



## Virtual Public Engagement in Agency Rulemaking

### Committee on Rulemaking

#### Proposed Recommendation from Committee | May 11, 2023

1           The law often requires agencies to give interested persons an opportunity to participate in  
2 rulemakings.<sup>1</sup> Presidential directives, including Executive Order 14,094, *Modernizing*  
3 *Regulatory Review*, also instruct agencies to proactively engage a range of interested or affected  
4 persons, including underserved communities and program beneficiaries.<sup>2</sup> And as a matter of best  
5 practice, the Administrative Conference has encouraged agencies to consider additional  
6 opportunities for public engagement.<sup>3</sup>

7           Interested persons are often able to learn about participation opportunities through notice  
8 in the *Federal Register* and participate in the rulemaking by submitting written data, views, and  
9 arguments, typically after the agency has issued a notice of proposed rulemaking (NPRM).

10          Agencies may also provide opportunities for oral presentation, whether before or after an  
11 NPRM has been issued. This opportunity can take the form of a public hearing, meeting, or  
12 listening session—what this Recommendation refers to as a “public rulemaking engagement.”  
13 Agencies may provide a public rulemaking engagement because a statute, presidential directive,

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<sup>1</sup> See, e.g., 5 U.S.C. § 553(c).

<sup>2</sup> 88 Fed. Reg. 21,879 (Apr. 6, 2023).

<sup>3</sup> Admin. Conf. of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36,082 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking*, 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 2011-1, *Legal Considerations in E-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, 41 Fed. Reg. 29,654 (July 19, 1976); Admin. Conf. of the U.S., Recommendation 72-1, *Broadcast of Agency Proceedings*, 38 Fed. Reg. 19,791 (July 23, 1973).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

14 or agency rule or policy requires one or because such engagement would improve agency  
15 decision making and promote public participation in regulatory policymaking.<sup>4</sup> The Conference  
16 has encouraged agencies to hold public rulemaking engagements when it would be beneficial to  
17 do so and to explore more effective options for notice, to ensure interested persons are aware of  
18 and understand regulatory developments that affect them. Agencies also directly engage with  
19 people and organizations that are interested in and affected by their rules, and the Conference has  
20 encouraged them to do so consistent with rules governing the integrity of the rulemaking  
21 process.<sup>5</sup>

22         Effective public engagement requires overcoming barriers to participation, including  
23 geographical constraints, resource limitations, and language barriers. For example, to ensure that  
24 all people affected by a rulemaking are aware of the rulemaking and opportunities to participate,  
25 the Conference has recommended that agencies conduct outreach that targets members of the  
26 public with relevant views who do not typically participate in rulemaking or may otherwise not  
27 be represented.

28         In recent years, and especially during the COVID-19 pandemic, agencies increasingly  
29 have used widely available, internet-based videoconferencing software to engage with the  
30 public.<sup>6</sup> By reducing some barriers that people—especially members of historically underserved  
31 communities—encounter, virtual public engagement can help broaden participation in agency  
32 rulemakings.<sup>7</sup>

33         This Recommendation encourages agencies to offer virtual options when they determine  
34 it would be beneficial to hold a public rulemaking engagement or directly engage with specific  
35 people and organizations. It also offers best practices for planning, improving notice of, and

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<sup>4</sup> Kazia Nowacki, *Virtual Public Engagement in Agency Rulemaking* 5–6 (Mar. 30, 2023) (draft report to the Admin. Conf. of the U.S.).

<sup>5</sup> See Admin. Conf. of the U.S., Recommendation 2014-4, “*Ex Parte*” *Communications in Informal Rulemaking*, 79 Fed. Reg. 35,993 (June 25, 2014).

<sup>6</sup> This mirrors developments with respect to the use of virtual hearings in agency adjudication. See Admin. Conf. of the U.S., Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*, 87 Fed. Reg. 1715 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 Fed. Reg. 36,083 (July 8, 2021).

<sup>7</sup> Kazia Nowacki, *Virtual Public Engagement in Agency Rulemaking* (May 11, 2023) (report to the Admin. Conf. of the U.S.).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

36 managing public rulemaking engagements, as well as ensuring that members of the public can  
37 easily access materials related to virtual public rulemaking engagements (e.g., agendas,  
38 recordings, transcripts) and underlying rulemakings (e.g., draft rules, docket materials).  
39 This Recommendation builds on many previous recommendations of the Conference regarding  
40 public participation in agency rulemaking, including Recommendation 2018-7, *Public*  
41 *Engagement in Rulemaking*, which, among other things, encourages agencies to develop  
42 comprehensive plans for public engagement in rulemaking, and Recommendation 2014-4, “*Ex*  
43 *Parte*” *Communications in Informal Rulemaking*, which offers best practices for engaging with  
44 members of the public while safeguarding the integrity of agency rulemaking.

