Virtual Public Engagement in Agency Rulemaking

Committee on Rulemaking

Proposed Recommendation for Plenary | June 15, 2023

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

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

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

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¹ See, e.g., 5 U.S.C. § 553(c).
or agency rule or policy requires one or because such engagement would improve agency
decision making and promote public participation in regulatory policymaking. The Conference
has encouraged agencies to hold public rulemaking engagements when it would be beneficial to
do so and to explore more effective options for notice, to ensure interested persons are aware of
and understand regulatory developments that affect them. Agencies also directly engage with
people and organizations that are interested in and affected by their rules, and the Conference has
encouraged them to do so consistent with rules governing the integrity of the rulemaking
process.⁴

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

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

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

⁴ Kazia Nowacki, Virtual Public Engagement in Agency Rulemaking 5–6 (May 25, 2023) (report to the Admin.
Conf. of the U.S.).


⁶ 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,
36,083 (July 8, 2021).

⁷ Kazia Nowacki, Virtual Public Engagement in Agency Rulemaking (May 25, 2023) (report to the Admin. Conf. of
the U.S.).
managing public rulemaking engagements, as well as ensuring that members of the public can easily access materials related to virtual public rulemaking engagements (e.g., agendas, recordings, transcripts) and underlying rulemakings (e.g., draft rules, docket materials).

This Recommendation builds on many previous recommendations of the Conference regarding public participation in agency rulemaking, including Recommendation 2018-7, *Public Engagement in Rulemaking*, which, among other things, encourages agencies to develop comprehensive plans for public engagement in rulemaking, and Recommendation 2014-4, *“Ex Parte” Communications in Informal Rulemaking*, which offers best practices for engaging with members of the public while safeguarding the integrity of agency rulemaking.

**RECOMMENDATION**

**Virtual Public Engagement Planning**

1. Each agency that engages in rulemaking should utilize internet-based videoconferencing software as a way to broaden engagement with interested persons in a cost-effective way, including through outreach that targets members of the public with relevant views who do not typically participate in rulemaking or may otherwise not be represented. As part of its overall policy for public engagement in rulemaking (described in Recommendation 2018-7, *Public Engagement in Rulemaking*), each agency should explain how it intends to use internet-based videoconferencing to engage with the public.

2. Each agency should ensure that its policies regarding informal communications between agency personnel and individual members of the public related to a rulemaking (described in Recommendation 2014-4, *“Ex Parte” Communications in Informal Rulemaking*) cover communications that take place virtually.

3. Each agency should prepare and post to a publicly available website guidance on the conduct of virtual public rulemaking engagements—that is, a meeting, hearing, listening session, or other live event that is rulemaking related and open to the general public—and ensure employees involved with such engagements are familiar with that guidance.
4. When an agency plans to hold a public rulemaking engagement, it should allow for interested persons to observe the engagement remotely and, when feasible, provide input and ask questions remotely.

5. When an agency decides to hold a public rulemaking engagement, rulemaking personnel should collaborate with personnel who oversee communications, public affairs, public engagement, and other relevant activities for the agency to ensure the engagement reaches the targeted audience and facilitates effective participation from interested persons, including groups that are affected by the rulemaking and have otherwise been underrepresented in the agency’s administrative process.

**Notice**

6. An agency should include, as applicable, the following information in the public notices for a public rulemaking engagement with a virtual or remote component:

   a. The date and time of the engagement, at the beginning of the notice;
   b. Options for remote attendance, including a direct link or instructions to obtain a direct link to the internet-based videoconference event and alternative remote attendance options for members of the public without access to broadband internet, at the beginning of the notice;
   c. A plain-language summary of the rulemaking and description of the engagement’s purpose and agenda and the nature of the public input, if any, the agency is seeking to obtain through the engagement;
   d. A link to the webpage described in Paragraph 7;
   e. Information about opportunities for members of the public to speak during the engagement, including any directions for requesting to speak and any moderation policies, such as limits on the time for speaking;
   f. The availability of closed captioning, language interpretation, and telecommunications relay services and access instructions;
   g. The availability and location of a recording, a transcript, a summary, or minutes; and
h. Contact information for a person who can answer questions about the engagement or arrange accommodations.

7. To encourage participation in a public rulemaking engagement, the agency should create a dedicated webpage for each such engagement that includes the information described in Paragraph 6. The webpage should include, as applicable:
   a. A link to the internet-based videoconferencing event, its registration page, or information for alternative remote attendance options for members of the public without access to broadband internet;
   b. A link to the Federal Register notice;
   c. Any materials associated with the engagement, such as an agenda, a program, speakers’ biographies, a draft rule, the rulemaking docket, or questions for participants;
   d. A livestream of the engagement for the public to observe while it is occurring; and
   e. Any recording, transcript, summary, or minutes after the engagement has ended.

8. The Office of the Federal Register (OFR) should update the Document Drafting Handbook to provide agencies guidance on drafting Federal Register notices for public rulemaking engagements with virtual or remote components that include the information described in Paragraph 6.

9. OFR and the eRulemaking Program should update the “Document Details” sidebar on FederalRegister.gov and Regulations.gov to include, for any rulemaking in which there is a public rulemaking engagement, a link to the agency webpage described in Paragraph 7.

Managing Virtual Public Engagements

10. When feasible, each agency should allow interested persons to observe a livestream of the public rulemaking engagement remotely at any time while it is occurring and should not require members of the public to register. Agencies may want to set a registration deadline for those wishing to speak or requiring accommodations.
11. To manage participant expectations, an agency should communicate the following matters, among others, to participants at the beginning of the event:
   a. The purpose and goal of the engagement;
   b. The moderation policies, including those governing speaking time limits and whether or why the agency can or cannot respond to oral statements made by participants;
   c. The management of the public speaking queue;
   d. Whether the chat function, if using an internet-based videoconferencing platform, will be disabled or monitored and, if monitored, whether the chat will be included in the record;
   e. How participants can access the rulemaking materials throughout the meeting; and
   f. Whether the event will be recorded or transcribed and where it will be made available.

12. Each agency should ensure it has adequate support to run public rulemaking engagements, including their virtual and other remote components. Adequate support might include technological or troubleshooting assistance, a third-party moderating service, or a sufficient number of staff members available.

**Recordings and Transcripts**

13. When an agency holds a public rulemaking engagement, it should record, transcribe, summarize, or prepare meeting minutes of the engagement unless doing so would adversely affect the willingness of public participants to provide input or ask questions.

14. Each agency should make any recording, transcript, summary, or minutes of a public rulemaking engagement available in any public docket associated with the rulemaking and on the webpage described in Paragraph 7, and should do so in a timely manner.