



Public Engagement in Rulemaking

Committee on Rulemaking

Proposed Recommendation for Committee | 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 in the
5 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 their proposals.²
9 Other statutes, including the Federal Advisory Committee Act (FACA)³ and Negotiated
10 Rulemaking Act,⁴ provide agencies with other means to engage representatives of identified
11 interests in the rulemaking process. In many rulemakings, however, agencies rely primarily on
12 notice-and-comment procedures to solicit public input. Although the notice-and-comment
13 process generates important information, agencies can sometimes benefit from engaging the
14 public at other points in the process and through other methods, particularly as they identify
15 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 See Negotiated Rulemaking Act, Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified as amended at 5 U.S.C. §§ 561–570 (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 efforts before or in conjunction with issuing
22 NPRMs.

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

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

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).



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34 participate in notice and comment.⁷ Agencies can tailor their plans to specific rule proposals,
35 reflecting the unique purposes, goals, and needs of each rulemaking. A well-designed plan will
36 include a variety of techniques to obtain valuable information from diverse sources at each stage
37 of the process.⁸

38 Not all rulemakings, however, warrant enhanced public engagement. Some rules hold
39 little public salience or address narrow issues, so public engagement beyond the notice-and-
40 comment process is unlikely to provide the agency with additional relevant information. On the
41 other hand, some rules are complex, affect a wide range of interests in a variety of ways, or
42 implicate controversial issues. For these rules, additional, well-designed public engagement may
43 be worthwhile to obtain information from affected interests who might not otherwise participate
44 in the rulemaking and to encourage more useful participation from those who do. Agencies
45 considering enhanced public engagement for a particular rule must carefully evaluate many
46 factors, including agency resources, rule complexity, and the prevalence of otherwise missing
47 information or views, before deciding whether to pursue additional outreach. Furthermore, even
48 after agencies decide to undertake enhanced public engagement when developing their rules,
49 they must decide what methods are best suited to accomplish their outreach goals. Each method
50 may offer distinct benefits but come with varying costs or other limitations. Agencies should
51 consider how a specific method of public engagement will assist them in obtaining the type of
52 information and feedback they seek. Agencies should also consider the best timing for each of
53 their public engagement efforts. Finally, with whatever public participation method an agency
54 chooses, it should demonstrate a sincere desire to learn from those who participate and should
55 display an open-mindedness about relevant issues.

56 This Recommendation highlights three main methods for supplementing the notice-and-
57 comment process. First, agencies can publish “requests for information” (RFIs) or “advance

⁷ For a discussion of general public engagement plans, *see* Sant’Ambrogio & Staszewski, *supra* note 1, at 128–133. For examples of general public engagement plans, *see* U.S. DEP’T OF THE INTERIOR, NATL’ PARK SERVS., 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, *see* Sant’Ambrogio & Staszewski, *supra* note 1, at 133–139.



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58 notices of proposed rulemaking” (ANPRMs) in the *Federal Register* to request data, comments,
59 or other information on regulatory issues before proceeding with a specific regulatory proposal.⁹
60 Although these two mechanisms are similar, RFIs are generally used when an agency is
61 determining whether to proceed at all and, if so, what general approach to take.¹⁰ ANPRMs are
62 generally used when the agency has formulated one or more tentative regulatory options, and
63 seeks input on which option to propose.¹¹ RFIs and ANPRMs may be particularly beneficial
64 when agencies seek additional information to identify areas of concern, compare potential
65 approaches to problems, and evaluate and refine regulatory proposals. RFIs and ANPRMs
66 provide agencies with additional opportunities to solicit information without organizing costly or
67 potentially burdensome face-to-face engagement efforts.

68 Second, agencies may engage in targeted outreach to identify and engage affected
69 interests that might not otherwise participate in the rulemaking.¹² RFIs and ANPRMs are useful
70 tools to enhance participation early in the rulemaking process. However, because they are
71 published in the *Federal Register*, they may only reach affected interests that are already likely
72 to participate in the rulemaking. Targeted outreach efforts allow agencies to seek information
73 from individuals and entities that may not read the *Federal Register* or otherwise be unaware of
74 or unable to participate effectively in the notice-and-comment process. To engage in targeted
75 outreach, an agency identifies affected interests that are not likely to participate and undertakes
76 efforts to notify those interests of the rulemaking and to encourage and facilitate their
77 participation. Targeted outreach can take on a variety of forms, and agencies tailor these efforts
78 to specific affected interests and rules.

