# Transparency and Public Participation in the Rulemaking Process

***A Nonpartisan Presidential Transition Task Force Report***

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# Executive Summary

Each year, federal administrative agencies create thousands of new rules that collectively deliver major benefits to society, such as in terms of consumer protection, civil rights, and public health and safety. Many of these rules also impose substantial costs on the economy. Because agency rules have such significant impacts, the procedures agencies use to engage in rulemaking are themselves significant. Depending on how rulemaking procedures are designed, they can affect both the quality and legitimacy of agencies' rules, thereby shaping outcomes for society overall. Procedures promote quality decisions by helping generate rules that advance overall public welfare and comport with agencies' statutory mandates. Procedures promote legitimacy when they help ensure that agencies and their staffs act fairly, approaching regulatory problems with an open mind and listening respectfully to a broad spectrum of public perspectives.

## Transparency and Public Participation

"Transparency" and "public participation" represent two features of the rulemaking process that can enhance rulemaking quality and legitimacy. Transparency refers to public access to information held by government rule makers as well as information about their decision making. Public participation encompasses varied opportunities for citizens, nongovernmental organizations, businesses, and others outside the federal government to contribute to and comment on proposed rules. Both transparency and public participation can promote democratic legitimacy by strengthening the connections between government agencies and the public they serve. Both can also help improve the quality of agency rulemaking. Transparency helps ensure meaningful and informed public participation, and meaningful and informed public participation informs agency rule makers.

## The Task Force on Transparency and Public Participation

The Task Force on Transparency and Public Participation, an independent committee initiated at the behest of OMB Watch as part of a larger regulatory reform initiative,[*] organized a series of meetings to discuss how regulators can enhance these two features of agency rulemaking. This report summarizes and expands upon the Task Force's deliberations by addressing how transparency and public participation can further overarching regulatory goals, by identifying current problems in the transparency and participatory nature of notice-and-comment rulemaking, and by making specific, fully implementable recommendations for procedural reform.

[*] Although commissioned by OMB Watch for its regulatory reform project, this report was neither vetted nor approved by OMB Watch or its project steering committee. Instead, this report was used to inform the project staff in its preparation of materials and recommendations to the steering committee.

## Existing Concerns About Agency Rulemaking

Although the Task Force recognized that the U.S. regulatory process is already relatively transparent and participatory, at least compared with other countries, the Task Force nevertheless identified five broad concerns about agencies' current rulemaking practices. First, agencies are too often neither transparent nor participatory at the earliest stages of rulemaking—even though much of what will become the agency's final rule gets developed well before the agency issues a Notice of Proposed Rulemaking (NPRM) and invites public comment. Second, agencies too often fail to reach out to all interest groups in an even-handed manner—too frequently either shying away from meeting with any external groups at all, or meeting much more with groups representing just one side of a regulatory issue. Third, when agencies do open themselves up for public input during their comment periods, they too often fail to structure public participation in a way that would allow for the benefits of dialogue and interaction between different external commenters. Fourth, agencies have not taken full advantage of the Internet and information technology to ensure well-functioning, timely public access to the information that would both increase public understanding of the rulemaking process and allow the public to contribute to it better. Finally, some concern exists that agencies' stated rationales too often amount to post hoc rationalizations rather than transparent accounts of agency officials' true motivations for policy choices.

## Task Force Recommendations

Having identified these concerns, the Task Force next developed a set of recommendations intended to address them. In this report, the Task Force's recommendations are presented in three categories: (1) Transparency, (2) Public Participation, and (3) Strategic Management. All the recommendations are listed in full in Appendix 1.

Transparency Recommendations: The transparency recommendations focus on improving the means by which agencies decide what information to release, with the ultimate goal of making sure that publicly releasable information is made available in a timely manner and in a way that allows the public meaningful access, primarily through use of the Internet. Specific recommendations include:

- Making available on-line all records that an agency or court has determined to be releasable under the Freedom of Information Act (FOIA)
- Adopting best practices for establishing rulemaking dockets when agencies begin working on new rules and promptly including in these dockets all relevant background information
- Improving the searchability of information available through the Regulations.gov portal and ensuring that data in this system are accurate and timely
- Creating procedures for public interest groups to qualify for standing fee exemptions under FOIA
- Clarifying legal protections afforded to whistleblowers and streamlining the processing of federal employee whistleblower claims

Public Participation Recommendations: The public participation recommendations focus on ensuring that all interests are represented in the rulemaking process and that these parties are represented at an early stage in that process. Specific recommendations include:

- Encouraging agencies to experiment with and learn from more interactive public comment processes
- Creating an agency culture that promotes communications with external actors, so long as the existence of those communications is disclosed in agency dockets
- Maintaining "open door" policies or taking affirmative steps to ensure broad-based involvement early in the development of new rules
- Reducing barriers to the use of federal advisory committees

Strategic Management Recommendations: The strategic management recommendations seek to encourage agencies, and the executive branch as a whole, to examine their own practices and to develop ways in which they can continuously improve and assess their transparency and public participation policies. Specific recommendations include:

- Encouraging agencies to develop "public participation plans" to assess and strive to improve on a regular basis their own progress on transparency and public participation
- Reauthorizing and adequately funding the Administrative Conference of the United States (ACUS), so as to reinstate this institutional mechanism for evaluating reforms and developing recommendations for additional improvements
- Planning for program evaluation before the above recommendations (or other reforms) are implemented, so as to ensure the development of sound empirical measures that will inform subsequent program evaluations

## Conclusion

Enhancing transparency and public participation in the rulemaking process can improve the quality and legitimacy of government regulation. The Task Force believes its recommendations would go a long way to addressing deficiencies in existing rulemaking practices. Its recommendations represent important priorities for the next administration to ensure that government regulations serve the American public effectively and are adopted through a fair and open process.

# Preface

Calls for reforming the rulemaking process come from many quarters. The existence of such calls testifies to regulation's importance to the economy and overall social welfare. That these calls come from many quarters shows how society's need for legitimate and high-quality regulatory decisions cannot be claimed by a single political party, interest group, or ideological perspective.

In an effort to elicit ideas for advancing society's overall interest in the rulemaking process through transparency and public participation, our Task Force undertook a probing process to identify ways to improve these aspects of rulemaking. The Task Force sought to provide an independent assessment of problems with the current rulemaking process, to engage in a detailed dialogue and exchange of views about the causes of these problems, and to identify possible solutions that would better advance society's need for procedural legitimacy and substantive quality in government regulation.

To enable the Task Force to draw upon a broad set of experiences inside and outside of government, I invited a diverse collection of professionals to participate as Task Force members. With the members' varied backgrounds came varying perspectives on the general issues of administrative law that relate to rulemaking, as well as specifically on transparency and public participation in the rulemaking process. As a result, the Task Force discussions we had together were both insightful and robust. To those readers accustomed to policy conversations in Washington, D.C., with more heat than light, it may come as a surprise to know that, despite members' differences, Task Force deliberations were also extremely respectful and refreshingly constructive.

The impetus for this Task Force came from OMB Watch, a Washington, D.C., based organization interested in regulatory issues. As a prelude to the Presidential elections in 2008 and the transition to a new administration in 2009, OMB Watch instituted what it has called the "Advancing the Public Interest Through Regulatory Reform Project." The Project is coordinated by a Steering Committee composed of academics and practitioners from outside of OMB Watch. To inform its own deliberations about recommendations that it will release in a separate report, the Steering Committee commissioned the establishment of several Task Forces. In addition to the Task Force on Transparency and Public Participation, the Steering Committee established three additional task forces on "scientific integrity," "regulatory tools," and "government management."

Although this Task Force report is intended to assist the Steering Committee of the OMB Watch project, it is also designed as a stand-alone statement independent of the Steering Committee and OMB Watch. The report's content was determined by the Task Force's deliberations alone. It was neither vetted nor approved by OMB Watch or the Steering Committee, but instead was used to inform OMB Watch staff in their preparation of materials and recommendations to the Steering Committee. Task Force members were asked to participate in their individual capacities, not as formal representatives of any organization with which they are affiliated. In order to foster open participation, our deliberations and

communications were conducted on a not-for-attribution basis, and hence this report does not specify the individual task force members whose comments sparked the ideas and recommendations found in these pages.

Finally, although this report represents an effort to summarize and synthesize the perspectives that emerged from our Task Force deliberations, it does not necessarily represent the views of all the Task Force members or, obviously, of the institutions with which they are affiliated. It should also not be construed to represent a consensus statement or shared set of findings or recommendations. As a summary of the main thrusts of a wide-ranging set of conversations, the views expressed herein also do not necessarily reflect those of the report's authors. However, the ideas and recommendations in this report do represent their own, synthetic form of expert participation in the rulemaking process. They have great merit and warrant respectful consideration.

Cary Coglianese
Task Force Chair

# Acknowledgments

This report would not have been possible but for the willingness of Task Force members to give generously of their time and insight. Their thoughtful deliberations produced an impressive set of notes and materials upon which this report is based. In addition, Task Force members gave careful scrutiny to several iterations of this report, for which I am also most grateful.

The drafting of the report came as a result of the many hours devoted by its two excellent reporters, Heather Kilmartin and Evan Mendelson, both law students at the University of Pennsylvania who worked under my direction. At every turn, Heather and Evan played key roles in this endeavor and consistently exceeded even my highest expectations. I cannot thank them enough for their exceptional service.

OMB Watch provided financial support to enable Task Force members to travel to meetings in Washington, D.C., and to ensure honoraria could be provided to the Task Force's two reporters. I greatly appreciate OMB Watch's foresight in initiating the Task Force, its generosity in supporting our efforts, and its wisdom in unwaveringly providing us complete independence. I am personally appreciative of the patience and collegiality Gary Bass, Rick Melberth, and Matt Madia of OMB Watch extended me throughout the project.

Finally, I gratefully acknowledge the assistance of Delila Omerbasic and Joan Rose in developing the cover design and Eric Dillalogue in his careful formatting of the report.

Cary Coglianese
Task Force Chair

# Introduction

Virtually every major aspect of contemporary life is affected by regulation. Economic activity depends on the appropriate regulation of key sectors such as energy, communications, and transportation. The food people eat, the water they drink, and the air they breathe are all affected — for good or ill — by the quality of government regulation. Similarly, the prices consumers pay for many goods and services are influenced by government regulation. Whatever degree to which people enjoy important social and economic rights and experience equality of opportunity also depends in large part on regulation. Everywhere people go, especially when they travel by rail, plane, or automobile, they encounter the behavior of others who are governed by regulation. Health care and prescription drugs, international trade and corporate finance — the list of areas of social and economic activity affected by regulation is truly a long one.

Given the importance of regulation, the process by which rules are made raises important implications for democratic values and the advancement of overall social welfare. Although many legal requirements can be found in legislation adopted by Congress, vastly more regulatory requirements are created by administrative agencies headed by officials appointed by the President (with Senate confirmation) who implement authority delegated to them by statute. As agency officials attempt to perform their roles as policy makers, they often interact with members of Congress and White House officials. But they also regularly face difficult decisions about whether and how to interact directly with a public that does not elect them but will be greatly affected by their decisions.

The Task Force on Transparency and Public Participation in Rulemaking was created to provide advice suitable for the next Presidential administration in considering ways to improve the federal rulemaking process. The Task Force was created under the auspices of the "Advancing the Public Interest Through Regulatory Reform Project" established by OMB Watch, a Washington, D.C. based organization interested in regulatory issues. However, the Task Force operated independently of OMB Watch and its members consisted of experienced professionals outside of OMB Watch with backgrounds in government service, business representation, nongovernmental organization advocacy, and academe. During the Task Force's meetings in Washington, D.C., its members discussed the role of transparency and public participation in the rulemaking process, specifically focusing on the ends that transparency and public participation serve and also on developing a set of policy recommendations that can bring the rulemaking process closer to the ends of substantive quality and procedural legitimacy.

This report summarizes the result of those Task Force discussions. Part I focuses on the goals of the rulemaking process and how transparency and public participation fit within those goals. Part II sets forth specific policy recommendations for the next Presidential administration. These recommendations are themselves organized into three categories: transparency, public participation, and strategic management.

# I. Transparency and Public Participation: Tools to Improve Informal Rulemaking

Rulemaking procedures should aim to encourage decisions that both are legitimate and achieve the best outcomes for society.[1] The quality of regulatory outcomes can be assessed against agencies' statutory missions as well as more broadly by whether specific decisions advance the overall welfare of society. To ensure legitimacy in the rulemaking process, agency officials should arrive at their decisions in a fair and open manner, specifically by approaching a regulatory problem with an open mind, taking into account all relevant interests, and arriving at well-reasoned decisions. In many cases, rulemaking will make some interests in society better off than others, but those who end up "losing" should at least be able to understand why government reached the decisions it did and to appreciate that their interests were considered fairly and treated with respect.

