



Administrative Conference Recommendation 2018-7

Public Engagement in Rulemaking

Adopted December 14, 2018

Robust public participation is vital to the rulemaking process. By providing opportunities for public input and dialogue, agencies can obtain more comprehensive information, enhance the legitimacy and accountability of their decisions, and increase public support for their rules.¹ Agencies, however, often face challenges in involving a variety of affected interests and interested persons 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 rulemaking proposals.² Other statutes, including the Federal Advisory Committee Act (FACA)³ and Negotiated Rulemaking Act,⁴ describe other means to engage representatives of identified interests in the rulemaking process. In many rulemakings, however, agencies rely primarily on notice-and-comment procedures to solicit public input. Although the notice-and-comment process generates important information, agencies can sometimes benefit from engaging the public at other points in the process and through other methods, particularly as they identify regulatory issues and develop potential options before issuing NPRMs.

¹ 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>.

² 5 U.S.C. § 553(b)–(c).

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

⁴ 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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The Conference has previously adopted several recommendations directed at expanding participation in the rulemaking process. These previous 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.⁵ This Recommendation builds on these past recommendations and focuses on supplemental tools agencies can use to expand their public engagement.

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

Strategic planning focused on public engagement can help agencies solicit and obtain valuable information from a greater number of affected interests with diverse experiences, information, and views throughout the rulemaking process, including experts, individuals, or entities with knowledge germane to the proposed rule who do not typically participate in the 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 (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).

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 138–43. For examples of general public engagement policies, see U.S. DEP’T OF THE INTERIOR, NAT’L PARK SERV.,



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engagement that identifies factors or establishes standards for the agency to use to design engagement efforts in individual rulemakings. The agency can then apply or tailor its general policy to specific rule proposals, reflecting the unique purposes, goals, and needs of each rulemaking. Well-designed planning for specific rulemakings will include consideration of a variety of methods to obtain valuable information from diverse sources at various stages during the rulemaking process.⁸

Not all rulemakings, however, warrant enhanced public engagement. Some rules hold little public salience or address narrow issues, so public engagement 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 interests in a variety of ways, or implicate controversial issues. For these rules, additional, well-designed public engagement may be worthwhile to obtain information from affected interests and other interested persons who might not otherwise participate in the rulemaking and encourage more useful participation from those who do. Agencies considering enhanced public engagement for a particular rule must carefully evaluate many factors, including agency resources, rule complexity, and the prevalence of otherwise missing information or views, before deciding whether to pursue additional outreach. Furthermore, even after agencies decide to undertake enhanced public engagement 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. Agencies should also consider the best timing for using a method of public engagement. Finally, with whatever public 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 143–49.



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those who participate and should display open-mindedness about the relevant issues presented by the rulemaking.

This Recommendation highlights three 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.⁹ Although these two mechanisms are similar, RFIs are generally used when an agency is determining whether to proceed at all and, if so, what general approach to take.¹⁰ ANPRMs are generally used when the agency has formulated one or more tentative regulatory options and seeks input on which option to propose.¹¹ 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. RFIs and ANPRMs provide agencies with additional opportunities to solicit information without organizing potentially costly or burdensome face-to-face engagement efforts.

Second, agencies may engage in targeted outreach to identify and engage affected interests that might not otherwise participate in the rulemaking.¹² RFIs and ANPRMs are useful tools to enhance participation early in the rulemaking process. However, RFIs and ANPRMs published in the *Federal Register* may only reach affected interests that are already likely to participate in the rulemaking. Targeted outreach efforts allow agencies to seek information from individuals and entities that may not read the *Federal Register* or otherwise would be unaware of 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 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).

¹¹ 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.

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 53.



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outreach, an agency identifies affected interests that are not likely to participate and undertakes efforts to notify those interests of the rulemaking and encourage and facilitate their participation. Targeted outreach can take on a variety of forms, and agencies tailor these efforts to specific affected interests and rules.

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

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

Agencies should make information available to the public about individual rulemakings 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 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).

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

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).



