



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Public Engagement in Rulemaking

### Committee on Rulemaking

Proposed Recommendation | December 14, 2018

#### Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from Council members and Conference members (with sources shown in the margin).

1 Robust public participation is vital to the rulemaking process. By providing opportunities  
2 for public input and dialogue, agencies can obtain more comprehensive information, enhance the  
3 legitimacy and accountability of their decisions, and increase public support for their rules.<sup>1</sup>  
4 Agencies, however, often face challenges in involving a variety of affected interests and  
5 interested persons in the rulemaking process.

6 The Administrative Procedure Act (APA) recognizes the value of public participation in  
7 rulemaking by requiring agencies to publish a notice of a proposed rulemaking (NPRM) in the  
8 *Federal Register* and provide interested persons an opportunity to comment on rulemaking  
9 proposals.<sup>2</sup> Other statutes, including the Federal Advisory Committee Act (FACA)<sup>3</sup> and  
10 Negotiated Rulemaking Act,<sup>4</sup> provide agencies with describe other means to engage  
11 representatives of identified interests in the rulemaking process. In many rulemakings, however,

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<sup>1</sup> Michael Sant'Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking 9–17 (Nov. 19, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/public-engagement-rulemaking-final-report>.

<sup>2</sup> 5 U.S.C. § 553(b)–(c).

<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).

<sup>4</sup> Negotiated Rulemaking Act, Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified as amended at 5 U.S.C. §§ 561–70).



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12 agencies rely primarily on notice-and-comment procedures to solicit public input. Although the  
13 notice-and-comment process generates important information, agencies can sometimes benefit  
14 from engaging the public at other points in the process and through other methods, particularly as  
15 they identify regulatory issues and develop potential options before issuing NPRMs.

16 The Conference has previously adopted several recommendations directed at expanding  
17 participation in the rulemaking process. These previous recommendations address a variety of  
18 issues, including rulemaking petitions, advisory committees, negotiated rulemaking, social  
19 media, comment and reply periods, and plain language in regulatory drafting.<sup>5</sup> This  
20 Recommendation builds on these past recommendations and focuses on supplemental tools  
21 agencies can use to expand their public engagement.

22 For the purposes of this Recommendation, “public engagement” refers to activities by the  
23 agency to elicit input from the public. It includes efforts to enhance public understanding of  
24 agency rulemaking and foster meaningful participation in the rulemaking process by members of  
25 the public. Because some affected interests and other interested persons may not be aware of  
26 agency rulemakings or understand how to participate, effective public engagement may require  
27 agencies to undertake deliberate outreach and public education efforts to overcome barriers to  
28 participation, including geographical, language, resource, and other constraints.<sup>6</sup>

29 Strategic planning focused on public engagement can help agencies solicit and obtain  
30 valuable information from a greater number of affected interests with diverse experiences,

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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 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31,040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 Fed. Reg. 75,117 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-7, *Federal Advisory Committee Act: Issues and Proposed Reforms*, 77 Fed. Reg. 2261 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-2, *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

<sup>6</sup> See, e.g., Cary Coglianese, *Federal Agency Use of Electronic Media in the Rulemaking Process* 46–48 (Dec. 5, 2011) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/final-agency-innovations-report> (discussing the “digital divide” and differing Internet usage among a variety of demographics).



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31 information, and views throughout the rulemaking process, including experts, individuals, or  
32 entities with knowledge germane to the proposed rule who do not typically participate in the  
33 notice-and-comment process.<sup>7</sup> An agency should begin by developing a general policy for public  
34 engagement that identifies factors or establishes standards for the agency to use to design  
35 engagement efforts in individual rulemakings. The agency can then apply or tailor its general  
36 policy to specific rule proposals, reflecting the unique purposes, goals, and needs of each  
37 rulemaking. Well-designed planning for specific rulemakings will include consideration of a  
38 variety of methods to obtain valuable information from diverse sources at various stages during  
39 the rulemaking process.<sup>8</sup>