## A. How Transparency and Public Participation Can Advance Rulemaking's Quality and Legitimacy

How can the rulemaking process be designed in order to advance the twin goals of legitimacy and quality decision making? This section of the report explores how aspects of the rulemaking process related to transparency and public participation can help advance rulemaking's goals. By transparency, we mean the availability of, and ease of access by the public to, information held by the government, as well as the ability to observe or become informed about decision making by regulatory staff and officials. Transparency also means that agency decisions are clearly articulated, the rationales for these decisions are fully explained, and the evidence on which they are based is publicly accessible. By public participation, we mean the involvement by citizens, small businesses, nongovernmental organizations, trade associations, academics and other researchers, and others outside government in helping develop agency rules, whether through the open comment process required by § 553(c) of the Administrative Procedure Act (APA) or through other participatory processes.[2]

Those seeking to reform the rulemaking process often treat transparency and public participation as ends in themselves, but we believe they are more usefully seen as tools that can enhance regulators' ability to achieve society's goal of quality and legitimate rules. Public participation promotes legitimacy by creating a sense of fairness in rulemaking. Included in the notion of a fair process is the idea that all citizens have the ability to participate and also that an agency will listen to all interests. Transparency helps because an agency's refusal to listen to

[1] These twin goals have been long-recognized. *See, e.g.,* Roger C. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 Va. L. Rev. 585, 591-93 (1972) (arguing that while administrative procedures serve as a means to achieve better substantive outcomes, the procedures should also aim to foster meaningful participation by the relevant parties, "accuracy" in identifying issues to address, efficiency in resolving these issues, and acceptability of the resolution to "the agency, the participants, and the general public").

[2] 5 U.S.C. § 553(c) (2000).

relevant opinions is more likely to be detected in a transparent system than in a closed system. Not surprisingly, public clamoring for increased governmental transparency seems to peak in the wake of concerns about governmental favoritism.

Transparency and public participation can also help facilitate oversight of agencies by the democratically elected branches of the government — as well as contribute to a more robust record for judicial review, through which judges can exercise their authority to ensure that agency decisions comport with statutory mandates.[3] Transparency helps both the public and other branches of government to assess whether agency decisions are in fact being made on the grounds asserted for them and not on other, potentially improper, grounds.

Transparency and public participation will not only inevitably help to achieve democratic goals, but they can also help produce better, more informed policy decisions. Increased participation allows agencies to obtain information that may help them better understand how current policies could be improved and also how the public or regulated parties would respond to a change in policy. Participation can therefore help decision makers better foresee and appreciate the impact of decisions they are contemplating. Additionally, a legitimate rule will likely produce increased compliance. Affected groups are more likely to comply — indeed, they may even find it easier to comply — with a rule if they are allowed the opportunity to provide meaningful input during the formation of the rule and to understand better the rationale underlying it.[4]

Transparency contributes to the substantive goals of the rulemaking process by making information more readily available to more people. Such increased access by the public to information enables better public participation—which, in turn, produces the benefits discussed above. When people have access to the information upon which the agency relies, they can more meaningfully speak to the accuracy and adequacy of the information and the conclusions that an agency chooses to draw from it. Better public comments founded on better information should lead to better rules.

Increased access to the deliberative process within agencies — and within other government entities charged with regulatory analysis — may also improve the quality of participation by allowing people to respond to an agency's expressed goals, thoughts, or concerns (although as noted below, complete transparency of deliberative processes can create problems too). Transparency also can contribute to better substantive results by allowing the public to act as an effective check on the regulatory system. When the public can monitor agency behavior, it makes it harder for regulators to choose policies that are sloppy or expedient rather than those that will best advance the overall public welfare and the agency's statutory mandate. The public not only can pull the alarm on extreme forms of agency wrongdoing, such as corruption, but can also ensure that even well-intentioned regulators do not stray from their statutory mandates.

Improved transparency and public participation are not necessarily, though, unmitigated goods. Even if increasing participation and transparency might always make the

[3] *See* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1493 (1992) ("[The notice and comment process] fulfills an important function—to compile a record for judicial review.").

[4] *See, e.g.*, Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1089 (2005) (suggesting that decreased legitimacy in agency rulemaking and enforcement efforts will lead to increased resistance by regulated parties).

rulemaking process and its resulting rules more legitimate, too much transparency and public participation can very well detract from making quality decisions in a timely manner. Increasing public participation requires an agency to expend more resources on filtering through and reading the comments submitted.[5] These resources may be well spent to the extent that the additional comments contribute to better policies, but many comments are likely to be duplicative of earlier submissions. There may be, in other words, an *optimal* level of participation, beyond which the costs and associated delays of dealing with public comments exceed the marginal benefits of processing them. For this reason, the quantitative level of participation should not be given greater priority than the quality and balance of participation. It is more important that the agency hear from all distinct viewpoints than that it hear from large numbers of individuals or groups expressing the same arguments or conveying the same information. Although agencies should never prohibit or actively discourage public comments, they need not affirmatively seek to expand participation for every rulemaking nor treat rulemaking as a mere popularity exercise based on the comments received.

Just as there may be such a thing as too much participation, total transparency may also detract from the goal of high quality decision making. Regulators may not engage in full and open deliberations if they know that the public, as well as the agency's governmental over-seers, could be monitoring everything said or written within the agency.[6] If regulatory officials feel inhibited, they may engage in much less dissent, discussion, and self-criticism than necessary for sound policy making. Decision makers do need some protected space to think critically and even ask "dumb" questions.

In addition to the possibility of inhibiting internal debate, a commitment to transparency could make it less likely that private firms would voluntarily provide agencies with potentially helpful information, especially if doing so were to mean that agencies must disclose confidential business information they obtain from such regulated firms.[7] Since rulemaking demands extensive gathering of information held by regulated firms, rulemakers need to strike a balance between the critical objective of letting the public to know the full basis for the agency's decisions and the protection of confidential business information.[8] Although agency decisions about the disclosure of information used to justify new rules should generally adhere to full transparency, the presumption of disclosure can be overcome in cases where it is established that there is a sufficient need for confidential treatment of private information or where a statutory requirement compels such treatment.

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[5] *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 224-25 (1997) (noting the high costs of information analysis for agency decision making).

[6] *See, e.g.*, Special Committee, Administrative Conference of the United States, *Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act*, 49 ADMIN. L. REV. 421, 422 (1997) (explaining ways in which open-meeting requirements can inhibit the communications that occur at those meetings).

[7] *See* Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 337-40 (2004).

[8] As the Office of Information and Privacy within the Justice Department has noted, "Society's strong interest in an open government can conflict with other fundamental societal values, [including] 'protecting sensitive business information' . . . Though tensions among these competing interests are characteristic of democratic society, their resolution lies in providing a workable scheme that encompasses, balances, and appropriately protects all interests—while placing primary emphasis on the most responsible disclosure possible." UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE, March 2007, at 5-6, *available at* http://www.justice.gov/oip/foia_guide07/introduction.pdf.

Finally, achieving transparency and providing meaningful opportunities for public participation are not entirely cost-free undertakings. They may lengthen the time and resources agencies need to reach decisions and issue rules. In some cases, additional time and effort would be a good thing, at least if the alternative is for the agency to make a merely expedient or otherwise erroneous decision. In designing processes to handle information and public participation, then, it would be mistaken to let concern for administrative efficiency completely trump the democratic and decisional advantages served by transparency and public participation.

## B. Strengths and Weaknesses of the Existing Rulemaking Process

Recognizing that transparency and public participation can both further and detract from regulatory goals, the question becomes one of how well the current rulemaking process is calibrated. In other words, in what ways—and in what contexts—does the current process allow either too much or too little transparency and participation?

Compared to many other countries, the United States has long had a relatively open and transparent rulemaking process. Following procedures outlined in statutes such as the APA, the Freedom of Information Act (FOIA), and the Government in Sunshine Act, agencies regularly make information available to the public and give the public opportunities to comment on proposed rules. Additionally, oversight of agency rulemaking, such as through the Office of Management and Budget's (OMB) review process, has generally grown more transparent over the past twenty-five years.[9] The trend in recent years toward allowing members of the general public to access information about the rulemaking process via the Internet is a further step in the direction of enhanced transparency.[10] However, without diminishing the positive aspects of, and recent improvements to, the regulatory system, the next part of this report addresses how the government can further improve its use of public participation and transparency as tools for better rulemaking decisions.

[9] The Clinton Administration adopted procedures intended to improve the transparency of OMB's review process centered in its Office of Information and Regulatory Affairs (OIRA). *See* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 828 (2003) (noting that the Clinton Executive Order "required OIRA publicly to disclose information about communications between OIRA personnel and any person who is not employed by the executive branch, and to maintain a publicly available communications log containing the status of all regulatory actions, a notation of all written communications between OIRA personnel and outside parties, and the dates and names of individuals participating in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and outside parties."). OIRA adopted additional changes in the subsequent Bush Administration. Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L. J. 1257, 1292 (2006) (noting that the OIRA administrator in 2001 "published a memorandum to OIRA staff on the office's web site that extended [Executive Order 12,866's] disclosure requirements" and announced that "OIRA would disclose substantive meetings and other contacts with outside parties about a rule under review[;] . . . would disclose substantive telephone calls with outside parties that were initiated by the Administrator[; and] . . . would be expanding its web site [and] posting lists of regulations currently under review")(footnotes omitted).

[10] *See* EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, THE PRESIDENT'S MANAGEMENT AGENDA: FISCAL YEAR 2002, at 23-25, *available at* http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf. *See generally* Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353 (2004).

One complaint about the current process is that agencies can and should do a better job of listening to, and even soliciting, meaningful participation from all interests. This complaint can best be addressed by breaking it down into two distinct concerns. First, there is concern that the input agencies receive is not meaningful because, by the time that the notice of proposed rulemaking (NPRM) is published and the comment period begins, the agency is highly unlikely to alter its policy significantly.[11] Many internal deliberations and policy discussions occur before an agency issues its NPRM, during a part of the process that is least open and transparent.[12] Also, case law interpreting the APA limits the ability of an agency to depart from the substance of an NPRM without initiating a second round of notice and comment.[13] If public participation does not affect agency's actual decision making process because it occurs after rules are already formulated, it is hard to see how it can significantly enhance either the quality or legitimacy of rulemaking.

Even when agencies do reach out to parts of the public at meaningful stages in the process, they do not always do so in ways that adequately involve all affected interests. Agency officials too often hear mainly from well-organized or politically popular interests, which may make up only a subset of the overall public interests that will be affected by many regulatory decisions. In this way, failure to hear from all interests can detract from both the substantive and procedural goals of rulemaking. While it may be unlikely that an agency "forced" to listen to a particular opinion will alter its policy as a result of that opinion, allowing that viewpoint to be heard still furthers both the reality and the perception of a fair process. Moreover, agencies that do truly listen will learn more and consequently should be able to make better decisions.

Another complaint about public participation is related to the way in which the public comment process operates. The perception, if not the reality, is that the comment process operates as a one-way communication that does not facilitate an actual discussion or exchange of ideas, either between commenters and the agency, or among commenters.[14] Agencies may view the comment process as a formality in the rulemaking process, at least partly because of the problem noted in the above paragraph: that is, many decisions have largely been made by the time agencies solicit public commentary. Also, agencies generally share a mistaken perception that interaction with external entities following the issuance of the NPRM constitutes improper, "ex parte" communications, even though the courts have long since clarified that there is no inherent legal bar to such contacts. In this regard, the institutionalized norms and formal policies discouraging ex parte communications that developed in the wake of the *Home Box Office, Inc. v. FCC*[15] decision may have the unintentional side effect of suppressing out-

[11] *See* William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66 (2004).

[12] Semiannual agendas, first required by an Executive Order of President Carter, were designed in part to address this problem. *See* Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 23, 1978).

[13] *See, e.g.*, Nat'l Mining Ass'n v. MSHA, 116 F.3d 520, 531 (D.C. Cir. 1997).

[14] *See* Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 435 (2004) (stating that interactive technology can help address rulemaking's "democratic deficit" by allowing for great collaboration between government and citizens).

[15] 567 F.2d 9 (D.C. Cir. 1977).

reach, thus keeping regulators less informed of differing points of view.[16] To avoid the costs, delays, and limitations associated with compliance with the Federal Advisory Committee Act (FACA),[17] agency lawyers also sometimes interpret FACA's requirements conservatively to avoid any risk of inadvertently triggering the Act. As a result, agency officials can be reluctant to meet with and engage in an ongoing dialogue with affected individuals and organizations.

