

Statement of Principles for Public Engagement in Agency Rulemaking

INTRODUCTION

1 Federal agencies issue rules to implement, interpret, and prescribe the laws and policies
2 they administer and to describe their organization, procedure, and practice requirements.¹ Public
3 engagement—defined as “activities by [an] agency to elicit input from the public”²—is an
4 integral part of agency rulemaking. As the Administrative Conference of the United States
5 (ACUS) has recognized: “By providing opportunities for public input and dialogue, agencies can
6 obtain more comprehensive information, enhance the legitimacy and accountability of their
7 decisions, and increase public support for their rules.”³

8 Several statutes set forth the basic framework for public engagement in agency
9 rulemaking. Most notably, the Administrative Procedure Act (APA) generally requires that
10 agencies engage with the public through the notice-and-comment process. Under this process,
11 before an agency issues, amends, or repeals a rule, an agency provides notice of its proposal and
12 “give[s] interested persons an opportunity to participate in the rulemaking through submission of
13 written data, views, or arguments.”⁴

14 Agencies are not required to use this process for all rules. Under the APA, for example,
15 notice-and-comment rulemaking is not required for interpretive rules or general statements of
16 policy (together called “guidance documents”) or for rules of agency organization, procedure, or
17 practice. There can also be “good cause” for agencies to forgo notice-and-comment rulemaking
18 in certain circumstances. Many other statutes set forth alternative or supplemental requirements
19 for specific types of rules.

20 These laws establish only the minimum procedural requirements for agencies.
21 Policymakers have learned a great deal about the value of public engagement since 1946, when
22 the APA was enacted. Drawing on this experience, Congress has devised additional methods for

¹ 5 U.S.C. § 551.

² Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Agency Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019).

³ *Id.*

⁴ 5 U.S.C. § 553.

23 agencies to engage with the public, for example under the Federal Advisory Committee Act and
24 the Negotiated Rulemaking Act. Many presidents have adopted additional requirements to
25 improve the effectiveness of public engagement, particularly with members of communities that
26 have been historically underrepresented in agency rulemakings, and the Office of Information
27 and Regulatory Affairs has issued guidance implementing presidential directives.⁵ Agencies are
28 also free to adopt additional practices as appropriate, and many have done so.

29 Congress established ACUS, in part, to “promote more effective public participation . . .
30 in the rulemaking process.”⁶ ACUS has adopted dozens of recommendations, listed in the
31 Appendix, to help agencies efficiently, equitably, and effectively provide opportunities for public
32 input and dialogue when they issue, amend, and repeal rules. These recommendations identify
33 principles and best practices for effective public engagement. They also recognize that there is
34 no single approach to public engagement that will work for every agency in every rulemaking.
35 To engage with the public efficiently, equitably, and effectively, agencies must consider a range
36 of factors, including the complexity of a rule, the impact of a rule, the people likely to be
37 affected by a rule, and available resources.⁷

38 The ACUS Office of the Chair prepared this Statement of Principles to concisely describe
39 principles and best practices identified in recommendations adopted by ACUS. The Office of the
40 Chair will update this Statement from time to time as ACUS adopts new recommendations that
41 address public participation in agency rulemaking.

⁵ A list of rulemaking requirements from the Executive Office of the President is available in the *Federal Administrative Procedure Sourcebook*, which is published jointly by ACUS and the American Bar Association’s Section of Administrative Law and Regulatory Practice. The *Sourcebook* is available at <https://sourcebook.acus.gov>.

⁶ 5 U.S.C. § 591(2).

⁷ Recommendation 2018-7, *supra* note 2, ¶ 3.