### RECOMMENDATION

#### Virtual Public Engagement Planning

- 45 1. Each agency that engages in rulemaking should utilize internet-based videoconferencing  
46 software as a way to broaden engagement with interested persons in a cost-effective way,  
47 including through outreach that targets members of the public with relevant views who  
48 do not typically participate in rulemaking or may otherwise not be represented. As part of  
49 its overall policy for public engagement in rulemaking (described in Recommendation  
50 2018-7, *Public Engagement in Rulemaking*), each agency should explain how it intends  
51 to use internet-based videoconferencing to engage with the public.
- 52 2. Each agency should ensure that its policies regarding informal communications between  
53 agency personnel and individual members of the public related to a rulemaking  
54 (described in Recommendation 2014-4, “*Ex Parte*” *Communications in Informal*  
55 *Rulemaking*) cover communications that take place virtually.
- 56 3. Each agency should prepare and post to a publicly available website guidance on the  
57 conduct of virtual public rulemaking engagements—that is, a meeting, hearing, listening  
58 session, or other live event that is rulemaking related and open to the general public—and  
59 ensure employees involved with such engagements are familiar with that guidance.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 60 4. When an agency plans to hold a public rulemaking engagement, it should allow for  
61 interested persons to observe the engagement remotely and, when feasible, provide input  
62 and ask questions remotely.
- 63 5. When an agency decides to hold a public rulemaking engagement, rulemaking personnel  
64 should collaborate with personnel who oversee communications, public affairs, public  
65 engagement, and other relevant activities for the agency to ensure the engagement  
66 reaches the targeted audience and facilitates effective participation from interested  
67 persons, including groups that are affected by the rulemaking and have otherwise been  
68 underrepresented in the agency's administrative process.

### **Notice**

- 69 6. An agency should include, as applicable, the following information in the public notices  
70 for a public rulemaking engagement with a virtual or remote component:
- 71 a. The date and time of the engagement, at the beginning of the notice;
  - 72 b. Options for remote attendance, including a direct link or instructions to obtain a  
73 direct link to the internet-based videoconference event and alternative remote  
74 attendance options for members of the public without access to broadband  
75 internet, at the beginning of the notice;
  - 76 c. A plain-language summary of the rulemaking and description of the engagement's  
77 purpose and agenda and the nature of the public input, if any, the agency is  
78 seeking to obtain through the engagement;
  - 79 d. A link to the webpage described in Paragraph 7;
  - 80 e. Information about opportunities for members of the public to speak during the  
81 engagement, including any directions for requesting to speak and any moderation  
82 policies, such as limits on the time for speaking;
  - 83 f. The availability of closed captioning, language interpretation, and  
84 telecommunications relay services and access instructions;
  - 85 g. The availability and location of a recording, a transcript, a summary, or minutes;  
86 and



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 87           h. Contact information for a person who can answer questions about the engagement  
88           or arrange accommodations.
- 89       7. To encourage participation in a public rulemaking engagement, the agency should create  
90       a dedicated webpage for each such engagement that includes the information described in  
91       Paragraph 6. The webpage should include, as applicable:
- 92           a. A link to the internet-based videoconferencing event, its registration page, or  
93           information for alternative remote attendance options for members of the  
94           public without access to broadband internet;
- 95           b. A link to the *Federal Register* notice;
- 96           c. Any materials associated with the engagement, such as an agenda, a program,  
97           speakers' biographies, a draft rule, the rulemaking docket, or questions for  
98           participants;
- 99           d. A livestream of the engagement for the public to observe while it is occurring;  
100          and
- 101          e. Any recording, transcript, summary, or minutes after the engagement has  
102          ended.
- 103       8. The Office of the Federal Register (OFR) should update the *Document Drafting*  
104       *Handbook* to provide agencies guidance on drafting *Federal Register* notices for public  
105       rulemaking engagements with virtual or remote components that include the information  
106       described in Paragraph 6.
- 107       9. OFR and the eRulemaking Program should update the “Document Details” sidebar on  
108       FederalRegister.gov and Regulations.gov to include, for any rulemaking in which there is  
109       a public rulemaking engagement, a link to the agency webpage described in Paragraph 7.

### **Managing Virtual Public Engagements**

- 110       10. When feasible, each agency should allow interested persons to observe a livestream of  
111       the public rulemaking engagement remotely at any time while it is occurring and should  
112       not require members of the public to register. Agencies may want to set a registration  
113       deadline for those wishing to speak or requiring accommodations.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 114 11. To manage participant expectations, an agency should communicate the following  
115 matters, among others, to participants at the beginning of the event:
- 116 a. The purpose and goal of the engagement;
  - 117 b. The moderation policies, including those governing speaking time limits and  
118 whether or why the agency can or cannot respond to oral statements made by  
119 participants;
  - 120 c. The management of the public speaking queue;
  - 121 d. Whether the chat function, if using an internet-based videoconferencing  
122 platform, will be disabled or monitored and, if monitored, whether the chat  
123 will be included in the record;
  - 124 e. How participants can access the rulemaking materials throughout the meeting;  
125 and
  - 126 f. Whether the event will be recorded or transcribed and where it will be made  
127 available.
- 128 12. Each agency should ensure it has adequate support to run public rulemaking  
129 engagements, including their virtual and other remote components. Adequate support  
130 might include technological or troubleshooting assistance, a third-party moderating  
131 service, or a sufficient number of staff members available.

### **Recordings and Transcripts**

- 132 13. When an agency holds a public rulemaking engagement, it should record, transcribe,  
133 summarize, or prepare meeting minutes of the engagement unless doing so would  
134 adversely affect the willingness of public participants to provide input or ask questions.
- 135 14. Each agency should make any recording, transcript, summary, or minutes of a public  
136 rulemaking engagement available in any public docket associated with the rulemaking  
137 and on the webpage described in Paragraph 7, and should do so in a timely manner.