As for transparency, some observers complain that agencies do not make information available to the public within a time frame and in a manner that allows for its meaningful use, especially as a prerequisite to public participation. For example, important data may not be included in a rulemaking docket until late in the comment process, or such information may be buried in voluminous records that are not available electronically. The lack of meaningful access to important information detracts from the public's ability to contribute to the formulation of better rules. It means that the participation that does occur will likely be less informed, and therefore potentially less helpful or meaningful, than it otherwise could be. The lack of information is a problem both for citizens generally as well as for the sophisticated "repeat players" in the rulemaking process who are otherwise better able to overcome informational obstacles. A fairer process would give all parties the opportunity not only to file comments, but to file meaningful and informed comments.

Another transparency-related complaint is that an agency's stated justification for a given policy too often represents a post hoc rationalization for a rule that was actually based on other factors. To be sure, some will question whether discovering an agency's "true" motivations is really all that important.[18] Perhaps an agency policy should simply stand on its own merits, and if a post hoc rationalization nevertheless provides sound reasoning for a sound policy, the actual motivation may well be unimportant. However, others could claim that post hoc rationalizations still can inhibit the ability of the public and the courts to monitor rulemaking's substantive goals by evaluating agency policy.[19] The courts, and probably sometimes even the public and its legislative representatives, defer to agencies because the agencies have specialized knowledge and expertise. Although deference may be justified for other reasons, it would clearly not be warranted on the basis of expertise when agencies do not rely on expert judgment but on other factors, such as political expediency. Furthermore, a post hoc rational-

[16] This is both unfortunate and unnecessary as the courts have made it clear the holding in *Home Box Office* was limited to its facts and that there is no "ex parte" doctrine in informal rulemaking. *See* Sierra Club v. Costle, 657 F.2d 298, 402 (D.C. Cir. 1981) ("[The D.C. Circuit has] declined to apply Home Box Office to informal rulemaking of the general policymaking sort.") (citing United Steelworkers of America v. Marshall, 647 F.2d 1189, 1237-38 (D.C.Cir. 1980) and Action for Children's Television v. FCC, 564 F.2d 458, 474-77 (D.C. Cir. 1977)).

[17] *See* Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. REG. 451, 493-503 (1997).

[18] After all, the Supreme Court long ago held that courts are not permitted "to probe the mental processes" of administrators. Morgan v. United States, 304 U.S. 1, 18 (1938); *see also* Morgan v. United States, 313 U.S. 409, 422 (1941) (noting that "[i]t is not for us to try to penetrate the precise course of the Secretary's reasoning" and that "the integrity of the administrative process must be . . . respected").

[19] The Supreme Court has disfavored rationalizations developed by an agency, or its attorneys, in the context of litigation after the agency decision has been made, even if those rationalizations would have been adequate to sustain the decision had they been announced contemporaneously with it. *See* Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 87 (1943) (noting that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based").

ization, to the extent that it becomes detected, can detract from the perceived legitimacy of administrative rules. A process that is grounded upon an illusion may only foster cynicism, not legitimacy.

## II. Improving the Rulemaking Process: Task Force Recommendations

Having defined the general manner in which transparency and public participation can contribute to better and more legitimate rules, and having considered complaints about the current rulemaking process, we turn next to how the process can be improved. This Part will set forth policy recommendations for advancing rulemaking's dual goals of quality and legitimacy, while also addressing the current deficiencies in the process in greater specificity. The recommendations below are organized into three sections: Transparency, Public Participation, and Strategic Management. The Transparency and Public Participation sections focus, respectively, on enhancing the availability of government information and on effectively channeling public input into the rulemaking process. The Strategic Management section suggests ways by which agencies, or, more specifically, the next administration, can establish a framework for continuous evaluation of the implementation of transparency and public participation policies.

### A. Transparency

Information is central to rulemaking, not only for agency officials to make good decisions but also for the public to understand and participate in the rulemaking process. In order to properly monitor an agency and contribute meaningful comments, the public needs access to the information upon which the agency is relying. This need for information applies both before and after the issuance of a proposed rule. As noted above, much of an agency's decision making and deliberations can occur prior to the agency's publication of the NPRM and prior to the opening of a public docket. Current docketing practices do not encompass all the information needed to ensure transparency and inform participation during the time when the agency reaches many of its crucial decisions. As such, taking steps to improve the overall access to and monitoring of agency decision making will enable the public and interested organizations to contribute more meaningfully to rulemaking. This section of the report therefore makes recommendations to improve the general disclosure and availability of agency information—especially in the pre-NPRM period—and also steps to improve disclosure during the notice-and-comment period that follows the issuance of the NPRM.

As discussed in Part I of this report, transparency not only contributes directly to increased quality and legitimacy in the rulemaking process—primarily by allowing the public to monitor agencies and by ensuring a more fair process—but it also contributes indirectly to these goals by allowing for more meaningful public participation. This section's recommendations focus, first, on ensuring that the "correct" information is released to the public and, second, on guaranteeing that this information is released in a manner that allows for

meaningful public access. By ensuring the release of the right information in an accessible manner, the government can ensure that the benefits of transparency to the rulemaking process are realized. This section also suggests ways in which whistleblower protections can be enhanced so that, in the event of failures in the general mechanisms of transparency, information about problematic instances of agency decision making can more easily be detected.

### 1. Adopt Proactive Practices for the Availability of Releasable Information

The Freedom of Information Act (FOIA) fundamentally altered the nature of government-wide transparency by creating a presumption of releasability of agency-held information.[20] It therefore represented a legislative acknowledgment of the benefits of transparency: enhancing legitimacy and creating a more-educated electorate that, in the rulemaking context, manifests itself in the form of more constructive public participation. FOIA, however, contains nine statutory exemptions,[21] each of which can be read as recognition of the fact that FOIA's presumption of disclosure brings with it potentially harmful consequences—some of which we noted in Part I.A. However, FOIA makes plain that any document that is not covered by an exemption is available upon request.

Currently, most people seeking agency records must submit a formal request (with the exception of some categories of agency-controlled records that are statutorily required to be made available automatically).[22] The agency then determines whether to grant their release or invoke a statutory exemption. Requests for potentially releasable information are often delayed, as a result of either routine administrative delays or agencies' hesitancy to release information, even if such information does not fall within a FOIA exemption. While many requests for information are handled in a routine manner, sometimes even simple requests subject to the standard FOIA request process involve long, and unnecessary, delays.

Given the importance of the timely release of information to allowing meaningful participation in agency rulemaking, the process by which agencies decide what information to release could be streamlined. Building on the requirements of the E-FOIA Amendments of 1996 that certain categories of documents be posted on agency websites,[23] agencies should publish, on their websites, any information that they, or a court, have already determined does not fall within a FOIA exemption. To enhance timely access, such information should be made available without forcing the public to go through what would be, in instances where information has already been released or determined to be releasable, a superfluous administrative procedure. Nevertheless, when an agency in good faith believes that FOIA exempts the agency from disclosing the requested information, it can and should deny and, if necessary, litigate the matter. If the agency loses, however, the information should be made available not just to the requestor, but to the public (via website) without others needing to file a request for it. Finally,

[20] *See* U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991) ("[FOIA's] strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.").

[21] *See infra* Appendix 3.

[22] *See* 5 U.S.C. § 552(a)(1).

[23] 5 U.S.C. § 552(a)(2).

it should go without saying that documents that FOIA requires an agency to release without request should be made available as required (currently, such disclosure is not always made).

In making the FOIA disclosure process more efficient, agencies should also experiment with alternative procedures for filling standard FOIA requests. Agencies could preemptively label certain documents "exempt" or "non-exempt" at the time of their creation. Non-exempt documents could be made publicly available on the agency's website, while exempt documents would require the usual FOIA request and litigation. Such a system could involve agencies' using a document management system that would require an agency employee to specify the nature of the document—non-exempt, exempt, or uncertain—upon saving that document. The agency could then use this system to publish documents on the Internet by simply publishing those documents that have been labeled non-exempt. Such a system may have the downside of requiring agencies to dedicate excessive resources to making ex ante FOIA determinations, or of encouraging agency officials simply to label everything "exempt" to avoid accidental disclosure. However, these potential downsides should not necessarily stop agencies from experimenting with this, or a similar, procedure. A more modest alternative would be simply to create, as suggested above, on-line, searchable repositories of all documents that agencies have released in response to FOIA requests.

While FOIA imposes a transparency presumption on *all* agency records, more targeted transparency policies that apply directly to the rulemaking process may further advance both the legitimacy of final rules and the ability of commenters to improve the quality of new rules. Section 307 of the Clean Air Act establishes a level of transparency in its rulemaking docket requirements that all agencies would do well to emulate.[24] The Act requires that dockets for certain rules or other administrative actions undertaken by the Environmental Protection Agency (EPA) pursuant to the Clean Air Act include "all written comments and documentary information," "transcript[s] of public hearings," and "[a]ll documents which become available after the proposed rule has been published and which the [EPA] Administrator determines are of central relevance to the rulemaking."[25] Finally, dockets must also include drafts sent to OMB both before and after the issuance of NPRMs, in addition to the comments exchanged between the EPA and OMB and other agencies reviewing the rules.[26] Perhaps most importantly, rulemaking dockets must be open to the public at certain specified times during each comment period.[27]

The docket-related practices observed by EPA for air pollution rules deserve consideration by other agencies. The publishing both of documents of "central relevance" and of draft rules and comments to and from OMB allows the public to have access to the kind of information that can help enhance rulemaking quality and legitimacy. Improving docket practices should help agencies address the problems identified in Part I, specifically agencies' failures to provide information at a time and in a manner that allows for interested parties to comment meaningfully. Although the next section of this report will elaborate upon *how*

[24] For the Act's docket requirements, see 42 U.S.C. § 7607(d) (2000).
[25] *Id.* § 7607(d)(4)(B)(i).
[26] *Id.* § 7607(d)(4)(B)(ii).
[27] *Id.* § 7607(d)(4)(A).

information should be released to the public, the necessary first step is to determine *what* should be released. The Clean Air Act provides an example of useful standards for this first step.

**Recommendation T1.** Agencies should streamline the FOIA request process by publishing electronically not only (i) the records that FOIA requires an agency to release without first receiving a request, but also (ii) any documents that an agency or court has previously determined not to fall within a FOIA exemption.

- These efforts could include controlled experimentation with (i) a document-management system that would involve agencies applying a FOIA classification to each document at the time of creation and releasing all documents for which there is no claimed exemption, or (ii) on-line document repositories.

**Recommendation T2.** Agencies should adapt, as government-wide best practices for docket-related transparency, the requirements of Clean Air Act § 307(d) that call for promptly including in each rule's docket, among other records, all communications with OMB and other documents of "central relevance."

### 2. Effectively Manage the Release of Information to Ensure Public Access

Once an agency determines that information should be—or is required to be—made available to the public, it should not only release that information but do so in a way that the public can easily access the information and use it to participate in the rulemaking process. Making information available in a form that the public cannot easily use does little to advance the public interests served by transparency. Increasing openness, both by expanding rulemaking dockets and by streamlining FOIA, significantly contributes to legitimacy, but improving the organization and searchability of this information would substantially strengthen the contributions of transparency and public participation.

The need to strengthen the management and accessibility of information is evident in the context of so-called e-rulemaking. The application of information technology to the rulemaking process — e-rulemaking — dates back to the Clinton Administration.[28] The Bush Administration implemented a government-wide e-rulemaking project as part of its larger "e-government" initiative, seeking to use technology to enhance public access to the rulemaking process.[29] In 2003, the Bush Administration launched Regulations.gov, a web portal designed to facilitate electronic filings of public comments on proposed regulations and also to

[28] *See, e.g.,* National Performance Review, IT03: Develop Integrated Electronic Access to Government Information and Services (Sept. 1993), *available at* http://govinfo.library.unt.edu/npr/library/reports/it03.html; National Performance Review, REG04: Enhance Public Awareness and Participation (Sept. 1993), *available at* http://govinfo.library.unt.edu/npr/library/reports/reg04.html.

[29] *See* EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 10.

serve as a clearinghouse of information stored in the Federal Docket Management System (FDMS). Although Regulations.gov helps ensure that the rulemaking process is more accessible by making rulemaking dockets accessible via the Internet, it currently fails to function in a manner well tailored to use by the general public. The site is not nearly as user-friendly as technology now readily allows, as is evidenced by the greater usability of many commercial websites. More importantly, Regulations.gov does not greatly enhance transparency in a way that facilitates public participation, therefore failing to fulfill very well one of transparency's principal means of improving rulemaking. Improvement of Regulations.gov could be a useful starting point for the next administration's e-rulemaking initiatives. The focus of the next administration should be on improving (1) the ease of access and usability of the Regulations.gov interface, (2) the quality of data being uploaded into FDMS, and (3) the timeliness of agency data entry into FDMS.