PLANNING FOR PUBLIC ENGAGEMENT

- 42 1. Because the public may have valuable information concerning the impact and
43 effectiveness of agency rules, agencies should engage broadly with the public in their
44 rulemaking processes—including during regulatory planning and prioritization, notice-
45 and-comment rulemaking, and retrospective review—even when they are not required to
46 do so by law.¹
- 47 2. Agencies should develop general policies for public engagement in their rulemakings and
48 make those policies publicly available.² An agency’s general policies should address:
- 49 a. Its goals and purposes in engaging the public;
 - 50 b. The types of individuals or organizations with whom it seeks to engage and the
51 methods for communicating with them and encouraging them to participate;
 - 52 c. How such individuals and organizations can participate in the rulemaking process;
 - 53 d. The agency personnel or offices to whom members of the public can direct
54 questions related to the rulemaking process;
 - 55 e. The types of information it seeks from public engagement;
 - 56 f. How the information from public engagement will inform the rulemaking process
57 or be used;
 - 58 g. When public engagement should occur;
 - 59 h. The range of available methods for public engagement, such as those listed in
60 Principle 13;
 - 61 i. Records and other information, such as upcoming opportunities for public
62 engagement, it will include in the public rulemaking docket and on the agency’s
63 website;
 - 64 j. How it will handle nongovernmental ex parte communications (i.e., written or
65 oral communications regarding the substance of an anticipated or ongoing
66 rulemaking between agency personnel and people outside the agency that are not
67 placed in the public rulemaking docket at the time they occur);
 - 68 k. Practices for managing comments received during the notice-and-comment
69 process, including mass, computer-generated, and falsely attributed comments;
70 comments that include personal or confidential commercial information; and
71 comments received after the comment period has ended; and

- 72 1. Plans to periodically evaluate the effectiveness of public engagement policies.
- 73 3. Agencies should use their general policies to inform public engagement for specific
- 74 rulemakings. Planning should take place as early as possible during a rulemaking.³
- 75 4. Effective planning for public engagement can require collaboration among many
- 76 different people, including multiple offices within an agency, including program offices,
- 77 legal offices, and offices that oversee communications, public engagement, and public
- 78 affairs. Personnel with public engagement training and experience can be especially
- 79 helpful in developing general public engagement policies and public engagement plans
- 80 for specific rulemakings. Personnel at other agencies may also have useful information
- 81 about best practices for public engagement. Agencies should, therefore, also consider
- 82 sharing their public participation policies, data, and other information about the
- 83 effectiveness of their public engagement outreach with other agencies.⁴
- 84 5. Agencies should train employees to understand and apply recognized best practices in
- 85 public engagement, including the use of technologies that may broaden public
- 86 participation or help them manage public comments—including mass, computer-
- 87 generated, and falsely attributed comments—more effectively.⁵
- 88 6. Agencies should develop resources that educate the public on the rulemaking process,
- 89 describe the role of public participation, provide guidance on submitting effective
- 90 comments, clarify how the agency will consider public input provided outside the notice-
- 91 and-comment process, and provide easy access to ongoing rulemakings.⁶
- 92 7. Agencies should periodically evaluate the effectiveness of their public engagement
- 93 policies, including by soliciting feedback and suggestions for improvement from the
- 94 public, and update them as needed.⁷

THE PUBLIC WITH WHOM TO ENGAGE

- 95 8. Agencies should engage with a wide range of people interested in or affected by their
- 96 rulemakings, including experts and members of communities that historically have been
- 97 underrepresented in agency rulemakings, and be deliberate and proactive in their
- 98 outreach.⁸

WHEN TO ENGAGE WITH THE PUBLIC

- 99 9. Agencies should engage with the public throughout the rulemaking process, not just
100 during the notice-and-comment process. Public engagement is especially valuable during
101 the early stages of the rulemaking process, before an agency has developed a proposed
102 rule, and public engagement should generally occur as early as feasible in the rulemaking
103 process. Agencies should engage with the public to identify problems, set regulatory
104 priorities, and consider regulatory alternatives.⁹
- 105 10. Public engagement can also help agencies assess adopted rules and decide whether to
106 revisit them. Agencies should consider opportunities to solicit input from the public on
107 the impact and effectiveness of adopted rules, for example as part of retrospective review,
108 post-promulgation comment processes (especially when there was no pre-promulgation
109 opportunity for public participation, e.g., direct final rules), and through more informal
110 engagement methods.¹⁰

HOW TO ENGAGE WITH THE PUBLIC

- 111 11. Agencies should ensure that all people and groups interested in or affected by their
112 rulemakings are aware of opportunities for public participation and can meaningfully
113 access and effectively participate in them. They should consider economic, geographic,
114 linguistic, educational, technological, and other barriers to effective participation that
115 interested and affected parties, including members of historically underrepresented
116 groups, may face.¹¹
- 117 12. Agencies should manage the notice-and-comment process so that interested persons can
118 effectively participate in agency rulemakings and so that agencies can obtain
119 comprehensive information and conduct their rulemakings efficiently. For example,
120 agencies should generally use a comment period of at least 30 days and at least 60 days
121 for “significant regulatory actions” as defined in Executive Order 12,866.¹²
- 122 13. In addition to the notice-and-comment process, agencies may use many different methods
123 to engage with the public depending on their needs.¹³ Each has its benefits and costs.
124 Agencies should consider a broad range of methods for public engagement, including:
- 125 a. Formalizing a process for members of the public to petition for the issuance,
126 amendment, or repeal of a rule under 5 U.S.C. § 553(e);

