate in rulemaking, and members of the public with relevant views that may not otherwise be represented. These targeted outreach efforts should

a. Identify methods of proactively bringing the rulemaking to the attention of affected interests that do not normally monitor the agency’s activities;

b. Motivate participation by explaining the nature of the rulemaking process and how the agency will use public input; and

c. Provide information about the issues and questions raised by the rulemaking in an accessible and comprehensible form, so that potential participants are able to provide focused, relevant, and useful input.

8. Facilitated Meetings.

a. When agencies seek the benefits of interactive dialogue with affected interests who normally participate, those who the agency believes merit targeted outreach, or both, the agency should consider facilitating meetings with these interests.

b. When conducting meetings with the public, agencies should:

i. determine whether to target and invite specific participants 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. determine whether and how to provide opportunities for deliberation among participants;

iv. recruit participants based on the nature of the rule at issue and the type of feedback that they seek;

v. provide a trained facilitator or moderator from inside the agency or hire one from outside the agency, as appropriate;

vi. prepare questions and disseminate them in advance;

vii. determine whether and how to structure interactive dialogue between participants;

viii. provide background materials for the participants that clearly explain relevant issues and the primary policy alternatives;
ix. conduct and record the session and make that recording available on the 
   website dedicated to that rulemaking; and 
  x. prepare a report summarizing the results.

  c. Agency representatives should remain neutral during meetings and pose targeted
    questions aimed at soliciting specific information they need to make informed
    decisions or open-ended questions on other issues or concerns.

**Dedicated Webpages for Rulemaking Information**

9. 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. Agencies should
   seek to make their webpages accessible for individuals and groups that do not typically
   participate in the rulemaking process, such as by using audiovisual materials to
   supplement more traditional written information in appropriate situations. Dedicated
   webpages for rules that involve enhanced public engagement should provide information
   such as:

   a. the status of the rulemaking initiative and opportunities to participate in the
      process;
   b. an explanation of the rulemaking process, the role of public participation, and the
      qualities of a useful comment;
   c. substantive information about the issues under consideration, presented in forms
      that are readable and comprehensible by non-experts; and
   d. summaries of any results of prior public engagement efforts.