Regulations.gov marks an important advance in rulemaking transparency, but it still leaves significant room for improvement in all three of these areas. Taking the first area as an example, Regulations.gov has minimal browsing capability and requires users to rely on its search engine, which at present is woefully inadequate. The search engine neither allows for easy identification of an unknown docket, nor does it have sophisticated data mining capability. Despite the fact that the vast majority of visitors to Regulations.gov—both sophisticated users and the general public—want to locate rulemaking *dockets*, search tools seem primarily designed to retrieve unique *documents* from all the materials in the FDMS, rather than to locate either entire dockets or specific documents *within dockets*. The site has recently added a full-text search engine that makes locating dockets somewhat easier, provided users already have some idea of what they are looking for; but less informed users (especially ones who may not even know what a "docket" is) are still unlikely to find the dockets relevant to their interests.

Prior to implementation of FDMS, many agencies administered their own online docket databases. Several of these agency websites had useful features that have yet to be implemented on Regulations.gov. For example, EPA's site allowed users to perform a full-text search inside each docket. EPA and DOT also gave the public the ability to search an individual docket for comments submitted by a particular organization. Both search functions were extremely helpful to users. Information technology offers the opportunity to integrate databases and resources in ways that facilitate and simplify public access, particularly for less sophisticated users. Thus, for example, rulemaking dockets on Regulations.gov could provide hyperlinks to agency websites, relevant provisions in the *Federal Register*, and other online resources. Information concerning a rule's history, back to both the authorizing statute and past or related rules, could also be cross-linked within the site.

The Task Force recommends that the next administration take major steps to improve the search capability of Regulations.gov, so that even users who are not sure of the particular docket or document for which they are searching can nevertheless find the most relevant materials. Agencies should also be encouraged to enhance their own websites' search capabilities and maintain "major-rule" web pages that link to Regulations.gov. Future administrations should continue expansion of e-rulemaking capabilities, especially in light of the

enactment of the E-Government Act of 2002, which directs federal agencies to use information technologies in adjudicatory and rulemaking proceedings.[30]

Efforts similar to the recommended improvements to e-rulemaking can and should also be expanded more broadly to agency records in general. As noted in the previous section, a document that either the agency or a court has declared to be non-exempt under FOIA should be made available to the public via the agency's website. As such, the importance of searchabilty on Regulations.gov also extends to the public availability of agency document libraries. In the same way that agencies can create searchable dockets, they can and should create document libraries or repositories that allow the public to browse public records. One reason for FOIA delays is that requesters are forced to request records without knowing what documents actually exist in an agency's files; the agency must then determine how to respond to such nonspecific requests. If agencies had easily searchable online libraries of publicly available records, requestors would be able to access agency information much more quickly, while the agency would presumably also save the time and money associated with locating the requested information. Even documents that an agency does not believe to be releasable could be referenced in individual citation entries in the document library, so that requesters could challenge a specific document's status under FOIA without forcing the agency to engage in a time-consuming search process.

Largely because of the difficulties of interacting with agencies through the FOIA request process, it is often the more experienced nonprofit advocacy organizations, commonly referred to as public interest groups, that attempt to gain access to agency records in order to understand agency rulemaking better and participate more meaningfully in the process. FOIA provides a fee exemption — often relied upon by organized groups — for requests made in the public interest.[31] The groups that repeatedly rely on this provision nevertheless must meet the burden of establishing that they qualify for the exemption with respect to each individual request. This creates conflicts that are repetitive and wasteful, both for the government as well as for outside organizations. Both the agencies and the public could be better served if the next administration were to establish a procedure by which established public interest groups could qualify for a permanent FOIA fee exemption, or at least one that remained in effect for a designated period of time with an opportunity for renewal.

The obvious candidate to oversee agency implementation of these FOIA reforms would be the new Office of Government Information Services (OGIS), created as part of the OPEN Government Act of 2007.[32] The Act intended OGIS to serve as a government-wide FOIA ombudsman by overseeing agencies' FOIA compliance and operations and improving agencies' FOIA practices. It also stated that OGIS is to be located "within the National Archives and Records Administration."[33] President Bush has, however, recommended shifting the funding

[30] *See* E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915-16 (codified at 44 U.S.C. § 3501 note).

[31] *See* 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge or at a charge reduced below the fees established . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.").

[32] Openness Promotes Effectiveness in Our Government Act of 2007, Pub. L. No. 110-175, § 10(a), 121 Stat. 2524, 2529 (codified at 5 U.S.C. § 552(h)).

[33] *Id.*

for OGIS to the Department of Justice.[34] Given the statute's directive, moving OGIS from the National Archives and Records Administration to the Department of Justice would appear to contravene Congress's intent and could potentially frustrate the underlying purpose of OGIS.[35] Although the Department of Justice has expertise in FOIA matters and some of OGIS's contemplated functions overlap with those currently provided by the Department's Office of Information and Privacy (OIP), locating OGIS within Justice poses the risk that the Office will be inadequately separated from those responsible for litigating the government's FOIA disputes. If OGIS were placed in an adequately funded office within the National Archives and Records Administration, the advisory and ombudsman functions currently performed by OIP could be transferred to OGIS, thus keeping FOIA coordination institutionally distinct from FOIA litigation.

**Recommendation T3.** The next administration should improve the e-rulemaking system by focusing on 1) the ease of access and usability of the Regulations.gov site, 2) the quality of data being uploaded, and 3) the timeliness of agency data entry into the Federal Docket Management System.

**Recommendation T4.** Individual agencies should also improve search capabilities on their own websites and, for significant rulemakings, create pages that hyperlink to Regulations.gov.

**Recommendation T5.** Agencies should create online FOIA document libraries that allow the public to search and access documents that the agency or a court has determined not to be exempt from FOIA disclosure.

**Recommendation T6.** Agencies should create a procedure by which public interest groups can qualify for a standing FOIA fee exemption.

**Recommendation T7.** The Office of Government Information Services should be located in the National Archives and Records Administration and should be tasked with overseeing FOIA reforms.

[34] *See* Elizabeth Williamson, *Is Ombudsman Already in Jeopardy? Bush Proposes Moving Post from Archives to Justice Dept.*, WASH. POST, Feb. 6, 2008, at A17 (quoting White House spokesman Tony Fratto as stating that "only the Department of Justice . . . is properly situated and empowered to mediate issues between requestors and the federal government" (internal quotation marks omitted)).

[35] *See, e.g.*, 154 CONG. REC. S1050, 1050-51 (daily ed. Feb. 14, 2008) (statement of Sen. Leahy).

### 3. Ensure That the Public Can Properly Monitor Information Disclosure

As discussed in Part I, transparency facilitates public monitoring of agencies that may encourage agency decision makers to exercise greater care in developing agency rules — and to avoid making decisions on expediency or other improper grounds. However, this raises the question of how the public can monitor agencies' compliance with transparency requirements themselves, since failures to comply will by definition be nontransparent. If agencies fail to abide by transparency-related policies, then the public will likely be unable to fulfill the monitoring function that transparency generally facilitates.

Whistleblower protections provide an important way of bolstering transparency requirements and ensuring the public is properly informed about agency decision making. Whistleblowers help by revealing agency information that may have been improperly withheld, as well as uncovering wrongdoing that the general public cannot detect. Because whistle-blowers have access to agency information beyond what transparency rules like FOIA provide to the general public, they are in a unique position to monitor agency behavior. Provision of adequate and meaningful protection for whistleblowers is therefore an important means of preserving the integrity of the rulemaking process.

There are two major categories of whistleblowers—federal employees and private-sector whistleblowers. The Task Force focused mainly on the category of federal employees and concluded that federal whistleblowers need to be afforded better and more meaningful protection. Specifically, to improve protection for federal whistleblowers, the next administration should take steps to achieve more timely processing of whistleblower complaints, adjust the burden of proof in whistleblower cases, and strengthen protections for whistleblowers who release information to Congress. Whistleblower-retaliation complainants are often bogged down in administrative proceedings and may never have a timely opportunity to argue their cases before an independent administrator or the judiciary. Where backlogs exist, agencies should create more streamlined, independent, and expedited adjudicatory procedures for addressing whistleblower retaliation complaints. Whistleblowers should receive an improved opportunity to achieve timely hearings before an impartial panel.

Congress could also strengthen whistleblower protections by reevaluating the legal standards of proof in whistleblower complaint cases. Under the Whistleblower Protection Act,[36] whistleblowers are generally protected from reprisals for disclosure of information that the federal employee "reasonably believes evidences . . . a violation of any law, rule, or regulation, or . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety," provided certain exceptions do not apply.[37] Although the Act requires only an objectively reasonable belief of agency wrongdoing, the standard of proof in practice can appear to be a de facto requirement of "absolute certainty" on the part of the whistleblower.

Such a heightened standard can create an insurmountable obstacle for many whistleblowers, particularly given the fact that most of the relevant evidence needed to prove

[36] 5 U.S.C. § 1221 (2000).
[37] *Id.* § 2302.

the certainty of their claims will be controlled by agencies or their administrators. The Task Force therefore recommends that evaluating tribunals adopt a reasonable burden of proof that takes into account the difficulties whistleblowers face in gathering information to substantiate their claims. The burden of proof should not be interpreted in a way that effectively acts as a bar to adequate protection for legitimate whistleblowers—those with an objectively reasonable belief in unlawful government action—nor should there be a presumption in favor of any party to a whistleblower retaliation complaint.

Finally, there must be adequate protection provided for lawful whistleblower disclosures. Congress should make clear that the Lloyd-La Follette Act[38] provides protection for whistleblower disclosures made to Congress pursuant to the Whistleblower Protection Act. It is preferable to channel whistleblower disclosures directly to Congress (as opposed to the media), and whistleblowers that do go to Congress should therefore receive especially clear protection against agency retaliation.

Several bills are currently pending that would expand whistleblower protection.[39] At a minimum, the implementation of this legislation should be carefully monitored, when and if it passes into law, ideally by a government entity that is independent of the agencies to which the legislation applies. In addition, an appropriate entity should also study the protections afforded whistleblowers in the private sector, with an eye to determining whether there should be more uniformity between protections for public (federal and state) and private sector whistleblowers.[40] Private sector whistleblowers can provide valuable information needed for the development of agency rulemaking.[41]

**Recommendation T8.** Agencies should take necessary steps to ensure streamlined, independent, and expedited reviews of whistleblower claims of retaliation.

**Recommendation T9.** The adjudication of whistleblower protection claims should be governed by an objectively reasonable standard without a presumption of non-retaliation by the government.

[38] 5 U.S.C. § 7211 (2000).

[39] S. 274, the Federal Employee Protection of Disclosures Act, would clarify existing whistleblower law and enhance the protection for federal employee whistleblowers. H.R. 985, the Whistleblower Protection Enhancement Act of 2007, refines whistleblower protections in response to decisions by the U.S. Court of Appeals for the Federal Circuit limiting the scope of disclosures protected under the current law and provides specific whistleblower protections to federal workers who specialize in national security issues, federal contractor employees, and federal employees who make disclosures regarding actions that threaten the integrity of federal science.

[40] In the past, the Administrative Conference of the United States (ACUS) has fruitfully examined the issue of gaps in whistleblower protection in the past, leading to recommendations that were incorporated into amendments to the Whistleblower Protection Act. *See, e.g.*, Federal Protection of Private Sector Health and Safety Whistleblowers (Recommendation 87-2), 52 Fed. Reg. 23,629, 23,631-32 (June 24, 1987) (formerly codified at 1 C.F.R. § 305.87-2), *available at* http://www.law.fsu.edu/library/admin/acus/305872.html.

[41] Coglianese et al., *supra* note 7, at 299-300.

**Recommendation T10.** Congress should confirm that the Lloyd-La Follette Act covers government whistleblowers that go to Congress with information.

**Recommendation T11.** The implementation of any new whistleblower policies passed by Congress should be carefully monitored by a government-wide entity that is independent from regulatory agencies.

## B. Public Participation

Agencies need current and relevant information about the activities they are charged with regulating. As discussed in Part I above, robust public participation in the rulemaking process allows agencies to obtain information that helps them improve the quality of new regulations, increase the probability of compliance, and create a more complete record for judicial review.[43] Public participation is also fundamentally linked to concepts of legitimacy and fairness in agency rulemaking. Thus, reforms that improve the degree and quality of public participation in the rulemaking process could contribute both to the creation of better rules and to the promotion of the underlying democratic values implicated in the administrative process.

### 1. Promote the Multidirectional Flow of Information in the Comment Process

Under standard notice-and-comment rulemaking procedures, the comment period does not necessarily involve an exchange of ideas, either among commenters or between commenters and government officials. In especially controversial rulemakings, agencies receive many comments representing extreme positions — sometimes with both sides talking past each other. Due to the fact that comments are one-shot attempts at persuasion, commenters often file their comments on the last day possible, both for practical as well as strategic reasons (namely, trying to have the last word). As a result, agencies are not infrequently flooded with comments late in the public comment period and are left to sift through them unassisted by the interested public. Sifting through these comments and extracting the key information and arguments from them can be costly and time-consuming. Further, due to confusion about the rules governing so-called ex parte communications — discussed in the next subsection — regulators are too often unwilling to solicit responses or clarification from commenters.