- 127 b. Hosting internet and social media forums;
- 128 c. Using focus groups;
- 129 d. Issuing requests for information and advance notices of proposed rulemaking;
- 130 e. Meeting with and conducting targeted outreach to interested and affected parties,
- 131 consistent with laws and policies on ex parte communications;
- 132 f. Using ombuds;
- 133 g. Using advisory committees, including those tasked with conducting negotiated
- 134 rulemaking;
- 135 h. Holding public meetings, hearings, and listening sessions (and including
- 136 opportunities for remote participation) with interested and affected parties; and
- 137 i. Providing supplemental opportunities for members of the public to reply to
- 138 comments submitted during the notice-and-comment process.

139 14. When agencies provide opportunities for public participation, they should notify
140 interested and affected parties about those opportunities using media that are likely to
141 reach them. In addition to providing notice in the *Federal Register*, agencies should:

- 142 a. Create dedicated webpages that include key information about rulemaking
- 143 initiatives and engagements;
- 144 b. Use social media and email alerts to notify interested and affected parties about
- 145 opportunities for public participation; and
- 146 c. Work with relevant state and local governments and intermediary organizations
- 147 (e.g., trade associations, professional associations, community organizations,
- 148 advocacy groups) that can help provide effective notice to interested persons.¹⁴

149 15. Agencies should provide information about rulemaking initiatives so that interested and
150 affected parties, including members of historically underrepresented groups, can
151 understand them. Agencies should:

- 152 a. Write rulemaking documents in terms that the relevant audience can understand;
- 153 b. Provide plain-language summaries of rules;
- 154 c. Identify issues under consideration so that non-specialists can understand them;
- 155 d. Use audiovisual materials or other media to supplement more traditional written
- 156 information, when appropriate; and
- 157 e. Provide relevant information in languages other than English, when appropriate.¹⁵

- 158 16. Interested and affected parties can participate most effectively in a rulemaking when they
159 can review records and information that may inform the agency’s decision-making
160 process. During the notice-and-comment process, in particular, agencies should maintain
161 an online rulemaking docket that allows the public to review:
- 162 a. Notices pertaining to the rulemaking;
 - 163 b. Comments received in response to a notice of proposed rulemaking;
 - 164 c. Ex parte communications after a notice of proposed rulemaking has been issued;
 - 165 d. Intragovernmental communications which contain material factual information
166 (as opposed to indications of government policy);
 - 167 e. Transcripts or recordings, if any, of oral presentations made during the
168 rulemaking;
 - 169 f. Reports or recommendations of any relevant advisory committees;
 - 170 g. Other materials required by law to be considered or made public in connection
171 with the rulemaking; and
 - 172 h. Any other materials considered by the agency during the rulemaking.¹⁶