40 Not all rulemakings, however, warrant enhanced public engagement. Some rules hold  
41 little public salience or address narrow issues, so public engagement beyond the notice-and-  
42 comment process is unlikely to provide the agency with additional relevant information. On the  
43 other hand, some rules are complex, affect a wide range of interests in a variety of ways, or  
44 implicate controversial issues. For these rules, additional, well-designed public engagement may  
45 be worthwhile to obtain information from affected interests and other interested persons who  
46 might not otherwise participate in the rulemaking and encourage more useful participation from  
47 those who do. Agencies considering enhanced public engagement for a particular rule must  
48 carefully evaluate many factors, including agency resources, rule complexity, and the prevalence  
49 of otherwise missing information or views, before deciding whether to pursue additional  
50 outreach. Furthermore, even after agencies decide to undertake enhanced public engagement  
51 when developing their rules, they must decide what methods are best suited to accomplish their  
52 outreach goals. Each method may offer distinct benefits but come with varying costs or other  
53 limitations. Agencies should consider how a specific method of public engagement will assist

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<sup>7</sup> For a discussion of general public engagement policies, see Sant’Ambrogio & Staszewski, *supra* note 1, at 138–43. For examples of general public engagement policies, see U.S. DEP’T OF THE INTERIOR, NAT’L PARK SERV., DIRECTOR’S ORDER #75A: CIVIC ENGAGEMENT AND PUBLIC INVOLVEMENT POLICY (Aug. 30, 2007); ENVTL. PROT. AGENCY, PUBLIC INVOLVEMENT POLICY OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY (2003).

<sup>8</sup> For a discussion of specific public engagement plans for individual rulemaking initiatives, see Sant’Ambrogio & Staszewski, *supra* note 1, at 143–49.



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54 them in obtaining the type of information and feedback they seek. Agencies should also consider  
55 the best timing for using a method of public engagement. Finally, with whatever public  
56 engagement method an agency chooses, it should demonstrate a sincere desire to learn from  
57 those who participate and should display an open-mindedness about the relevant issues presented  
58 by the rulemaking.

59 This Recommendation highlights three main methods for supplementing the notice-and-  
60 comment process. First, agencies can publish “requests for information” (RFIs) or “advance  
61 notices of proposed rulemaking” (ANPRMs) in the *Federal Register* to request data, comments,  
62 or other information on regulatory issues before proceeding with a specific regulatory proposal.<sup>9</sup>  
63 Although these two mechanisms are similar, RFIs are generally used when an agency is  
64 determining whether to proceed at all and, if so, what general approach to take.<sup>10</sup> ANPRMs are  
65 generally used when the agency has formulated one or more tentative regulatory options and  
66 seeks input on which option to propose.<sup>11</sup> RFIs and ANPRMs may be particularly beneficial  
67 when agencies seek additional information to identify areas of concern, compare potential  
68 approaches to problems, and evaluate and refine regulatory proposals. RFIs and ANPRMs  
69 provide agencies with additional opportunities to solicit information without organizing  
70 potentially costly or burdensome face-to-face engagement efforts.

71 Second, agencies may engage in targeted outreach to identify and engage affected  
72 interests that might not otherwise participate in the rulemaking.<sup>12</sup> RFIs and ANPRMs are useful  
73 tools to enhance participation early in the rulemaking process. However, RFIs and ANPRMs  
74 published in the *Federal Register* may only reach affected interests that are already likely to

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<sup>9</sup> Some agencies refer to documents similar to RFIs and ANPRMs under other names, including “notice of inquiry.”

<sup>10</sup> For a discussion of the use of RFIs during agenda setting and rule development, see *id.* at 50–52, 65 (discussing the use of RFIs by the Department of Energy, the Bureau of Consumer Financial Protection, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation).

<sup>11</sup> For a discussion of the use of ANPRMs, see *id.* at 78–80. For example, the Department of Energy routinely issues ANPRMs to solicit public comments on preliminary proposals pursuant to its process rule. See *id.* at 141–43.

<sup>12</sup> For example, the Forest Service conducted targeted outreach, including forums, roundtables, and consultation meetings, seeking the input of recreational users of forests, Native American tribal communities, and state and local government officials when developing its 2012 Planning Rule. See *id.* at 53.



