

Dec. 11, 2022

To: OIRA, opengov@ostp.eop.gov

Re: Opening the Federal Regulatory Process to More Voices: OIRA to Hold Open Government Engagement Session This Month, <https://www.whitehouse.gov/omb/briefing-room/2022/11/07/opening-the-federal-regulatory-process-to-more-voices-oira-to-hold-open-government-engagement-session-this-month/>

To Whom It May Concern: In response to OIRA's request for input concerning suggestions for bolstering public engagement, I write to suggest the following:

- **A. Enhance Use of Technology Tools to Collect Public Comments and Enhance Public Engagement in Rulemaking;**
- **B. Encourage Agencies to Provide Additional Time for Comments on Rulemakings, Requests for Information and other Opportunities for Input;**
- **C. Consider providing agencies with staff and funding to encourage public engagement through Offices of Public Participation; and**
- **D. Support Additional Study Regarding Use of Negotiated Rulemaking.**

A. **Enhance Use of Technology Tools to Collect Public Comments and Enhance Public Engagement in Rulemaking:** Despite the availability of new tools for collecting public comments and opinions and recommendations from the Administrative Conference of the United States (ACUS) and others to enhance public engagement in rulemaking, the process in most cases seems little changed from decades ago.¹ Proposed Rules, Advance Notices of Proposed Rulemaking, Requests for Information and similar documents are often issued with limited public engagement throughout the process. Though Regulations.gov permits collection of comments electronically there is little or no interaction among stakeholders who submit comments through the commenting process. Agency rulemaking staff and subject matter experts review and respond to comments largely on their own without interacting with commenters.

In the past, working with the Department of Transportation, the Cornell e-rulemaking Initiative pioneered Regulation Room.² The Site provided explanations and summaries of rules in plain language, allow hyperlinking to external references and permit users to comment on sections of these documents and see in real-time comments from others. An archived example from an air travel accessibility rule is pictured below.

By contrast, comments currently to Regulations.gov are either typed on the Site or scanned in or uploaded as separate documents. Sometimes documents are posted immediately and other times at or after the end of the comment period. Each comment must be reviewed separately while also referencing the rule or document that is the subject of the comment. This process obstructs meaningful interaction among commenters and may make it more difficult for 'average' public

¹ <https://www.acus.gov/meetings-and-events/event/forum-enhancing-public-input-agency-rulemaking>; <https://www.acus.gov/research-projects/public-engagement-rulemaking>, <https://www.acus.gov/recommendation/social-media-rulemaking>

² Solivan, Jackeline and Farina, Cynthia R., "Regulation Room: How the Internet Improves Public Participation in Rulemaking" (2013). Cornell e-Rulemaking Initiative Publications. 13. <https://scholarship.law.cornell.edu/ceri/13>. See also the archived Regulation Room site at: <http://www.regulationroom.org/>.

commenters who do not have deep knowledge of the issues to participate or leading to ‘mass comments’ that are not on point.³

Using new technologies would not be easy for federal agencies to accomplish. Funding, staff, additional rulemaking or document review and revision time and political support would be needed to successfully adopt these tools. But social media communities sustain a vibrant and interesting dialogue that is largely missing from the current rulemaking process. Somewhere between the ‘wild west’ (at times) of social media such as Reddit, Twitter and Facebook and the current fairly abstract and formal rulemaking and commenting process lies a middle ground that takes advantage of new technologies and means of information-sharing and interaction while maintaining some balance of moderation, process and decorum. Reconsidering use of tools similar Regulation Room may help find this balance.

The screenshot shows the Regulation Room website interface. At the top, there's a navigation bar with 'Regulation Room' and links to 'Home', 'Learn More', 'About', and 'FAQ'. Below this, the 'Air Travel Accessibility' section is highlighted. A grid of issues is shown, including 'Websites: Accessibility standards (42 comments)', 'Kiosks: Accessibility standards (72 comments)', 'Websites: Benefits & costs of accessibility (15 comments)', 'Kiosks: Benefits & costs of accessibility (13 comments)', and 'Websites: Which? What content? (7 comments)'. The 'Agency Proposal' section for 'Kiosks: Benefits & costs of accessibility' is expanded, showing a list of issues: '\$1. Importance of good data', '\$2. Benefits: Travelers with disabilities', '\$3. Benefits: Airlines & airports', '\$4. Benefits to other travelers', and '\$5. Costs to airlines & airports'. A message states 'The discussion is now closed. The final summary is available.' Below this, the content for '\$1. Importance of good data' is displayed, discussing DOT's 2004 rulemaking proposal and the need for more data. On the right, the 'Peoples' Comments (13)' section shows a list of comments with counts: '\$1. Importance of good data' (0 comments), '\$2. Benefits: Travelers with disabilities' (2 comments), '\$3. Benefits: Airlines & airports' (0 comments), '\$4. Benefits to other travelers' (1 comment), and '\$5. Costs to airlines & airports' (10 comments). The bottom of the page shows a Windows taskbar with various application icons and a system clock indicating 2:10 PM on 12/11/2022.

