



Public Engagement in Rulemaking

Committee on Rulemaking

Proposed Recommendation from Committee on Rulemaking | October 17, 2018

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.¹
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.² Other statutes, including the Federal Advisory Committee Act (FACA)³ and
10 Negotiated Rulemaking Act,⁴ provide agencies with other means to engage representatives of
11 identified interests in the rulemaking process. In many rulemakings, however, agencies rely
12 primarily on notice-and-comment procedures to solicit public input. Although the notice-and-
13 comment process generates important information, agencies can sometimes benefit from
14 engaging the public at other points in the process and through other methods, particularly as they
15 identify regulatory issues and develop potential options before issuing NPRMs.

¹ 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>.

² 5 U.S.C. § 553(b)–(c) (2012).

³ Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2 (2012)).

⁴ Negotiated Rulemaking Act, Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified as amended at 5 U.S.C. §§ 561–70 (2012)).



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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.⁵ The present
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 to foster meaningful participation in the rulemaking process by members
25 of 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.⁶

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,
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.⁷ An agency should begin by developing a general policy for public

⁵ 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).

⁶ 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).

⁷ For a discussion of general public engagement policies, see Sant’Ambrogio & Staszewski, *supra* note 1, at 128–33. For examples of general public engagement policies, see U.S. DEP’T OF THE INTERIOR, NAT’L PARK SERV.,



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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.⁸

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 to encourage more useful participation
47 from 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
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

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).

⁸ For a discussion of specific public engagement plans for individual rulemaking initiatives, see Sant' Ambrogio & Staszewski, *supra* note 1, at 133–39.



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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.⁹
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.¹⁰ 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.¹¹ 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.¹² 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
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

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

¹⁰ For a discussion of the use of RFIs during agenda setting and rule development, see *id.* at 47–48, 60–61 (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).

¹¹ For a discussion of the use of ANPRMs, see *id.* at 72–74. For example, the Department of Energy routinely issues ANPRMs to solicit public comments on preliminary proposals pursuant to its process rule. See *id.* at 132–33.

¹² 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 49.



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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 to encourage and facilitate their
80 participation. Targeted outreach can take on a variety of forms, and agencies tailor these efforts
81 to specific 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 to 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.¹³ An agency can structure a meeting to generate open-ended dialogue,
91 allowing participants the opportunity to raise their own concerns or issues.¹⁴ 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 so that the requirements of FACA or the
95 Paperwork Reduction Act (PRA) are not applicable.¹⁵

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

¹³ For a discussion of focus groups and listening sessions, see *id.* at 45–51 (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), 60–63 (discussing use of facilitated listening sessions by the Nuclear Regulatory Commission), 75–76 (discussing public meetings in general and EPA's use of "shuttle diplomacy" and technical workshops).

¹⁴ For a discussion of different techniques to facilitate enhanced deliberation, see *id.* at 119–28.

¹⁵ These methods would not implicate FACA as long as they are structured so the 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 (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).



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.¹⁶ 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.¹⁷

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.
- 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.

¹⁶ 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 77.

¹⁷ *See generally* Recommendation 2011-8, *supra* note 5.



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- 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 constraints, such as the Federal Advisory Committee Act
138 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.

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.



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- 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.
- 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. 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;
 - 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



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- 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:
- 184 i. determine whether to target and invite specific participants or open the
185 meeting to any interested member of the general public;
 - 186 ii. determine whether to conduct the meeting in person, online, or both;
 - 187 iii. recruit participants based on the nature of the rule at issue and the type of
188 feedback that the agency seeks;
 - 189 iv. consider using a trained facilitator or moderator from inside or outside the
190 agency, as appropriate;
 - 191 v. provide background materials for the participants that clearly explain
192 relevant issues and the primary policy alternatives in language and form
193 comprehensible to all types of participants the agency seeks to engage;
 - 194 vi. disseminate questions to participants in advance, including either open-
195 ended questions or questions aimed at soliciting specific information the
196 agency needs to make informed decisions;
 - 197 vii. determine whether and how to structure interactive dialogue among
198 participants;
 - 199 viii. consider recording the session and making that recording publicly
200 available; and
 - 201 ix. prepare a summary of the meeting.
- 202 b. Agency representatives should take an open-minded stance during meetings with
203 affected interests and other interested persons.



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- 204 c. When a rulemaking is particularly important or controversial or the agency seeks
205 to promote clarity and learning through dialogue, the agency should consider
206 facilitating additional opportunities for enhanced deliberation among affected
207 interests and other interested persons.

Public Availability of Rulemaking Information

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