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75 participate in the rulemaking. Targeted outreach efforts allow agencies to seek information from  
76 individuals and entities that may not read the *Federal Register* or otherwise would be unaware of  
77 or unable to participate effectively in the notice-and-comment process. To engage in targeted  
78 outreach, an agency identifies affected interests that are not likely to participate and undertakes  
79 efforts to notify those interests of the rulemaking and encourage and facilitate their participation.  
80 Targeted outreach can take on a variety of forms, and agencies tailor these efforts to specific  
81 affected interests and rules.

82 Third, agencies may also convene meetings of affected interests and other interested  
83 persons to obtain useful feedback on potential regulatory alternatives and elicit information  
84 through a process of interactive dialogue. Meetings can educate participants and allow them to  
85 consider and respond to differing views, thereby informing decision-makers in the process.  
86 When all goes well, meetings can foster the generation of new ideas and creative solutions that  
87 would be missed when participants simply assert their existing positions. Meetings also can lead  
88 to some change in participants' positions in light of a greater understanding of others' concerns.

89 Agencies must carefully plan meetings to help ensure that they will elicit the type of  
90 information sought.<sup>13</sup> An agency can structure a meeting to generate open-ended dialogue,  
91 allowing participants the opportunity to raise their own concerns or issues.<sup>14</sup> Alternatively, an  
92 agency can structure a meeting so that the agency's priorities dictate the agenda or discussion  
93 topics. Although meetings, whether designated as focus groups, workshops, hearings, or listening  
94 sessions, can vary in their format, they can be structured and managed so that the requirements of  
95 FACA or the Paperwork Reduction Act (PRA) are not applicable.<sup>15</sup>

<sup>13</sup> For a discussion of focus groups and listening sessions, see *id.* at 48–54 (discussing the use of focus groups by the National Highway Traffic Safety Administration to address public fears about airbags and potential labels on tire fuel efficiency), 65–68 (discussing use of facilitated listening sessions by the Nuclear Regulatory Commission), 80–82 (discussing public meetings in general and EPA's use of "shuttle diplomacy" and technical workshops).

<sup>14</sup> For a discussion of different techniques to facilitate enhanced deliberation, see *id.* at 128–138.

<sup>15</sup> These methods would not implicate FACA as long as they are structured so the that each participant provides individual advice, as opposed to the group providing collective advice. See 40 C.F.R. § 102-3.40(c). group is not collaborating to offer a set of proposals to the agency. See, e.g., Judicial Watch, Inc. v. Clinton, 76 F.3d 1232, 1233

**Commented [CMA1]:** Proposed amendment from Carol Ann Siciliano #1

Completeness, because agencies need to be attentive to these statutes' requirements during the meetings themselves.

**Commented [CMA2]:** Proposed amendment from Carol Ann Siciliano #2

Accuracy. (1) The restrictions apply to more than sets of proposals; and (2) GSA's regulations are a clearer source than the *Judicial Watch* case.



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96 Agencies should make information available to the public about individual rulemakings  
97 and opportunities to participate. The availability of this information will help ensure that  
98 members of the public are adequately informed and can participate meaningfully in response to  
99 RFIs, ANPRMs, meeting opportunities, and other forms of public engagement.<sup>16</sup> For example,  
100 an agency may list such information on a dedicated webpage or a section of a page on an  
101 agency's website. Doing so could help that agency inform and engage affected interests and  
102 other interested persons throughout the rulemaking process.<sup>17</sup>

### RECOMMENDATION

#### Public Engagement Planning

- 103 1. Agencies should develop and make publicly available general policies for public  
104 engagement in their rulemakings. An agency's general policy should address how the  
105 agency will consider factors, such as:
- 106 a. the agency's goals and purposes in engaging the public;
  - 107 b. the types of individuals or organizations with whom the agency seeks to engage,  
108 including experts and any affected interests that may be absent from or  
109 insufficiently represented in the notice-and-comment rulemaking process;
  - 110 c. how such types of individuals or organizations can be motivated to participate;
  - 111 d. what types of information the agency seeks from its public engagement;
  - 112 e. how this information is likely to be obtained;
  - 113 f. what the agency will do with the information;
  - 114 g. when public engagement should occur; and
  - 115 h. the range of methods of public engagement available to the agency.