To enhance the value of public comments, the next administration should encourage pilot experiments with interactive comment processes.[44] Interactive comment periods would

[43] *See supra* Part I.A.

[44] The Task Force's recommendations concerning interactive comment periods bear resemblance to a much earlier ACUS recommendation on this issue. *See* Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking (Recommendation No. 76-3), 41 Fed. Reg. 29,653, 29,654-55 (July 19, 1976) (formerly codified at 1 C.F.R. § 305.76-3), *available at* http://www.law.fsu.edu/library/admin/acus/305763.html.

appear to be most appropriate for rulemakings in which (1) the issues involved are extremely technical or complex; (2) comments filed in the initial round of commenting raise new or unanticipated issues; or (3) comments filed in the initial round of commenting contain significantly conflicting data. In these rulemakings, agencies could usefully provide two rounds of commenting to provide for interaction among commenters. Persons that submit comments during the first round would be eligible to respond to opposing comments or to agency queries in the second round. This two-round approach would assist commenters and the agency staff in critically evaluating underlying data, assessing arguments offered by others, and overall improving the quality of information available to decision makers. Such a two-round approach may well also have a secondary effect of removing the strategic incentives to make extreme or unsupported claims or to file last-minute commentary.

While an interactive comment period could be somewhat more time-consuming than the current procedure, the gains in information and convenience for the agency may easily outweigh the costs in some cases. The Task Force therefore recommends that interactive comment periods should be piloted on a small scale. To ensure that these pilot programs can be properly evaluated, the design of the programs must be carefully considered, especially with respect to the selection of the rules for experimentation with this technique. For example, agencies could randomly select rules for interactive rebuttal periods from among the "significant" rules that are subject to the OMB review process. The Congressional Research Service, the Government Accountability Office, or a reauthorized Administrative Conference of the United States (ACUS)[45] could be charged with monitoring the results of these experiments, conducting careful empirical evaluation, and recommending future expansion of the pilot program if they prove successful.

**Recommendation P1.** The next administration should encourage agencies to experiment with interactive comment processes.

**Recommendation P2.** Pilot programs implementing interactive comment periods should be designed to facilitate collection of empirical data concerning the impact and efficiency of such processes, with the eventual goal of making recommendations about any permanent changes to the comment process.

### 2. Encourage Transparent Communications with External Actors

Informal communications with external actors outside the comment process can provide agencies with valuable information needed for rulemaking. Often these informal communications are the most efficient means for agencies to gather and develop information

[45] *See infra* Part II.C.2.

for rulemaking.[46] Such communications are also the most direct means of public access to administrative officials. As such, agencies should not discourage such communications, provided that agency staff disclose in a timely manner their occurrence and place an accurate summary of the topics discussed in the public docket, and provided further that staff remain open to even-handed communication with a variety of relevant interests or groups.[47] The next administration should strive to create an agency culture in which administrators understand that communications with outsiders during informal rulemaking are not only permitted but are also beneficial if documented transparently.

As noted above, there appears to be widespread confusion across agencies as to when communications with external actors are permissible.[48] Regulators often fear that any contacts with such outsiders during informal rulemaking constitute prohibited "ex parte" communications. This, in turn, leads to reticence on the part of agency civil servants and general reluctance to discuss contemplated agency activities. As a result, agency decision makers may tend to be less informed and knowledgeable on topics of regulation than is optimal. Agency confusion on this issue not only suppresses openness and outreach to interest groups but may also discourage open and frank discussion among civil servants within the agency. The standards governing communications with external actors should be clarified with the ultimate goal of making quality information more readily available to the agency decision maker, subject to disclosure requirements.

In particular, agencies should be encouraged to elicit information from a variety of external sources early in the process, even before the development of a proposed rule, but to disclose these early contacts when they have a significant impact on the development of the proposed rule. As discussed above, the concepts and assumptions underpinning a rule are sometimes developed at a very early stage of the rulemaking process and are difficult to rebut or dislodge later in the process.[49] Meetings between an agency and parties interested in a rulemaking early in the process can have a significant influence on the development of these assumptions and can often set the ultimate course of the rulemaking. To enable effective public participation, it is therefore important that agencies disclose contacts with interested parties at every stage of a rule's contemplation and development.

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[46] *See* Sierra Club v. Costle, 657 F.2d 298, 401 (D.C. Cir. 1981) ("Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall . . . .Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs.").

[47] The Task Force's recommendations on this point bear a close affinity with recommendations made by the Administrative Conference of the United States (ACUS) in the mid-1970s. *See* Ex Parte Communications in Informal Rulemaking Proceedings (Recommendation No. 77-3), 42 Fed. Reg. 52,251, 54,253 (Oct. 5, 1977) (formerly codified at 1 C.F.R. § 305.77-3), *available at* http://www.law.fsu.edu/library/admin/acus/305773.html ("Agencies should experiment in appropriate situations with procedures designed to disclose oral communications from outside the agency of significant information or argument respecting the merits of proposed rules, made to agency personnel participating in the decision on the proposed rule, by means of summaries promptly placed in the public file, meetings which the public may attend, or other techniques appropriate to their circumstances. To the extent that summaries are utilized they ordinarily should identify the source of the communications, but need not do so when the information or argument is cumulative.").

[48] *See supra* text accompanying notes 15-16.

[49] *See supra* text accompanying notes 11-12.

Agencies are already required by statute and executive order to publish regulatory agendas and plans of new rules under development.[50] By following the Task Force's Recommendation T2 and creating regulatory dockets at the moment they begin the development of any new rulemaking, agencies would provide an institutional forum for disclosure of early communications. Although it may be difficult to establish a bright-line rule for when the development of a new rulemaking begins, the agency should nevertheless attempt in good faith to disclose all pertinent rule-related contacts as early in the process as possible. Such disclosures need not provide a verbatim or even highly detailed account of the communications between the agency and the interested party. Rather, a simple disclosure that a contact occurred, a brief description of the topics discussed, and a listing all participating parties would enhance legitimacy of the process without adding any great burden to agency staff.

Some agencies have already adopted such disclosure policies. For example, the Department of Transportation now provides information on the status of all significant rulemakings on its website.[51] Recently, the EPA adopted a policy of using "Action Initiation Lists" to notify the public in near real time about new rulemakings, even before the publication of its regulatory agenda.[52] Other agencies should be encouraged to adopt similar policies. Regardless of the mechanism adopted, the ultimate goal should be improved transparency early in the regulatory process, thus increasing the possibility of more effective public participation.

A complement, or alternative, to this type of improved transparency would be for agencies to take affirmative steps to ensure that more interests are given an opportunity to participate meaningfully in the early stages of a rulemaking. The public will likely view the rulemaking process as more legitimate the greater its confidence that the rule development process incorporates a true diversity of interests and perspectives. Taking affirmative steps to involve the public early in the process will improve the integrity of an agency's decision making compared with a process that does not currently provide all interest groups—particularly those without significant funding or legal representation—with sufficient access during the crucial, early stages of rule development. These affirmative steps may include regional hearings, public evaluations of existing rules or gaps in rules, and other forms of active solicitation of feedback from the public.

To provide sufficient public access, agencies should be able to demonstrate that, at a minimum, they maintain a passive "open door" policy or have adopted other mechanisms to ensure broad-based public involvement (e.g., technical assistance grants, ombudspersons, or

[50] Regulatory Flexibility Act of 1980, 5 U.S.C. § 602 (requiring agencies to publish twice each year a regulatory agenda of rules under development that are "likely to have a significant economic impact on a substantial number of small entities"); Executive Order 12866, Regulatory Planning and Review §4 (Sept. 30, 1993), *available at* http://www.whitehouse.gov/omb/inforeg/eo12866/eo12866_amended_01-2007.pdf (requiring agencies to "prepare an agenda of all regulations under development or review" and to create regulatory plans "of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form" each year).

[51] U.S. Department of Transportation, Report on DOT Significant Rulemaking, http://regs.dot.gov/rulemakings/index.htm (last visited June 15, 2008).

[52] *See* U.S. EPA, Actions Initiated by Month, http://www.epa.gov/lawsregs/search/ail.html (last visited June 15, 2008).

consumer advocates).[53] Adopting "open door" policies, under which agencies that have contact with some interest groups commit to making themselves available for contact to all interest groups in an even-handed manner, would presumably be feasible to implement and quite effective if agencies faithfully adhere to them. In many cases, it may be difficult for agencies to hear from all the individuals and organizations that will be affected by a new rule, especially in areas of regulation where there are few organized interest groups. It may be necessary in such cases for the agency to appoint a public participation ombudsperson to speak on behalf of underrepresented persons and organizations.[54] Alternatively, this task could be delegated to a centralized agency or office tasked with representing the interests of those underrepresented within or with limited access to the rulemaking process.

**Recommendation P3.** The next administration should strive to create an agency culture in which administrators understand that it is good practice to communicate with external actors, so long as communications that have an impact on the development of a proposed rule are disclosed in agency dockets.

- Significant communications with external actors should be documented even when those contacts occur prior to the issuance of a notice of proposed rulemaking.
- Such disclosures need not be extremely detailed but should contain information as to the identity and affiliation of the parties to the communication, as well as the general topics discussed.

**Recommendation P4.** The standards governing communications with external actors should be expressly clarified to reduce confusion among administrators as to which communications are proscribed and which should be encouraged.

**Recommendation P5.** Agencies should be encouraged to take affirmative steps to ensure that more external interest groups are given an opportunity to participate meaningfully in the early stages of a rulemaking.

- At a minimum, agencies should maintain an "open door" policy, whereby agencies make themselves available for contact to all interest groups in an even-handed manner
- Alternatively, agencies should be encouraged to adopt other mechanisms to ensure broad-based public involvement.

[53] A Technical Assistance Grant (TAG) provides nonprofit citizens' groups with funding to hire independent expert advisors to enable them to participate in regulatory decisions. The grants are commonly used in complex, scientific regulatory actions such as in Superfund cleanup actions.

[54] *See* ACUS Recommendation, The Ombudsman in Federal Agencies, 1 C.F.R. § 301.90-2 (urging agencies with significant public interaction to consider establishing agency-wide or program specific ombudsmen and to set forth guidelines concerning powers, duties, qualifications, term, confidentiality, limitations on liability and judicial review, access to agency officials and records, and outreach).

**Recommendation P6.** Agencies should announce areas of prospective rulemaking as early as possible and take steps to involve all affected interests in the process of developing new rules.

### 3. Reduce Barriers to the Use of Balanced Advisory Committees When Useful and Appropriate

The Federal Advisory Committee Act (FACA)[55] governs when and how agencies may consult with external actors through on-going consultative panels. Advisory committees can be particularly useful in helping to establish agency priorities and developing possible approaches to rulemakings prior to publication of a NPRM. However, the requirements FACA imposes on agencies, combined with restrictions on the use of advisory committees imposed by Executive Order 12,838 and an array of GSA and OMB guidance documents, has created concern that agencies' use of federal advisory committees has become inhibited, if not significantly curtailed.[56] Procedural barriers to advisory committee formation may tend to discourage their use, despite the fact that, when operating as intended, such committees provide an excellent means of fostering diverse public participation. As such, some of the requirements imposed on agency use of advisory committees may well work at cross-purposes with the objectives of legitimate and high quality rulemaking. Accordingly, procedural barriers to the use of advisory committees should be reduced so that agencies will use advisory committees whenever they would be useful and appropriate.

Limitations on the formation of advisory committees can have negative effects on public participation in the regulatory process. FACA laudably requires agencies to balance committee membership to ensure that a variety of perspectives are adequately represented—including, in theory, critical or otherwise underrepresented perspectives. However, agencies' response to this balance requirement, and other procedural restrictions on the formation of committees, may simply be to avoid creating new advisory committees altogether, with the effect that absent or underrepresented perspectives will still remain absent from or underrepresented in the agency's deliberative process. Furthermore, because FACA requires that certain kinds of ongoing agency contacts with external actors comply with the procedural requirements in the Act, agency staff may avoid seeking outside views simply out of fear of triggering the requirements of FACA and prompting subsequent litigation (so-called "FACA-phobia").[57]

Instead of promoting diverse engagement with the public, FACA and its related requirements pose the risk of inhibiting public participation. At a minimum, the next

[55] 5 U.S.C. App. 2 §1 *et seq*.

[56] Executive Order 12,838 mandated the elimination of a significant number of advisory committees and now requires approval from OMB for the establishment of new committees. For a brief description of Executive Order 12,838 and related issues of FACA law, see *infra* Appendix 3.