ENDNOTES

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- ¹ Recommendations 2018-7, ¶¶ 6–8; 2017-6, ¶ 3; 2014-5, ¶ 13; 80-3, ¶ 3; 76-3, ¶ 1; 71-6, ¶ A; see e.g., Recommendations 2022-2, ¶¶ 4, 6; 2021-3, ¶¶ 3–4; 2020-1, ¶ 5; 2019-3, ¶ 6; 2018-7, ¶¶ 2, 5, 8(a); 2017-6, ¶ 3; 2017-2, ¶ 1; 2014-5, ¶¶ 5, 13; 2013-4, ¶ 2; 2012-7, ¶ 6; 2012-5, ¶ 3(b); 2012-4, ¶ 1(a); 2010-1, ¶ 5; 95-3, ¶ IV(A); 91-1, ¶¶ 7–8; 87-1, ¶ 1(c); 84-5, ¶¶ 3, 4; 84-1, ¶ B(4).
- ² Recommendations 2023-2, ¶¶ 1–7, 11, 13–14; 2022-2, ¶¶ 6, 13–19, 22(d); 2021-3, ¶¶ 2–7; 2021-2, ¶ 5; 2021-1, ¶ 11; 2020-2, ¶¶ 1–2, 4; 2020-1, ¶¶ 1–5; 2019-3, ¶¶ 1(b)(i), 11; 2018-7, ¶¶ 1–2, 3(i), 9; 2017-6, ¶¶ 1, 3; 2014-6, ¶ 1; 2014-4, ¶¶ 2–3; 2013-5, ¶ 3; 2013-4, ¶ 2; 2011-8, ¶¶ 2, 4; 2011-2, ¶¶ 1, 3; 2010-1, ¶ 7; 95-3, ¶ IV(A); 93-4, ¶ V; 89-7, ¶ 3(c); 86-6, ¶¶ 1–2; 84-5, ¶¶ 3–4; 84-1, ¶ B(2); 80-3, ¶ 3; 76-3, ¶ 1; 71-6, ¶ E; 71-3; 68-5, ¶ A(2).
- ³ Recommendations 2022-2, ¶¶ 2, 3, 7; 2018-7, ¶ 7; 2013-5, ¶ 3(a).
- ⁴ Recommendations 2023-2, ¶ 5; 2022-2, ¶¶ 22–23; 2021-3, ¶ 8; 2021-1, ¶¶ 15, 17; 2018-7, ¶ 4; 2017-6, ¶ 1; 2013-5, ¶ 4; 2012-5, ¶¶ 1–2; 2012-4, ¶¶ 7–8.
- ⁵ Recommendations 2023-2, ¶¶ 1, 3–4, 7, 10, 12; 2022-2, ¶¶ 10–11, 13–16, 20, 22; 2021-1, ¶¶ 11, 14, 16; 2018-7, ¶¶ 4, 9; 2017-3, ¶ 4; 2014-4, ¶¶ 14–16; 2013-5, ¶¶ 1–3; 2012-4, ¶¶ 2, 8; 2011-8, ¶¶ 1–3; 2011-7, ¶ 10; 2011-2, ¶ 3; 2011-1, ¶¶ 1, 4–5; 90-5, ¶ 1; 88-10, ¶ H; 72-1, ¶ A(1).
- ⁶ Recommendations 2023-2, ¶ 3; 2021-3, ¶ 3; 2021-1, ¶ 11; 2020-1, ¶¶ 2, 4; 2018-7, ¶¶ 7, 9; 2014-4, ¶¶ 1–2; 2013-5, ¶¶ 2–4, 6, 17.
- ⁷ Recommendations 2022-2, ¶¶ 6, 22(d); 2020-1, ¶ 2(f); 2017-6, ¶¶ 1, 3; 2017-3, ¶ 7.
- ⁸ Recommendations 2023-2, ¶¶ 1, 5; 2022-2, ¶ 7(c); 2021-3, ¶ 3; 2021-2, ¶¶ 5, 9; 2020-1, ¶ 4; 2018-7, ¶¶ 3, 7–8; 2016-5, ¶ 15; 2013-5, ¶¶ 2–3; 2012-4, ¶ 7; 2011-8, ¶ 6; 2010-1, ¶¶ 5–6; 90-2, ¶ 6; 84-5, ¶¶ 3, 4; 71-6, ¶¶ A, E; 68-5, ¶ A(1)–(2).
- ⁹ Recommendations 2023-2, ¶ 7; 2021-3, ¶¶ 1–3; 2021-2, ¶¶ 5, 9; 2018-7, ¶¶ 2, 5, 6(a), 8(a); 2017-2, ¶¶ 1–2; 2014-4, ¶ 4; 2014-5, ¶¶ 5, 13; 2013-5, ¶¶ 1, 3, 6; 2012-4, ¶¶ 1, 4; 95-3, ¶ III–IV(A); 93-5, ¶ III(A); 93-4, ¶ (V)(F); 87-1, ¶ 1(c)(1)–(2); 85-5, ¶ 3; 85-2, ¶ 5(c); 84-1, ¶ 4; 82-4, ¶¶ 1, 4, 7; 80-3, ¶ 3.
- ¹⁰ Recommendations 2021-2, ¶ 9; 2019-1, ¶¶ 2, 4, 8–10, 13–14; 2017-6, ¶ 3; 2017-5, ¶¶ 2, 7(e), 8–11; 2016-5, ¶ 1; 2014-4, ¶¶ 6, 8–10; 2013-5, ¶¶ 5, 10; 2011-2, ¶¶ 5–6; 95-4, ¶¶ I(B)(3), II(D); 92-2, ¶¶ II(A)–(B); 90-2, ¶ A(3); 83-2, ¶¶ 1, 2; 80-6, ¶ 2; 76-5, ¶¶ 1–2; 76-3, ¶ 1.
- ¹¹ Recommendations 2023-2, ¶¶ 1, 5; 2022-2, ¶¶ 1–3, 5, 7, 19; 2021-3, ¶ 3; 2021-2, ¶¶ 5, 9; 2018-7, ¶¶ 3(e)–(f), 7, 9; 2017-3, ¶¶ 1–2; 2013-5, ¶¶ 2–3; 2013-3, ¶ 9; 2012-4, ¶ 7; 2011-8, ¶ 6; 90-2, ¶ 6; 68-5, ¶ A(1).
- ¹² Recommendation 2011-2, ¶ 2.
- ¹³ Recommendations 2021-3, ¶ 2; 2022-2, ¶¶ 14–19; 2021-2, ¶¶ 5, 9; 2017-6, ¶ 3; 2016-5, ¶¶ 1(a), 15; 2014-6, ¶¶ 1–3, 6–9; 2014-4, ¶¶ 6, 10; 2013-5, ¶¶ 5, 10, 17; 2011-2, ¶ 6; 90-2, ¶ A(1), (3); 86-6, ¶¶ 1–2; 76-3, ¶ 1; 68-5, ¶ A(1)–(2). For examples of factors agencies should consider, see 2021-3, ¶ 1; 2018-7, ¶ 6(b); 2017-2, ¶ 2; 2013-5, ¶¶ 2–3, 6; 82-4, ¶¶ 4(c), 7.
- ¹⁴ Recommendations 2023-2, ¶¶ 1, 4–5, 7; 2022-2, ¶¶ 8, 10–11, 13–18, 21; 2021-2, ¶ 6; 2020-1, ¶ 3; 2018-7, ¶ 9; 2013-5, ¶¶ 1–3, 5; 2011-8, ¶¶ 1–3; 2011-7, ¶ 10; 2010-1, ¶ 7; 84-5, ¶¶ 3–4; 84-1, ¶ 3; 76-3, ¶ 1; 71-6, ¶ E.
- ¹⁵ Recommendations 2018-7, ¶¶ 3(f), 7, 8(a)(v), 9; 2017-3, ¶¶ 1, 6–7; 2013-5, ¶¶ 3, 12.
- ¹⁶ Recommendations 2023-2, ¶¶ 6–7, 13–14; 2020-1, ¶ 2(d); 2014-4, ¶¶ 5, 7, 9; 2013-4, ¶ 2; 2011-2, ¶ 3; 93-4, ¶ V(E); 77-3, ¶¶ 2–3; 76-3, ¶ 1(c).