<sup>15</sup> ~~(D.C. Cir. 1996)~~. These methods also would not implicate the PRA so long as the agency is not circulating a structured set of inquiries. 44 U.S.C. § 3502(3) (2012).

<sup>16</sup> For example, the Bureau of Consumer Financial Protection posted prototypes of disclosure forms on its website and sought targeted feedback when it developed rules governing disclosure requirements for home mortgages. See Sant'Ambrogio & Staszewski, *supra* note 1, at 83–84.

<sup>17</sup> See generally Recommendation 2011-8, *supra* note 5.



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- 116 2. An agency's general policy for public engagement should be used to inform public  
117 engagement with respect to specific rulemakings. Planning for public engagement for  
118 specific rules would best take place at the earliest feasible part of the rulemaking process.
- 119 3. In determining whether and how to enhance or target public engagement prior to the  
120 publication of a specific proposed rule, agencies should consider factors, such as:
- 121 a. the complexity of the rule;
  - 122 b. the potential magnitude and distribution of the costs and benefits of the rule;
  - 123 c. the interests that are likely to be affected and the extent to which they are likely to  
124 be affected;
  - 125 d. the information needed and the potential value of experience or expertise from  
126 outside the agency;
  - 127 e. whether specific forms of enhanced or targeted public engagement are likely to  
128 provide useful information, including from experts, individuals with knowledge  
129 germane to the proposed rule who do not typically participate in rulemaking, or  
130 other individuals with relevant views that may not otherwise be expressed;
  - 131 f. any challenges involved in obtaining informed participation from affected  
132 interests or other interested persons likely to have useful information, including  
133 the challenge of providing rulemaking materials in a language and form  
134 comprehensible to nonexperts whose participation is being sought;
  - 135 g. whether the rule is likely to be controversial;
  - 136 h. the time and resources available for enhanced or targeted public engagement; and  
137 i. whether additional legal **constraintsrequirements**, such as the Federal Advisory  
138 Committee Act or the Paperwork Reduction Act, might apply.
- 139 4. Agencies should consider using personnel with public engagement training and  
140 experience to participate in both the development of their general public engagement  
141 policies as well as in planning for specific rules. Agencies should support or provide  
142 opportunities to train employees to understand and apply recognized best practices in  
143 public engagement.



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**Timing and Methods of Public Engagement**

- 144 5. Public engagement should generally occur as early as feasible in the rulemaking process,  
145 including when identifying problems and setting regulatory priorities.
- 146 6. *Requests for Information and Advance Notices of Proposed Rulemaking.*
- 147 a. Agencies should consider using requests for information (RFIs) or advance  
148 notices of proposed rulemaking (ANPRMs) when they need to:
- 149 i. gather ~~diffuse~~ information or data about the existence, magnitude, and  
150 nature of a regulatory problem;
  - 151 ii. evaluate potential strategies to address a regulatory issue;
  - 152 iii. choose between more than one regulatory alternative; or
  - 153 iv. ~~develop and refine a proposed rule~~ draft regulatory text.
- 154 b. When using RFIs and ANPRMs, agencies should:
- 155 i. ~~communicate their open-mindedness with respect to the matters on which~~  
156 ~~they seek public comments;~~
  - 157 ~~ii.~~ pose detailed questions aimed at soliciting the information they need; and  
158 ~~iii.~~ ii. indicate that they are open to input on other questions and concerns.
- 159 c. Agencies should review any comments they receive in response to RFIs and  
160 ANPRMs and, when issuing any proposed rule that follows an RFI or ANPRM,  
161 explain how these comments informed or influenced the development of the  
162 subsequent proposal.
- 163 7. *Targeted Outreach.* When agencies believe that their public engagement may not reach  
164 all affected interests, they should consider conducting outreach that targets experts not  
165 already likely to be involved, individuals with knowledge germane to the proposed rule  
166 who do not typically participate in rulemaking, and members of the public with relevant  
167 views that may not otherwise be represented. These targeted outreach efforts should  
168 include:
- 169 a. proactively bringing the rulemaking to the attention of affected interests that do  
170 not normally monitor the agency’s activities;

**Commented [CA3]:** Proposed amendment from Council #1

**Commented [CMA4]:** Proposed amendment from Carol Ann Siciliano #3

“refine a proposed rule” indicates that a proposal has already been published, when in fact this is a pre-proposal paragraph.

