



Administrative Conference Recommendation 2023-2

Virtual Public Engagement in Agency Rulemaking

Adopted 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,

¹ See, e.g., 5 U.S.C. § 553(c).

² 88 Fed. Reg. 21,879 (Apr. 6, 2023).

³ 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).



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or agency rule or policy requires one or because such engagement would improve agency decision making and promote public participation in regulatory policymaking.⁴ 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.⁵

When agencies engage with the public, they must ensure that they meet all legal accessibility requirements.⁶ Effective public engagement also requires that agencies identify and address 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.⁷

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.⁸ By reducing some barriers that people—especially members of historically underserved communities—encounter, virtual public engagement can help broaden participation in agency

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

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

⁶ See, e.g., Rehabilitation Act of 1973, § 508, 29 U.S.C. § 794d; Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861; Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021); Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 11, 2000).

⁷ E.g., Admin. Conf. of the U.S., Recommendation 2021-3, *Early Public Input on Regulatory Alternatives*, ¶ 3, 86 Fed. Reg. 36,082, 36,082–36,083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, ¶ 1(b), 84 Fed. Reg. 2146, 2147 (Feb. 6, 2019).

⁸ 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).



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rulemakings.⁹ At the same time, virtual engagements may present barriers to access for some people, such as low-income individuals for whom it may be difficult to obtain access to high-quality personal devices or private internet services, individuals in rural areas who lack access to broadband internet, individuals whose disabilities prevent effective engagement in virtual proceedings or make it difficult to set up and manage the necessary technology, and individuals with limited English proficiency. Some individuals may also have difficulty, feel uncomfortable, or lack experience using a personal device or internet-based videoconferencing software to participate in an administrative proceeding.¹⁰

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 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. Agencies that engage in rulemaking should, when feasible and appropriate, utilize internet-based videoconferencing software as a means of broadening engagement with

⁹ Kazia Nowacki, *Virtual Public Engagement in Agency Rulemaking* (May 25, 2023) (report to the Admin. Conf. of the U.S.).

¹⁰ *Cf.* Recommendation 2021-4, *supra* note 8.



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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 potentially interested members of the public and facilitates effective participation from those persons, including groups that are affected by the rulemaking and may otherwise have 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;



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- 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 services such as 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 link to:
 - a. 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. 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



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- 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 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 participants’ 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 will or will not 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.



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12. As agency resources allow, 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 available staff members.

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, in a timely manner, 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.

Fees

15. Agencies should not assess fees on the public for virtual public engagement.