APPENDIX

68-5, *Representation of the Poor in Agency Rulemaking of Direct Consequence to Them*
71-3, *Articulation of Agency Policies*
71-6, *Public Participation in Administrative Hearings*
72-1, *Broadcast of Agency Proceedings*
76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*
76-5, *Interpretive Rules of General Applicability and Statements of General Policy*
77-3, *Ex Parte Communications in Informal Rulemaking Proceedings*
80-3, *Interpretation and Implementation of the Federal Advisory Committee Act*
82-4, *Procedures for Negotiating Proposed Regulations*
83-2, *The “Good Cause” Exemption from APA Rulemaking Requirements*
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84-5, *Preemption of State Regulation by Federal Agencies*
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86-6, *Petitions for Rulemaking*
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88-10, *Federal Agency Use of Computers in Acquiring and Releasing Information*
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95-3, *Review of Existing Agency Regulations*
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2013-3, *Science in the Administrative Process*
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2013-5, *Social Media in Rulemaking*
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2014-5, *Retrospective Review of Agency Rules*
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2016-5, *The Use of Ombuds in Federal Agencies*
2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*
2017-3, *Plain Language in Regulatory Drafting*
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2017-6, *Learning from Regulatory Experience*
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2019-1, *Agency Guidance Through Interpretive Rules*
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