[57] *See* Testimony of J. Clarence Davies before the U.S. House of Representatives Gov't Reform and Oversight Comm., July 14, 1998, *available at* http://www.rff.org/Documents/RFF-CTst-98-davies.pdf.

administration should eliminate the formal and informal restrictions on the allowable number of discretionary advisory committees that have followed from Executive Order 12,838. In general, procedures governing the formation of advisory committees should be simplified and streamlined. Agencies should be permitted to make use of advisory committees when they deem appropriate, so that such committees can help inform the development of agency rulemaking. In addition, future GSA and OMB guidelines should focus on clarifying and amplifying FACA's requirements that advisory committees be "fairly balanced" and should put procedures in place to guarantee representation of diverse perspectives on advisory committees. On committees charged with addressing scientific or technical issues, FACA's "fairly balanced" requirement should be construed to require a balance of expert views, not political interests.[58]

For the purpose of assessing standards for conflicts of interest and biases, it may also be useful to distinguish between advisory committees composed strictly of independent experts and those composed of representatives of affected interests. At present, all federal advisory committees are potentially subject to the disclosure requirements of the Ethics in Government Act of 1978.[59] These requirements are (and should be) drafted in such a way that they create more restrictive conflict-of-interest and bias standards for advisory committees comprised of technical experts.[60] Under existing law, an expert advisory committee participant must disclose conflicts of interest and bias. Participants with significant conflicts are generally disqualified from participation, while potential biases may appropriately be considered in seeking a balanced committee.[61] These same disclosure requirements and membership standards may not have such significant effects for self-consciously "political" advisory committees, composed of representatives of affected interests.

As discussed in Part I, increased transparency can sometimes discourage candid internal discussion among regulators. The same is true of advisory committees composed of technical experts. In light of this concern, FACA already provides exemptions for expert advisory committees in some agencies that regularly deal with technical or scientific matters, such as the National Academy of Sciences and the National Academy of Public Administration.[62] In general, expert advisory committees should have sufficient privacy to allow them to deliberate more openly and candidly, and the next administration should consider what additional committees would benefit from the opportunity to engage in non-public deliberations.

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[58] *See, e.g.,* Overview of the Panel Formation Process at the Environmental Protection Agency Science Advisory Board, September 2002 (EPA-SAB-EC-02-010) ("At the SAB, a balanced panel is characterized by inclusion of the necessary domains of knowledge, the relevant scientific perspectives . . . , and the collective breadth of experience to address the charge adequately.")

[59] Ethics in Government Act of 1978, 5 U.S.C. App. § 101, *et seq.* (2000).

[60] For general ACUS conflict of interest standard recommendations, see Conflict-of-Interest Requirements for Federal Advisory Committees (former 1 C.F.R. §305.89-3). A leading example for expert bodies is The National Academies' *Policy on Committee Composition and Balance and Conflicts of Interest* (May 12, 2003), *available at* http://www.nationalacademies.org/coi/bi-coi_form-0.pdf.

[61] Craig S. Barrow & James W. Conrad Jr., *Assessing the Reliability and Credibility of Industry Science and Scientists*, 114 ENVTL. HEALTH PERSPECTIVES 153 (2006).

[62] *See* 5 U.S.C. app. 2 § 15(b) (2000).

**Recommendation P7.** Procedural barriers to agency use of advisory committees should be reduced, and agencies should be encouraged to form advisory committees whenever useful and appropriate.

**Recommendation P8.** The next administration should clarify and amplify the Federal Advisory Committee Act's requirement that advisory committees be "fairly balanced" and should encourage agencies to adhere to existing standards to ensure representation of diverse perspectives on advisory committees.

**Recommendation P9.** The impact of conflict- or balance-of-interest rules and public meeting requirements may appropriately vary depending on the nature of the committee. It may be important for expert advisory committees to require a balance of scientific positions as opposed to interests, and to provide for non-public deliberations of certain expert committees.

## C. Strategic Management

The issues surrounding transparency and public participation in the administrative process are numerous and ever-evolving. It would be impossible for this report to respond to or anticipate all of these issues. A number of institutional mechanisms exist, however, that could allow the government to address the issues addressed in this report as well as issues that are beyond the scope of this report or will arise in the future. This section describes such mechanisms and recommends that agencies further explore means by which they can evaluate and improve upon their use of transparency and public participation.

### 1. Use Management-Based Strategies to Promote Transparency and Public Participation

Agencies could be encouraged to develop "Public Participation Plans" whereby they would establish strategic guidelines on how to solicit and make better use of public participation in their own regulatory processes. Planning by individual agencies is important because each agency is a unique administrative environment and a one-size-fits-all approach to all transparency and public participation issues will not likely be appropriate for all government agencies.

A planning or management-based approach to agency reform has already been introduced in other contexts. For example, in an effort to improve the scientific integrity of regulatory decision making, OMB issued a bulletin, pursuant to Executive Order 12,866,

mandating peer review of "influential scientific information" disseminated by agencies.[63] The OMB Bulletin noted that different peer review mechanisms are appropriate for different types of information products. Selection of an appropriate mechanism was left to the discretion of the agencies because agencies were best situated to weigh the costs and benefits associated with various types of peer review. The bulletin did, however, call for "a transparent process for public disclosure of peer review planning, including the establishment of an agenda that describes the peer review process that the agency has chosen for each of its forthcoming influential scientific information products."[64]

Similarly, each agency's Public Participation Plan could include elements identifying goals and core values (for example, the identification and solicitation of systematically under-represented constituencies), procedures for monitoring and evaluating compliance with the Plans, and procedures for measuring the effectiveness of the Plans (including efforts at collection of relevant data on levels, quality, and costs of participation at different points in the regulatory process). Agencies could develop Plans after some form of public notice and comment tailored to the unique challenges facing each agency. The Plans could also be subject to periodic internal review by the agency, no less often than every five years. Furthermore, agencies could be encouraged to produce documentation of compliance with their Plans at regular intervals and should periodically reassess the efficacy of their Plans.

A management-based approach to public participation policy reform has the potential to alter the bureaucratic culture within agencies over the long term. Another advantage of Public Participation Plans is the fact that internal agency discussions during development of the Plans, as well as the periodic internal reassessments, might generate information that would help regulatory policy makers learn what strategies for improvement of public participation work best in their area of regulatory activity. It would also ensure that such plans do not simply sit on a shelf without impacting agency decision making. Finally, the periodic reviews might yield data that are useful to the agency, to government generally, and to academic researchers interested in understanding and improving public participation in the administrative process.

Like the peer review plans called for by the OMB Bulletin, Public Participation Plans would not be focused on specific rules. Rather, they would reflect agency strategic thinking about ways to engage constructively with the issues of public participation and transparency on an ongoing basis. These planning processes should themselves be open and transparent. For example, in 2001, the Environmental Protection Agency used an asynchronous online public process to solicit input for its public participation policy.[65] Although the provisions of any Plans that agencies develop need not be made legally enforceable, nor the Plans themselves judicially reviewable, they could nevertheless be subject to periodic review both by the agency and by an oversight entity, whether in the Congress, OMB, or the White House.

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[63] Office of Management and Budget, Final Information Quality Bulletin for Peer Review (Dec. 16, 2004), *available at* http://www.whitehouse.gov/omb/memoranda/fy2005/m05-03.pdf.

[64] *Id*.

[65] *See generally* Thomas C. Beierle, Democracy On-Line: An Evaluation of the National Dialogue on Public Involvement in EPA Decisions (Jan. 2002), *available at* http://www.rff.org/Documents/RFF-RPT-demonline.pdf.

**Recommendation S1.** The next administration should encourage agencies to develop "Public Participation Plans" to assess the quality and diversity of participation in recent agency decisions and to identify ways to make better use of public participation and transparency in their rulemaking processes.

**Recommendation S2.** Public Participation Plans should be developed and adopted in a transparent process that involves, at a minimum, some form of public notice and comment.

**Recommendation S3.** Public Participation Plans should be subject to periodic review both by the propounding agency and by an oversight entity no less often than every five years.

### 2. Promote Continued Deliberation and Research on Issues of Transparency and Public Participation in the Rulemaking Process

The landscape within which agencies operate is not static. New or amended legislation, administrative policies and priorities of presidential administrations, the ever-expanding potential of information technology, and a host of other factors all contribute to flux in the administration of agency rulemaking. While agencies should identify and engage issues relating to transparency and public participation internally through the development of Public Participation Plans, broader study of these issues needs to be conducted by an objective, non-partisan body of experts in the field of administrative procedure implementation and reform. For this reason, the Task Force endorses the reauthorization and appropriation of funding for the Administrative Conference of the United States (ACUS).

From 1968 to 1995, ACUS operated as an independent agency and advisory committee that studied U.S. administrative processes, procedures, and practices for the purpose of recommending improvements and reforms to Congress and agencies. ACUS drew on the expertise of individuals from government, academia, and the private sector and over its 28 years of operation issued approximately 200 recommendations and hundreds of reports, articles, papers, and guides, some with government-wide scope and others that were agency-specific. Most of ACUS's recommendations were implemented by statutory enactment or agency action, resulting in significant changes in administrative processes and procedures, including the enactment of the Administrative Dispute Resolution Act, the Negotiated Rulemaking Act, the Equal Access to Justice Act, and the Congressional Accountability Act.[66]

[66] According to the former Acting Chair of the Conference and OIRA Administrator, Sally Katzen, over the life of the Administrative Conference "about three- fourths of [its] recommendations have been favorably acted on, in whole or in part." *Testimony Before the Subcomm. on the Judiciary on Admin. Law and Gov'tl Relations of the House Comm. on the Judiciary in Support of the Reauthorization of the Administrative Conference of the United States* 8 ADMIN. L.J. AM. U. 649, 665 (1994) [hereinafter Statement of Katzen].

ACUS cultivated an internal culture of, and developed a reputation for, high-quality neutral expertise. Recommendations passed through a meticulous and exacting vetting process before endorsement by the Conference. This process allowed ACUS to make successful recommendations even in areas of highly charged partisan debate. Additionally, ACUS was widely regarded as a cost-effective organization. Only the Chair, a small staff, and consultants received compensation, while government officials, prestigious academics, and private-sector experts served on a volunteer basis or for modest stipends. ACUS was able to use its small appropriations to attract considerable "in-kind" contributions for its projects. As a result, its studies, publications, and recommendations yielded significant monetary savings for agencies, practitioners, and private parties.

Despite broad bipartisan support for the work of the ACUS, on September 13, 1995, a joint House-Senate conference committee voted to terminate funding for the Conference.[67] The elimination of ACUS resulted in government budgetary savings of only approximately $1.8 million per year,[68] at the cost of millions of dollars in potential savings at the agency level as the result of implementation of future ACUS recommendations for administrative reform.[69] To make matters worse, after ACUS was defunded, its recommendations were removed from the Code of Federal Regulations (CFR), where they had previously been published. ACUS's recommendations are now available electronically only through the website of Florida State University.[70] The next administration should either restore all of these recommendations to the CFR or charge a newly reconstituted and funded ACUS with reviewing its past recommendations to determine which should be republished.

A newly reconstituted and funded ACUS would provide an excellent institutional vehicle for analysis of how to improve both the quality and legitimacy of agency rulemaking. ACUS's ongoing attention to these issues would enhance the government's ability to learn from pilot programs and other transparency or public participation reforms to the rulemaking process. Many of the recommendations of this Task Force report, if implemented, would be promising focal points for ACUS-sponsored research and program evaluation.

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[67] *See* Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub.L. 104-52, Title IV, 109 Stat. 468, 480.

[68] *See* Memorandum from Morton Rosenberg and T.J. Halstead, Congressional Research Service, to Rep. Chris Cannon, Chairman, House Subcommittee on Commerce and Administration, Committee on the Judiciary (Oct. 7, 2004), *available at* http://www.abanet.org/poladv/documents/acus_crs_7oct04.pdf (noting that in its last year in existence, ACUS received $1.8 million in appropriations).

[69] Implementation of ACUS recommendations often resulted in significant savings at the agency level. For example, in its final years, ACUS spearheaded the use of alternative dispute resolution techniques in agency litigation. According to Katzen's estimates, "[t]he FDIC, relying on ACUS recommendations, began a pilot mediation program that saved more than 9 million dollars in legal fees and expenses during the first eighteen months. A pilot project by the Department of Labor, on which ACUS has worked closely . . . reduced the cost of litigation in cases resolved by mediation by seventeen percent and expedited resolution of disputes by six months, or more than sixty percent." *See* Statement of Katzen, *supra* note 66, at 659.

[70] Florida State University College of Law, ABA Administrative Procedure Database, http://www.law.fsu.edu/library/admin/acus/acustoc.html (last visited June 15, 2008).

**Recommendation S4.** The Administrative Conference of the United States should be reauthorized, adequately funded, and charged with, among other tasks, evaluating future issues relating to transparency and public participation in the rulemaking process and issuing recommendations for additional improvements.

