



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

ANDREW FOIS
Chair

November 17, 2022

SENT VIA EMAIL

Mr. Dominic Mancini
Acting Administrator
Office of Information and Regulatory Affairs
Office Management and Budget
725 17th Street NW
Washington, DC 20503

Re: Opening the Federal Regulatory Process to More Voices and the U.S. National
Action Plan for Open Government

Dear Mr. Mancini:

I offer this comment as Chair of the Administrative Conference of the United States (ACUS), an independent agency within the executive branch.

Public participation is an integral part of federal agency rulemaking and central to ACUS's statutory mission. ACUS has issued dozens of recommendations and undertaken still more studies to, in the language of its authorizing statute, "promote more effective public participation and efficiency in the rulemaking process." 5 U.S.C. § 591(2). Recommendations reflect non-partisan consensus among the representatives of the many federal agencies who appoint members to ACUS and the forty or so public members (leading law professors, practitioners, and other experts) who together comprise ACUS's Assembly. *See* 5 U.S.C. § 593.

This letter describes several recommendations and other ACUS resources relevant to your office's November 17, 2022, Virtual Public Engagement Session for the U.S. Open Government National Action Plan. A more detailed list is available online at www.acus.gov/public-participation. I encourage the Office of Information and Regulatory Affairs (OIRA) to consider these and other ACUS resources as it works to improve public participation in the federal regulatory process, including participation from underserved communities.

Providing Information to Help Members of the Public Participate in the Rulemaking Process

The notice for the November 17 meeting asks: "What information would help members of the public better participate in the rulemaking process, especially members of the public from underserved communities?" Many ACUS recommendations offer best practices to ensure that

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members of the public, especially members of underserved communities, have the information they need to participate effectively in agency rulemaking processes.

ACUS recommends that agencies develop rules and policies on public engagement and make them publicly available. In developing rules and policies, agencies should consider the needs of individuals or groups that “may be absent from or insufficiently represented in the notice-and-comment rulemaking process.” Agencies should also engage the public when developing rules and policies on public engagement. *See, e.g., [Recommendation 2020-1, Rules on Rulemaking](#), 86 Fed. Reg. 6613; [Recommendation 2018-7, Public Engagement in Rulemaking](#), 84 Fed. Reg. 2146 (Feb. 6, 2019).*

To educate the public, ACUS recommends that agencies explain in accessible language how the rulemaking process works and provide guidance for the public on how to submit effective comments. *See, e.g., [Recommendation 2020-1, Rules on Rulemaking](#), 86 Fed. Reg. 6613; [Recommendation 2011-2, Rulemaking Comments](#), 76 Fed. Reg. 48,791 (Aug. 9, 2011).*

ACUS also recommends that agencies make information about specific rulemakings widely available and comprehensible for individuals and groups that do not typically participate in the rulemaking process. Agencies can also leverage technology (e.g., websites, social media) to publicize opportunities for participation. Rulemaking materials, including public comments and supporting materials, should also be easily accessible. *See, e.g., [Recommendation 2020-1, Rules on Rulemaking](#), 86 Fed. Reg. 6613; [Recommendation 2018-7, Public Engagement in Rulemaking](#), 84 Fed. Reg. 2146 (Feb. 6, 2019); [Recommendation 2018-6, Improving Access to Regulations.gov’s Rulemaking Dockets](#), 84 Fed. Reg. 2143 (Feb. 6, 2019); [Recommendation 2013-5, Social Media in Rulemaking](#), 78 Fed. Reg. 76,269 (Dec. 17, 2013); [Recommendation 2013-4, Administrative Record in Informal Rulemaking](#), 78 Fed. Reg. 41,358 (July 10, 2013).*

Additionally, ACUS encourages agencies to consider strategies for improving notice of significant regulatory developments after they are adopted, particularly with respect to members of historically underserved communities. *See [Recommendation 2022-2, Improving Notice of Regulatory Changes](#), 87 Fed. Reg. 39,798 (July 5, 2022).*

In addition to these recommendations, ACUS convened forums last year to address [Underserved Communities and the Regulatory Process](#) and [Enhancing Public Input in Agency Rulemaking](#). Government officials, community advocates, and academic experts discussed ways to promote public participation in the rulemaking process, for example through broader public engagement, targeted outreach to affected communities, and improved guidance about how the rulemaking process works and how members of the public can participate in it. OIRA may wish to consider those discussions in developing the U.S. Open Government National Action Plan. Transcripts and recordings of all panels are available on ACUS’s website.

Engaging Members of the Public Early in the Rulemaking Process

The notice for the November 17 meeting asks: “How can Federal agencies better engage members of the public early on when planning for regulations, for instance, when agencies are developing regulatory priorities?”

ACUS encourages agencies to engage with the public “as early as feasible in the rulemaking process,” to identify problems, set regulatory priorities, and consider regulatory alternatives. Early public engagement can result in a better-informed notice-and-comment process, facilitate agency decision making, and improve the quality of agency rules. Several recommendations describe best practices for early engagement with members of the public, including members of traditionally underrepresented groups, such as by using social media, holding listening sessions, conducting direct outreach to affected communities, and soliciting written comments. *See, e.g., Recommendation 2018-7, Public Engagement in Rulemaking*, 84 Fed. Reg. 2146 (Feb. 6, 2019); *Recommendation 2021-3, Early Input on Regulatory Alternatives*, 86 Fed. Reg. 36,082 (July 8, 2021); *Recommendation 2013-5, Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

White House Review

The notice for the November 17 meeting asks: “How can the White House—through OIRA—better facilitate engagement from members of the public when reviewing regulations?” Many of the recommendations described above identify best practices for facilitating public engagement that OIRA might encourage agencies to follow when they engage in rulemaking.

OIRA might also wish to consider the second panel of ACUS’s 2021 *Forum on Underserved Communities and the Regulatory Process*. Panelists, including several former senior OIRA officials, discussed different strategies for promoting engagement by members of underserved communities in the rulemaking process, including the role of OIRA in developing and implementing them.

Administrative Burdens

OIRA asks: “What types of public engagement can help agencies to better identify—and reduce—administrative burdens faced by the public when designing regulations affecting access to benefit programs?” ACUS has issued many recommendations intended to promote fairness, efficiency, and accessibility in agency adjudication programs. Many of those recommendations are available at www.acus.gov/adjudication.

ACUS is also currently undertaking a project entitled *Identifying and Reducing Burdens in Administrative Processes*, which is expected to result in a Recommendation to be adopted by the ACUS Assembly in 2023. The project will examine best practices, such as public engagement and data analysis, that agencies can use to identify unnecessary burdens that members of the public face when they engage with administrative programs or participate in

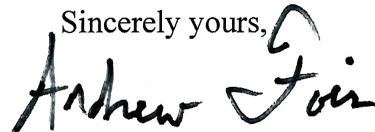
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administrative processes. It will also examine strategies agencies can use to reduce unnecessary burdens, such as streamlining processes and digitizing services.

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I commend OIRA for organizing the November 17, 2022, Virtual Public Engagement and appreciate the opportunity to provide information to inform development of the U.S. Open Government National Action Plan. ACUS welcomes any questions OIRA may have about the above-cited or other ACUS materials on adjudication. Please have OMB staff direct any questions to Jeremy Graboyes, Acting Research Director, at jgraboyes@acus.gov.

Sincerely yours,

A handwritten signature in black ink that reads "Andrew Fois". The signature is written in a cursive style with a large, stylized initial "A".

Andrew Fois
Chairman of the Administrative Conference