Archived Air Travel Accessibility Page, Regulation Room

- B. **Encourage Agencies to Provide Additional Time for Comments on Rulemakings, Requests for Information and other opportunities for input:** Typically, in reviewing Regulations.gov most proposed rules and RFIs seem to provide about 60 calendar days for public comments. In

³ <https://www.theregreview.org/2021/12/21/herz-mass-comments-costs/>

some cases, as little as 30 calendar days may be provided to comment on a proposed rule (the minimum period permitted under the Administrative Procedure Act).⁴ On occasion, agencies publish notices extending comment periods when there is considerable interest. Some members of Congress and others have encouraged agencies to permit 90-120 days for comments on complex rulemakings though it is not clear how this is defined (all rules and many RFIs and other documents deal with complex issues).⁵ Agencies sometimes have tight statutory deadlines or other reasons for providing a shorter comment period. However, OIRA can encourage agencies to provide 90 days for RFIs and rulemakings, especially those dealing with more complex or controversial issues. A longer comment period provides more time for members of the public and smaller organizations to learn about the proposal or request for input, speak to others and develop their comments.

- C. **Consider providing agencies with staff and funding to encourage public engagement through Offices of Public Participation:** While many, perhaps most agencies, have communications offices and staff, in many cases the focus of these offices may primarily be on developing publications and written materials, updating Web sites, and working with media and formal stakeholder groups. Offices may not be able to directly respond to public inquiries or specifically reach out to involve the public in rulemaking and other potential opportunities for input. The Federal Energy Regulatory Commission (FERC) in 2021 may have been the first agency to set up a new Office of Public Participation (OPP) (<https://www.ferc.gov/OPP>) with a mission to “assist members of the public who wish to learn more about, and participate in, FERC proceedings.”⁶ This Office, which appears to have a staff of six, has already led a training to support public participation in the regulatory process. Advocacy groups have made several recommendations they believe will bolster the OPP’s effectiveness, such as ensuring its independence within FERC, supporting early outreach to key stakeholders such as landowners impacted by the FERC, reimbursing some participants for the costs of their participation in the regulatory process and appointing a tribal liaison. If successful, the FERC’s office could serve as a model for other Departments and Agencies.
- D. **Support Additional Study Regarding Use of Negotiated Rulemaking.:** Negotiated rulemaking is a process through which agencies work with key stakeholders to develop by committee an acceptable proposed regulation that then is issued for public notice and comment.⁷ While not without challenges, such as selecting a representative and balanced committee and intersections with OIRA and advisory committee regulatory requirements, negotiated rulemaking can be one means of enhancing public engagement in rulemaking, ACUS notes. For instance, the public can attend and follow committee hearings as the rule is being made and (potentially) contact representatives on the committee. That said, the process has been controversial and, outside of the Environmental Protection Agency, Department of Education and Occupational Safety and Health Administration, rarely used.⁸ Some authors have suggested

⁴ <https://www.law.cornell.edu/uscode/text/5/553>

⁵ <https://center-forward.org/the-secs-comment-periods-for-new-regulations/>; <https://www.sec.gov/news/press-release/2022-82>

⁶ <https://www.ferc.gov/news-events/news/ferc-establishes-office-public-participation>; See also, New Report: Democratizing Our Regulatory System Is More Important Than Ever. Can FERC Lead the Way? <https://progressivereform.org/cpr-blog/new-report-democratizing-our-regulatory-system-can-ferc-lead-the-way/>; <https://www.nrdc.org/experts/gillian-giannetti/4-keys-successful-ferc-office-public-participation>; <https://www.mjbradley.com/reports/establishing-federal-energy-regulatory-commission-office-public-participation-review>; <https://therevelator.org/ferc-energy-equity/>; <https://www.ferc.gov/OPP>

⁷ https://sourcebook.acus.gov/wiki/Negotiated_Rulemaking_Act/view; <https://www.acus.gov/recommendation/negotiated-rulemaking-and-other-options-public-engagement>

⁸ <https://www.everycrsreport.com/reports/RL32452.html>; <https://www.podziba.com/publications>; <https://www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html>; [Page 3](https://ticas.org/accountability/what-comes-</p>
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the Food and Drug Administration and other agencies consider additional use of negotiated rulemaking but to date only a small percentage of rules are developed with negotiated rulemaking at a subset of agencies.⁹ OIRA could support additional study of negotiated rulemaking, including how to train and support agency staff (as the process differs from traditional notice-and-comment rulemaking), ensuring public participation and transparency and identifying which rules could best be developed using this approach. (Congress in some cases has required use of negotiated rulemaking but in other cases this can be initiated by an agency).¹⁰

Thank you for considering these suggestions and comments.

Sincerely,



Mitchell Berger, Comment Submitted 12.11.22: mazruia@hotmail.com

Note: Please note that I am a federal/HHS employee. However, I am submitting these suggestions in my personal/private capacity. The views expressed are mine only and should not be imputed to other individuals nor to any public or private entity.

next-accountability-issues-in-negotiated-rulemaking/; <https://www.aei.org/research-products/report/why-its-time-to-engage-with-the-department-of-educations-negotiated-rulemaking/>; <https://www.federalregister.gov/documents/2021/10/04/2021-21505/negotiated-rulemaking-committee-public-hearings>

⁹ Kobick J. Negotiated rulemaking: the next step in regulatory innovation at the Food and Drug Administration? Food Drug Law J. 2010;65(2):425-45, Marie C. Boyd, Unequal Protection under the Law: Why FDA Should Use Negotiated Rulemaking to Reform the Regulation of Generic Drugs, 35 Cardozo L. Rev. 1525 (2013-2014), https://scholarcommons.sc.edu/law_facpub/222/.

¹⁰ See e.g., <https://www.federalregister.gov/documents/1997/05/23/97-13718/health-care-programs-fraud-and-abuse-intent-to-form-the-negotiated-rulemaking-committee-for-the> and references to the Department of Education and other agencies in references cited above.