### 3. Engage in Ongoing Analysis to Promote More Effective Transparency and Public Participation Policies

The Task Force recognizes the importance of evaluating the impact of administrative innovations and reforms, given the significance of performance results as a key metric for judging governmental operations. As the next administration implements administrative reforms, it should take care to do so in ways that facilitate, to the greatest extent possible, empirical evaluation of their impacts. Administrative reforms are often adopted and implemented in a manner that frustrates attempts to measure their real impact and efficacy. Under typical conditions, it is difficult for agencies or government oversight and research bodies to determine whether an implemented reform is achieving its intended aims.

It is imperative that researchers and observers, both within the government and within the public, be able to assess causal relationships between reform and result. At the same time that reforms are proposed, government agencies should consider what would be the best means of evaluating the impact of these reforms. How will the agency be able to decide at a later time if its reforms have been effective? After reforms are implemented, evaluation research must be conducted to determine what reforms actually work. If reforms do work, evaluation research should help explain why; if they do not work, research should help explain why not. A reauthorized ACUS would be well situated to conduct such analysis and to issue recommendations for further improvements based on its findings. In addition, agencies themselves or outside researchers could conduct the analyses.

**Recommendation S5.** The federal government should encourage empirical evaluation of the impact of any innovation or reform of agency transparency and public participation policies. Agencies should therefore consider the best means of evaluating the impact of reforms before implementing changes to agency practice or policy.

**Recommendation S6.** Ex post evaluation and analysis of empirical data on transparency and public participation reforms should be conducted by a combination of a reauthorized Administrative Conference of the United States, agencies themselves, and outside academic researchers.

## Conclusion

Transparency and public participation serve the goals of procedural legitimacy and substantive quality in agency rulemaking. This report has identified ways that the rulemaking process can be reformed to meet these goals better, whether through new experimentation or through improvements in initiatives already underway. Ultimately, transparency and public participation reforms have the potential to benefit both administrative agencies and the public at large. Greater participation can lead to new information that will allow agencies to fulfill better their statutory mandates, while society will benefit from such substantively superior rules as well as a regulatory process with enhanced legitimacy. Improved transparency allows for more effective and useful participation while also establishing public oversight as a check on agency behavior.

The Task Force on Transparency and Public Participation recognizes that, while there have been some recent improvements in the area of transparency and public participation in rulemaking, other significant challenges remain. Public participation is often limited during the crucial stages of policy development pre-NPRM; agency communications with external actors are often discouraged or avoided; and the public does not always have ready access to the information that would allow for effective participation. The recommendations discussed in this report would go a long way toward improving the quality of agency rulemaking and enhancing its public legitimacy.

The Task Force's recommendations represent priorities that the next administration should seriously consider, but they are also not an exclusive set of options for constructive engagement with the challenges associated with agency rulemaking. Nor should the next administration lose sight of the overarching goals that transparency and public participation serve. The Task Force believes its recommendations are important for the quality and legitimacy of government regulation, but regardless of whether all of the recommendations in this report are adopted, government regulation's importance to our society means that the next administration must take serious, affirmative steps to renew the nation's commitment to a legitimate rulemaking process that yields high quality regulatory decisions.

# Appendix 1: Task Force Recommendations

## Transparency Recommendations

**Recommendation T1.** Agencies should streamline the FOIA request process by publishing electronically not only (i) the records that FOIA requires an agency to release without first receiving a request, but also (ii) any documents that an agency or court has previously determined not to fall within a FOIA exemption.

- These efforts could include controlled experimentation with (i) a document-management system that would involve agencies applying a FOIA classification to each document at the time of creation and releasing all documents for which there is no claimed exemption, or (ii) on-line document repositories.

**Recommendation T2.** Agencies should adapt, as government-wide best practices for docket-related transparency, the requirements of Clean Air Act § 307(d) that call for promptly including in each rule's docket, among other records, all communications with OMB and other documents of "central relevance."

**Recommendation T3.** The next administration should improve the e-rulemaking system by focusing on 1) the ease of access and usability of the Regulations.gov site, 2) the quality of data being uploaded, and 3) the timeliness of agency data entry into the Federal Docket Management System.

**Recommendation T4.** Individual agencies should also improve search capabilities on their own websites and, for significant rulemakings, create pages that hyperlink to Regulations.gov.

**Recommendation T5.** Agencies should create online FOIA document libraries that allow the public to search and access documents that the agency or a court has determined not to be exempt from FOIA disclosure.

**Recommendation T6.** Agencies should create a procedure by which public interest groups can qualify for a standing FOIA fee exemption.

**Recommendation T7.** The Office of Government Information Services should be located in the National Archives and Records Administration and should be tasked with overseeing FOIA reforms.

**Recommendation T8.** Agencies should take necessary steps to ensure streamlined, independent, and expedited reviews of whistleblower claims of retaliation.

**Recommendation T9.** The adjudication of whistleblower protection claims should be governed by an objectively reasonable standard without a presumption of non-retaliation by the government.

**Recommendation T10.** Congress should confirm that the Lloyd-La Follette Act covers government whistleblowers that go to Congress with information.

**Recommendation T11.** The implementation of any new whistleblower policies passed by Congress should be carefully monitored by a government-wide entity that is independent from regulatory agencies.

## Public Participation Recommendations

**Recommendation P1.** The next administration should encourage agencies to experiment with interactive comment processes.

**Recommendation P2.** Pilot programs implementing interactive comment periods should be designed to facilitate collection of empirical data concerning the impact and efficiency of such processes, with the eventual goal of making recommendations about any permanent changes to the comment process.

**Recommendation P3.** The next administration should strive to create an agency culture in which administrators understand that it is good practice to communicate with external actors, so long as communications that have an impact on the development of a proposed rule are disclosed in agency dockets.

- Significant communications with external actors should be documented even when those contacts occur prior to the issuance of a notice of proposed rulemaking.
- Such disclosures need not be extremely detailed but should contain information as to the identity and affiliation of the parties to the communication, as well as the general topics discussed.

**Recommendation P4.** The standards governing communications with external actors should be expressly clarified to reduce confusion among administrators as to which communications are proscribed and which should be encouraged.

**Recommendation P5.** Agencies should be encouraged to take affirmative steps to ensure that more external interest groups are given an opportunity to participate meaningfully in the early stages of a rulemaking.

- At a minimum, agencies should maintain an “open door” policy, whereby agencies make themselves available for contact to all interest groups in an even-handed manner.
- Alternatively, agencies should be encouraged to adopt other mechanisms to ensure broad-based public involvement.

**Recommendation P6.** Agencies should announce areas of prospective rulemaking as early as possible and take steps to involve all affected interests in the process of developing new rules.

**Recommendation P7.** Procedural barriers to agency use of advisory committees should be reduced, and agencies should be encouraged to form advisory committees whenever useful and appropriate.

**Recommendation P8.** The next administration should clarify and amplify the Federal Advisory Committee Act’s requirement that advisory committees be “fairly balanced” and should encourage agencies to adhere to existing standards to ensure representation of diverse perspectives on advisory committees.

**Recommendation P9.** The impact of conflict- or balance-of-interest rules and public meeting requirements may appropriately vary depending on the nature of the committee. It may be important for expert advisory committees to require a balance of scientific positions as opposed to interests, and to provide for non-public deliberations of certain expert committees.

## Strategic Management Recommendations

**Recommendation S1.** The next administration should encourage agencies to develop "Public Participation Plans" to assess the quality and diversity of participation in recent agency decisions and to identify ways to make better use of public participation and transparency in their rulemaking processes.

**Recommendation S2.** Public Participation Plans should be developed and adopted in a transparent process that involves, at a minimum, some form of public notice and comment.

**Recommendation S3.** Public Participation Plans should be subject to periodic review both by the propounding agency and by an oversight entity no less often than every five years.

**Recommendation S4.** The Administrative Conference of the United States should be reauthorized, adequately funded, and charged with, among other tasks, evaluating future issues relating to transparency and public participation in the rulemaking process and issuing recommendations for additional improvements.

**Recommendation S5.** The federal government should encourage empirical evaluation of the impact of any innovation or reform of agency transparency and public participation policies. Agencies should therefore consider the best means of evaluating the impact of reforms before implementing changes to agency practice or policy.

**Recommendation S6.** Ex post evaluation and analysis of empirical data on transparency and public participation reforms should be conducted by a combination of a reauthorized Administrative Conference of the United States, agencies themselves, and outside academic researchers.

# Appendix 2: Task Force Member Biographies

**Cary Coglianese (Task Force Chair)** is the Associate Dean for Academic Affairs and the Edward B. Shils Professor of Law and Professor of Political Science at the University of Pennsylvania, where he also is director of the Penn Program on Regulation. The author of numerous articles and books on administrative law and regulatory policy, he spent a dozen years on the faculty at Harvard University's John F. Kennedy School of Government and has been a visiting professor of law at Stanford University and Vanderbilt University. He is the founder and chair of the Law & Society Association's collaborative research network on regulatory governance, a council member of the American Bar Association's Section of Administrative Law and Regulatory Practice, and a founding editor of the journal *Regulation & Governance*.

**Steven J. Balla** is Associate Professor of Political Science, Public Policy and Public Administration, and International Affairs at The George Washington University, where he also serves as a Research Associate in the George Washington Institute of Public Policy. He is a member of the International Working Group on Online Consultation and Public Policy Making. During the 2008-2009 academic year, he will be a Fulbright Scholar at the Peking University School of Government. He is author, along with William T. Gormley, Jr., of *Bureaucracy and Democracy: Accountability and Performance*.

**Barbara H. Brandon** serves as Faculty Services Librarian at the University of Miami School of Law. She has practiced environmental law at both the federal and state levels for the United States Department of Justice, the Pennsylvania Department of Environmental Protection, and a large national law firm, as well as has served as a policy analyst for the nonprofit organization Information Renaissance. She has taught law at the University of Kentucky College of Law and as an adjunct professor at the University of Pittsburgh School of Law. She is currently a member of the American Bar Association's Committee on the Status and Future of Federal E-Rulemaking. She holds a JD from the University of Pittsburgh School of Law and an LLM from Harvard Law School.

**Ashley Brown** is the Executive Director of the Harvard Electricity Policy Group (HEPG), a program of the Mossavar-Rahmani Center for Business and Government at Harvard University's John F. Kennedy School of Government. He is of counsel to the law firm of Dewey & LeBoeuf LLP. He has also served as an advisor on infrastructure regulatory issues to governments such as Brazil, Tanzania, India, Ukraine, Russia, Philippines, Zambia, Namibia, Argentina, Costa Rica and Hungary. From 1983-1993, he served as Commissioner of the Public Utilities Commission of Ohio. Prior to his appointment, he was the coordinator and counsel for the Montgomery County [Ohio] Fair Housing Center, managing attorney for the Legal Aid Society of Dayton, Inc., and legal advisor to the Miami Valley Regional Planning Commission, also in Dayton. He has taught in public schools and universities, frequently lectures at universities and conferences

throughout the world, and publishes articles on subjects of interest to American and foreign electricity sectors.

**Louis Clark** is president and corporate accountability director of the Government Accountability Project (GAP) in Washington, D.C. GAP promotes accountability by advocating occupational free speech, litigating whistleblower cases, investigating and publicizing whistleblower concerns, and developing reforms of whistleblower laws and policies. GAP also conducts an accredited legal clinic for law students. Clark assumed directorship of GAP in 1978, having first served as legal counsel for the organization. He is a frequent contributor of articles on free speech and also has served as an adjunct professor at the Antioch University School of Law from 1978-1988 and the David E. Clarke School of Law since 1989.

**Thomas Cmar** is an attorney for the Natural Resources Defense Council (NRDC), where he litigates cases under FOIA and federal environmental laws. Prior to joining NRDC, he was an attorney for the International Labor Rights Fund and a law clerk to the Honorable Debra Freeman, United States Magistrate Judge in the Southern District of New York.

**Jamie Conrad** is the principal of Conrad Law & Policy Counsel, where he represents businesses, associations, and coalitions before agencies and Congress in the areas of homeland security; environment, health, and safety; and science policy/information quality. He practiced previously at the American Chemistry Council and at two major national law firms. He has chaired the Environmental Policy Commission for the City of Alexandria, Virginia, and was one of the few Democrats on the Bush-Cheney Transition Advisory Committee for the EPA. He is the Secretary of the ABA's Section of Administrative Law & Regulatory Practice.

**E. Donald Elliott** is a partner at Willkie Farr & Gallagher LLP and chairs the firm's worldwide Environmental, Health and Safety Department. From 1989 through 1991, he served as General Counsel of the EPA. He was professor at Yale Law School from 1981 through 1993 and continues to teach environmental law, administrative law, and complex civil litigation as an adjunct professor at Yale. He is a member of the National Academy of Sciences Board on Environmental Studies and Toxicology and of the advisory boards for the Center for Clean Air Policy, the *Environment Reporter*, the *Journal of Industrial Ecology*, and the Carnegie Mellon University Center for the Study and Improvement of Regulation.