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 Sant’Ambrogio & Staszewski, *supra* note 1, at 47–48, 60–61 (discussing the use of RFIs by the Department of Energy, the Consumer Financial Protection Bureau, 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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79 Third, agencies may also convene meetings of affected interests to obtain useful feedback
80 on potential regulatory alternatives and to elicit information through a process of interactive
81 dialogue. Meetings can educate participants and allow a variety of affected interests to consider
82 and respond to differing views, thereby informing decision-makers in the process. When all goes
83 well, meetings can foster the generation of new ideas and creative solutions that would be missed
84 when participants simply assert their existing positions. They also can lead to some change in
85 participants' positions in light of a greater understanding of others' concerns.

86 Agencies must carefully plan meetings to help ensure that they will elicit the type of
87 information sought.¹³ An agency can structure a meeting to generate open-ended dialogue,
88 allowing participants the opportunity to raise their own concerns or issues. Alternatively, an
89 agency can structure a meeting so that the agency's priorities dictate the agenda or discussion
90 topics. Although meetings, whether designated as focus groups, workshops, hearings, or listening
91 sessions, can vary in their format, they would not necessitate compliance with FACA or the
92 Paperwork Reduction Act (PRA).¹⁴

93 Agencies should make information about their individual rulemakings available on their
94 websites. This will help ensure that members of the public are adequately informed about
95 agencies' rulemaking plans and can participate thoughtfully in response to RFIs, ANPRMs,
96 meeting opportunities, and other forms of public engagement.¹⁵ As recommended below, any
97 contemplated rule that an agency deems appropriate for enhanced public engagement should
98 presumptively be listed on its own webpage or a section of a page on an agency's website 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); *see also id.* at 75–76 (discussing public meetings in general and EPA's use of shuttle diplomacy and technical workshops).

¹⁴ 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).

¹⁵ For example, the Consumer Financial Protection Bureau posted prototypes of disclosure forms on its website and sought targeted feedback when it developed rules governing disclosure requirements for home mortgages. *See id.* at 77.



99 can contain pertinent background information on the contemplated rule. Dedicated space on
100 agencies' websites for these rules can help agencies inform and engage affected interests
101 throughout the rulemaking process.¹⁶

RECOMMENDATION

Public Engagement Planning

- 102 1. Agencies should develop and make available on their webpages general plans for public
103 engagement in their rulemaking. Such plans should include consideration of:
- 104 a. the agency's goals and purposes in engaging the public;
 - 105 b. the types of individuals or organizations with whom the agency seeks to engage,
106 including experts and any affected interests that may be absent from or
107 insufficiently represented in the notice-and-comment rulemaking process;
 - 108 c. how such types of individuals or organizations can be motivated to participate;
 - 109 d. what type(s) of information the agency seeks from its public engagement;
 - 110 e. how this information is likely to be obtained;
 - 111 f. when public engagement efforts should occur;
 - 112 g. the range of methods for public engagement available to the agency; and
113 h. what the agency will do with the information.
- 114 2. Agencies' public engagement plans should be used to inform public engagement with
115 respect to specific rulemakings. Planning for public engagement for specific rules would
116 best take place at the earliest feasible part of the rulemaking process.
- 117 3. In determining whether and how to enhance or target public engagement prior to the
118 publication of a specific proposed rule, agencies should consider factors, such as:
- 119 a. the complexity of the rule;
 - 120 b. the potential magnitude and distribution of the costs and benefits of the rule;
 - 121 c. the interests that are likely to be affected and the extent to which they are likely to
122 be affected;

¹⁶ See generally Recommendation 2011-8, *supra* note 5.



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- 123 d. the information needed and the potential value of experience or expertise from
124 outside the agency;
- 125 e. whether specific forms of enhanced or targeted public engagement efforts are
126 likely to provide useful information, including from experts, individuals with
127 knowledge germane to the proposed rule who do not typically participate in
128 rulemaking, or other individuals with relevant views that may not otherwise be
129 expressed;
- 130 f. any challenges involved in obtaining informed participation from affected
131 interests likely to have useful information, including the challenge of providing
132 rulemaking materials in language and form comprehensible to nonexperts whose
133 participation is being sought;
- 134 g. whether the rule is likely to be controversial;
- 135 h. the time and resources available for enhanced or targeted public engagement; and
136 i. whether additional legal constraints, for example, the Federal Advisory
137 Committee Act or the Paperwork Reduction Act, might apply.
- 138 4. Agencies should consider assigning or retaining personnel with public engagement
139 training and experience to participate in both the general public engagement planning
140 process as well as in planning for specific rules. Agencies should support or provide
141 opportunities to train employees to understand and apply recognized best practices in
142 public engagement.