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members of the public are adequately informed and can participate meaningfully in response to RFIs, ANPRMs, meeting opportunities, and other forms of public engagement.¹⁶ For example, an agency may list such information on a dedicated webpage or a section of a page on an agency's website. Doing so could help that agency inform and engage affected interests and other interested persons throughout the rulemaking process.¹⁷

RECOMMENDATION

Public Engagement Planning

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

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 83–84.

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



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3. In determining whether and how to enhance or target public engagement prior to the publication of a specific proposed rule, 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 experience or expertise from outside the agency;
 - e. whether specific forms of enhanced or targeted public engagement are likely to provide useful information, including from 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 or other interested persons likely to have useful information, including the challenge of providing rulemaking materials in a language and form comprehensible to nonexperts whose participation is being sought;
 - g. whether the rule is likely to be controversial;
 - h. the time and resources available for enhanced or targeted public engagement as opposed to other uses; and
 - i. whether additional legal requirements, such as the Federal Advisory Committee Act or the Paperwork Reduction Act, might apply.
4. Agencies should consider using personnel with public engagement training and experience to participate in both the development of their general public engagement policies 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 public engagement.



Timing and Methods of Public Engagement

5. Public engagement should generally occur as early as feasible in the rulemaking process, including when identifying problems and setting regulatory priorities.
6. *Requests for Information and Advance Notices of Proposed Rulemaking.*
 - a. Agencies should consider using requests for information (RFIs) or advance notices of proposed rulemaking (ANPRMs) when they need to:
 - i. gather information or data about the existence, magnitude, and nature of 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 proposed rule.
 - b. When using RFIs and ANPRMs, agencies should:
 - i. sufficiently convey their receptivity to input;
 - 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 these comments informed or influenced the development of the subsequent proposal.
7. *Targeted Outreach.* When agencies believe that their public engagement may not reach all affected interests, they should consider conducting outreach that targets experts not already likely to be involved, individuals with knowledge germane to the 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 include:
 - a. proactively bringing the rulemaking to the attention of affected interests that do not normally monitor the agency's activities;



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- b. overcoming or minimizing possible geographical, language, resource, or other barriers to participation;
 - c. motivating participation by explaining the nature of the rulemaking process and how the agency will use public input; or
 - d. providing information about the issues and questions raised by the rulemaking in an accessible and comprehensible form and manner, so that potential participants are able to provide focused, relevant, and useful input.
8. *Meetings with Affected Interests and Other Interested Persons.*
- a. Agencies should consider convening meetings of affected interests and other interested persons to obtain feedback on their priorities and potential regulatory alternatives, particularly when they are unlikely to obtain the same information from written responses to RFIs, ANPRMs, or notices of proposed rulemaking (NPRMs). When conducting a meeting, the agency 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. recruit participants based on the nature of the rule at issue and the type of feedback that the agency seeks;
 - iv. consider using a trained facilitator or moderator from inside or outside the agency, as appropriate;
 - v. provide background materials for the participants that clearly explain relevant issues and the primary policy alternatives in language and form comprehensible to all types of participants the agency seeks to engage;
 - vi. disseminate questions to participants in advance, including either open-ended questions or questions aimed at soliciting specific information the agency needs to make informed decisions;
 - vii. determine whether and how to structure interactive dialogue among participants;



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- viii. consider recording the session and making that recording publicly available; and
 - ix. prepare a summary of the meeting.
- b. Agency representatives should convey their receptivity to input during meetings with affected interests and other interested persons.
 - c. The agency should consider structuring its meetings in a manner to promote enhanced input from affected interests and other interested persons.

Public Availability of Rulemaking Information

9. To support public engagement prior to the publication of the NPRM, agencies should consider affirmative steps to make publicly available relevant information about the rulemaking, such as by creating a dedicated webpage. Agencies should seek to make rulemaking information comprehensible for individuals and groups that do not typically participate in the rulemaking process, such as by using audiovisual materials or other media to supplement more traditional written information in appropriate situations. Information to make available could include:
- 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. an identification of the issues under consideration and related information, presented in forms that are readable and comprehensible by non-experts; and
 - d. summaries of public engagement efforts, including any information received from the public or a description of the impact of those efforts.