**Commented [CA5]:** Proposed amendment from Council #2



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- 171 b. overcoming or minimizing possible geographical, language, resource, or other  
172 barriers to participation;
- 173 c. motivating participation by explaining the nature of the rulemaking process and  
174 how the agency will use public input; or
- 175 d. providing information about the issues and questions raised by the rulemaking in  
176 an accessible and comprehensible form and manner, so that potential participants  
177 are able to provide focused, relevant, and useful input.
- 178 8. *Meetings with Affected Interests and Other Interested Persons.*
- 179 a. Agencies should consider convening meetings of affected interests and other  
180 interested persons to obtain feedback on their priorities and potential regulatory  
181 alternatives, particularly when they are unlikely to obtain the same information  
182 from written responses to RFIs, ANPRMs, or notices of proposed rulemaking  
183 (NPRMs). ~~When conducting a meeting, the agency should~~ In conducting a  
184 meeting, agencies should consider the following:
- 185 i. ~~determine~~ whether to target and invite specific participants or open the  
186 meeting to any interested member of the general public;
- 187 ii. ~~determine~~ whether to conduct the meeting in person, online, or both;
- 188 iii. whether to recruit participants based on the nature of the rule at issue and  
189 the type of feedback that the agency seeks;
- 190 iv. ~~consider using~~ whether to use a trained facilitator or moderator from inside  
191 or outside the agency, as appropriate;
- 192 v. whether to provide background materials for the participants that clearly  
193 explain relevant issues and the primary policy alternatives in language and  
194 form comprehensible to all types of participants the agency seeks to  
195 engage;
- 196 vi. whether to disseminate questions to participants in advance, including  
197 either open-ended questions or questions aimed at soliciting specific  
198 information the agency needs to make informed decisions;



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- 199       vii. ~~determine~~ whether and how to structure interactive dialogue among
- 200            participants;
- 201       viii. ~~whether to record~~~~consider recording~~ the session and making that recording
- 202            publicly available; and
- 203       ix. ~~whether to~~ prepare a summary of the meeting ~~and place it in the~~
- 204            ~~rulemaking docket.~~
- 205       b. Agency representatives should take an open-minded stance during meetings with
- 206            affected interests and other interested persons.
- 207       c. When a rulemaking is particularly important or controversial or the agency seeks
- 208            to promote clarity and learning through dialogue, the agency should consider
- 209            facilitating additional opportunities for enhanced deliberation among affected
- 210            interests and other interested persons.

**Commented [CA6]:** Proposed amendment from Council #3

**Commented [CMA7]:** Proposed amendment from Carol Ann Siciliano #4  
Good practice to promote transparency

**Commented [CA8]:** Proposed amendment from Council #4  
The Council requests a discussion of the Committee's intent with this language. Should the language be stricken, rewritten, or retained?

**Public Availability of Rulemaking Information**

- 211       9. To support public engagement prior to the publication of the NPRM, agencies should
- 212            consider affirmative steps to make publicly available relevant information about the
- 213            rulemaking, such as by creating a dedicated webpage. Agencies should seek to make
- 214            rulemaking information comprehensible for individuals and groups that do not typically
- 215            participate in the rulemaking process, such as by using audiovisual materials or other
- 216            media to supplement more traditional written information in appropriate situations.
- 217            Information to make available could include:
- 218            a. the status of the rulemaking initiative and opportunities to participate in the
- 219                process;
- 220            b. an explanation of the rulemaking process, the role of public participation, and the
- 221                qualities of a useful comment;
- 222            c. an identification of the issues under consideration and related information,
- 223                presented in forms that are readable and comprehensible by non-experts; and
- 224            d. summaries of public engagement efforts, including any information received from
- 225                the public or a description of the impact of those efforts.