Timing and Methods of Public Engagement

- 143 5. Public engagement should generally occur as early as feasible in the rulemaking process,
144 including when identifying problems and setting regulatory priorities.
- 145 6. *Requests for Information and Advance Notices of Proposed Rulemaking.*
- 146 a. Agencies should consider using requests for information (RFIs) and advance
147 notices of proposed rulemaking (ANPRMs) when they need to:
- 148 i. gather diffuse information or data about the existence, magnitude, and
149 nature of a regulatory problem,



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- 150 ii. evaluate potential strategies to address a regulatory issue,
151 iii. choose between more than one regulatory alternative, or
152 iv. develop and refine a proposed rule.
- 153 b. When using RFIs and ANPRMs, agencies should
- 154 i. communicate their open-mindedness with respect to the matters on which
155 they seek public comments,
156 ii. pose detailed questions aimed at soliciting the information they need, and
157 iii. indicate that they are open to input on other questions and concerns.
- 158 c. Agencies should review any comments they receive in response to RFIs and
159 ANPRMs and, when issuing any proposed rule that follows an RFI or ANPRM,
160 explain how these comments informed or influenced the development of the
161 subsequent proposal.
- 162 7. *Targeted Outreach.* When agencies believe that their public engagement may not reach
163 all affected interests, they should consider conducting outreach that targets experts not
164 already likely to be involved, individuals with knowledge germane to the proposed rule
165 who do not typically participate in rulemaking, and members of the public with relevant
166 views that may not otherwise be represented. These targeted outreach efforts should
167 include:
- 168 a. Proactively bringing the rulemaking to the attention of affected interests that do
169 not normally monitor the agency's activities;
- 170 b. Overcoming or minimizing possible geographical, language, resource, or other
171 barriers to participation;
- 172 c. Motivating participation by explaining the nature of the rulemaking process and
173 how the agency will use public input; or
- 174 d. Providing information about the issues and questions raised by the rulemaking in
175 an accessible and comprehensible form and manner, so that potential participants
176 are able to provide focused, relevant, and useful input.
- 177 8. *Meetings with Affected Interests.*



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- 178 a. Agencies should consider convening meetings of interested persons to obtain
179 feedback on their priorities and potential regulatory alternatives, particularly when
180 they are unlikely to obtain the same information from written responses to RFIs,
181 ANPRMs, or NPRMs. When conducting such meetings, agencies should:
- 182 i. determine whether to target and invite specific participants or open the
183 meeting to any interested member of the general public;
 - 184 ii. determine whether to conduct the meeting in person, online, or both;
 - 185 iii. recruit participants based on the nature of the rule at issue and the type of
186 feedback that they seek;
 - 187 iv. consider using a trained facilitator or moderator from inside the agency or
188 hire one from outside the agency, as appropriate;
 - 189 v. provide background materials for the participants that clearly explain
190 relevant issues and the primary policy alternatives in language and form
191 comprehensible to all types of participants the agency seeks to engage;
 - 192 vi. disseminate questions to participants in advance, including either open-
193 ended questions or questions aimed at soliciting specific information
194 agencies need to make informed decisions;
 - 195 vii. determine whether and how to structure interactive dialogue among
196 participants;
 - 197 viii. consider recording the session and make that recording available on a
198 website dedicated to that rulemaking; and
 - 199 ix. prepare a report summarizing the results.
- 200 b. Agency representatives should take an open-minded stance during meetings with
201 affected interests.
- 202 c. When a rulemaking is particularly important or controversial or the agency seeks
203 to promote clarity and learning through dialogue, the agency should consider
204 facilitating enhanced deliberation among interested persons by conducting
205 meetings in a format that permits interactive discussion among participants.



Dedicated Webpages for Rulemaking Information

- 206 9. When agencies plan additional public engagement in connection with a rule, they should
207 create a dedicated webpage for that rule, launched as early as possible. Agencies should
208 seek to make rulemaking information comprehensible for individuals and groups that do
209 not typically participate in the rulemaking process, such as by using audiovisual materials
210 to supplement more traditional written information in appropriate situations. Dedicated
211 webpages for rules that involve enhanced public engagement should provide information
212 such as:
- 213 a. the status of the rulemaking initiative and opportunities to participate in the
214 process;
 - 215 b. an explanation of the rulemaking process, the role of public participation, and the
216 qualities of a useful comment;
 - 217 c. substantive information about the issues under consideration, presented in forms
218 that are readable and comprehensible by non-experts; and
 - 219 d. summaries of any results of prior public engagement efforts.