**Fred Emery** is a principal in The Regulatory Group, Inc., a small consulting firm that specializes in federal regulations and the regulatory process. Emery has worked in the regulatory field for almost 50 years at both the state and federal levels. He served as Director of the Federal Register from 1970 to 1979 where he received national attention for his efforts to make federal regulations more readable. He has taught administrative law at the law school level, taught the rulemaking process to employees at most federal regulatory agencies, and is a Fellow of the ABA Section of Administrative Law and Regulatory Practice.

**William Funk** is a professor and the Jeffrey Bain Faculty Scholar at Lewis & Clark Law School. Prior to becoming a professor, he was an assistant general counsel at the U.S. Department of

Energy, the principal staff member of the Legislation Subcommittee of the U.S. House of Representatives' Permanent Select Committee on Intelligence, and a staff attorney in the Office of Legal Counsel for the U.S. Department of Justice. Funk has co-authored *Administrative Procedure and Practice: Problems and Cases*, *Administrative Law: Examples & Explanations*, the *Federal Administrative Procedure Sourcebook*, and *Legal Protection of the Environment*.

**Beth Noveck** is a professor of law at the New York Law School, where she is also the Director of the Institute for Information Law and Policy and of the Democracy Design Workshop, the latter of which focuses on fostering open, transparent, and collaborative ways of learning, working, and governing. In collaboration with the United States Patent and Trademark Office, Noveck launched the Peer to Patent: Community Patent Review Project. She authors The Cairns Blog on e-democracy, cyber democracy, and civic innovation.

**Stuart Shapiro** is an assistant professor at the Edward J. Bloustein School of Planning and Public Policy at Rutgers University. He has written on the public comment process, e-rulemaking, and other aspects of the rulemaking process. Prior to joining Rutgers, he worked for five years as a desk officer and manager at the Office of Information and Regulatory Affairs within the Office of Management and Budget, analyzing and coordinating review in the areas of labor, health, and social policy. He received his Ph.D. from Harvard University and has taught at Harvard, Georgetown, and the USDA Graduate School.

**Dan Turner** is the President of Turner Consulting Group, Inc. He started the company in 1994, drawing on his background in government computing services and state networking agencies. TCG has developed award-winning Web sites for several divisions of the National Institutes of Health, the National Science Foundation, the U.S. Department of Agriculture, the Department of Justice, and for private industry, as well as associations, educational institutions and small businesses. Turner serves on the board of the Entrepreneurs' Organization's Washington, D.C., Chapter and organizes and travels extensively to EO events worldwide. He is a member of the Association of Computing Machinery.

# Appendix 3: Summaries of Laws Related to Transparency and Public Participation in Rulemaking

### *Executive Order 12,838*

President William J. Clinton issued Executive Order 12,838 on February 10, 1993, ordering each executive department and agency to dissolve at least one-third of its advisory committees subject to FACA by the end of fiscal year 1993. Agencies were required to submit detailed justifications for any advisory committees that would not be disbanded, as well as a detailed recommendation for submission to Congress to continue or terminate any committee required by statute. The order also required agencies to receive approval from the director of the Office of Management and Budget (OMB) before sponsoring new advisory committees. The Order dictates that OMB approval of new agencies is to be granted "sparingly."

### *Executive Order 12,866*

President William J. Clinton issued Executive Order 12,866 in September 1993. The order rescinded the Reagan-Bush directives on regulatory review and reaffirmed OMB as the primary agency charged with review of proposed regulations. President George W. Bush has retained Executive Order 12,866, although with amendments contained in Executive Order 13,258 and Executive Order 13,422.

In addition to refining the cost-benefit analysis utilized by OMB during the review process, Executive Order 12,866 incorporated new procedures intended to make the regulatory review process more accessible and transparent to the public. Only the Administrator of OIRA (or her designee) may receive oral "communications initiated by persons not employed by the executive branch . . . regarding the substance of a regulatory action under OIRA review." E.O. 12,866 § 6 (b)(4)(A). Additionally, a representative from the issuing agency must be invited to any meeting involving substantive communications with outsiders regarding the regulatory action under OIRA review. E.O. 12,866 § 6 (b)(4)(B)(i). The dates of such meetings and the names of the individuals involved in the substantive communications must be forwarded to the issuing agency within ten working days of the meeting. E.O. 12,866 § 6 (b)(4)(B)(ii). This requirement extends to "meetings to which an agency representative was invited, but did not attend and [] telephone conversations." *Id*. Likewise, OIRA is required to forward written external communications, regardless of format, to the issuing agency within ten working days of receipt of such communications. OIRA is required to "maintain a publicly available log that [must] contain, at a minimum . . . the status of all regulatory action[,]" "[a] notation of all written [external] communications forwarded to an issuing agency[,]" "the dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person" outside the executive branch, and "the subject matter discussed during such communications." E.O. 12,866 § 6 (b)(4)(C). At the

end of the rulemaking process, OIRA must make all documents exchanged with the agency publicly available.

### *Federal Advisory Committee Act*

The Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2 § 1 *et seq*., governs the formation and function of advisory committees by federal agencies. The statute responded to concern that advisory committees were proliferating unnecessarily, that there were no mechanisms in place for either Congress or the public to monitor the "number, purpose, membership, activities, and cost" of the committees, and that the committees may exercise undue influence. 5 U.S.C. App. 2 § 2. FACA was designed to ensure that advisory committees provide balanced advice, make decisions in a way that is open to the public, act promptly to satisfy their mandates, and comply with cost control and recordkeeping procedures. To this end, FACA standardized procedures governing the "establishment, operation, administration, and duration of advisory committees." 5 U.S.C. App. 2 § 2(b)(4).

As defined by Section 3 of FACA, an "advisory committee" means "any committee, board, commission, council, conference, panel, task force, or other similar group" established by statute or reorganization plan, or established or utilized by the President or one or more agencies, "in the interest of obtaining advice or recommendations for the President," one or more executive agencies, or government officials. There are several specific exemptions from this definition, such as groups composed entirely of full-time or permanent part-time federal officers or employees; committees created by the National Academy of Sciences or the National Academy of Public Administration; committees of the Central Intelligence Agency and the Federal Reserve System; any local civic groups whose primary function is rendering a public service with respect to a federal program; and any local committees established to advise State or local officials or agencies.

Notably, the Act required that new advisory committees be established only after public notice and upon demonstration that the convening of a new committee serves the public interest (§ 9(a)); that the ongoing status and necessity of advisory committees be subject to periodic review and reassessment (§§ 7, 14); and that advisory committees be convened for clearly enumerated purposes and that their membership be "fairly balanced" (§ 5). Additionally, all advisory committee meetings were opened to the public, subject to a number of exceptions (§ 10(a)(1)). (FACA incorporates the same exemptions to mandatory public meetings as found in the Government in the Sunshine Act). Prior notice of meetings generally must be published in the *Federal Register* (§ 10(a)(2)). Committees must issue annual reports (§ 10(d)).

According to the U.S. General Services Administration's website (www.gsa.gov), there are an average of 1,000 advisory committees at any given time government-wide. This translates to approximately 40,000 committee members drawn from government and the public. Committee members provide their expertise in particular areas of government activity and offer information and advice on a broad range of topics effecting administrative regulation. Generally speaking, each federal agency that sponsors an advisory committee must adhere to both the procedural requirements established by FACA and the administrative guidelines

provided by the U.S. General Services Administration (GSA) Committee Management Secretariat.

### *Freedom of Information Act*

Enacted in 1966 and amended in 1996 and 2007, the Freedom of Information Act (FOIA), 5 U.S.C. § 552, establishes the default position that documents controlled by the U.S. government must be made publicly available. The Act defines which agency records are subject to disclosure, outlines mandatory disclosure procedures, and grants nine exemptions. The 1996 amendments to the Act significantly updated its requirements in light of technological developments, particularly the emergence of the Internet. The OPEN Government Act of 2007, summarized separately below, codified certain FOIA practices, added new reporting requirements, and clarified deadlines for responding to FOIA requests.

Executive branch agencies are required to publish certain items of information in the *Federal Register*. 5 U.S.C. § 552 (a)(1)(A)–(E). Agency orders and opinions, policy statements, and interpretations not published in the *Federal Register*, as well as staff manuals and instructions, must be available for inspection, copying, or sale or be published. 5 U.S.C. § 552 (a)(2). These types of agency documents created after November 1, 1996 must be available both through publicly accessible "paper reading rooms" and through online "electronic reading rooms." 5 U.S.C. § 552 (a)(2).

Agencies must make reasonable efforts to make other documents promptly available upon reasonably descriptive request by a member of the public. 5 U.S.C. § 552 (a)(3). The documents must be provided in the form or format specified by the requestor if possible. 5 U.S.C. § 552 (a)(3). Agencies must confirm FOIA requests within twenty days and inform the requestor of the agency's intent to comply with or deny the request. 5 U.S.C. § 552(a)(6)(a)(i). A denial may be appealed to the issuing agency's head, and appeals must normally be decided within twenty business days. 5 U.S.C. § 552(a)(6)(a)(i).

The Act provides nine exemptions to these disclosure requirements, some of which are mandatory and some of which are discretionary: 1) documents classified on the basis of national defense or foreign security; 2) records pertaining solely to internal agency personnel and practices; 3) records that are exempted from disclosure by another statute; 4) trade secrets and commercial or financial information or otherwise privileged and confidential records; 5) inter- or intra-agency memoranda or letters that would not normally be accessible outside the context of litigation; 6) personnel and medical files, or other files that would infringe on employee privacy; 7) records gathered for law enforcement purposes; 8) records concerning the examination, operation, or condition of financial institutions prepared, on the behalf of, or for the use of an agency responsible for overseeing such institutions; and 9) geological or geophysical information and data, including maps, concerning wells. 5 U.S.C. § 552(b)(1-9).

### *Government in the Sunshine Act*

Passed in 1994, the Government in the Sunshine Act, 5 U.S.C. § 552b, in principal part requires that meetings of federal agencies headed by collegial bodies, a majority of whose members are appointed by the President with the advice and consent of the Senate, be open to

the public. Approximately fifty agencies, including most of the major independent regulatory commissions, fall under the Act.

Subsection (a) provides the operative definitions under the Act, subsection (b) declares a broad presumption in favor of open meetings, and subsection (c) describes the circumstances under which a meeting, or a portion of a meeting, may be closed to the public. Subsection (c) provides a number of permissive exemptions that generally mirror those in the Freedom of Information Act, with a few notable exceptions. There is no exemption for interagency and intra-agency memoranda and letters, and there are two additional exemptions that do not have counterparts in FOIA. Specifically, Exemption 9 permits agencies that regulate securities, commodities, or financial institutions to close meetings to protect information that could endanger the stability of financial situations, and more broadly, it allows agencies to close meetings to protect information the disclosure of which would be likely to frustrate the implementation of a proposed agency action. Exemption 10 allows closure of meetings concerning agency participation in pending or anticipated litigation or formal adjudication.

Subsection (e)(1) requires that agencies publicly announce the time, place, and subject matter of a meeting at least one week in advance, in addition to providing notice of whether it is to be an open or closed meeting and of the name of and contact information for an agency official. Information about the time, place, and subject matter, as well as changes to the time or place of meetings, must be published in the Federal Register. 5 U.S.C. § 552b(e)(3). Less than seven days' notice of a meeting is permitted upon a recorded vote by a majority of the membership determining that "agency business requires" less notice, and upon the agency's making a public announcement at the "earliest practicable time." 5 U.S.C. § 552b(e)(1).

Agencies may decide to close a meeting only upon a recorded vote by a majority of the entire membership of the agency. 5 U.S.C. § 552b(d)(1). An agency may also close a meeting upon request by a "person whose interest may be directly affected by a portion of a meeting[,]" or by any member of the agency. 5 U.S.C. § 552b(d)(2). When a meeting is closed, written copies of the vote of each member must be disclosed within one day, as well as a full written explanation of the closing and a list of all expected meeting attendees and their affiliations. 5 U.S.C. § 552b(d)(3). Subsection (d)(4) provides an expedited closure procedure for agencies that regularly hold closed meetings under one of the exemptions to the Act. Subsection (f)(1) requires that, for every meeting closed under one or more of the exemption to the Act, the general counsel or chief legal officer of the agency must certify that the meeting may be properly closed. The presiding officer of a closed meeting must issue a statement describing the time and place of the meeting and listing the persons who were present. Depending on the exemption at issue, an agency must maintain a complete verbatim transcript, detailed minutes, or an electronic recording of all closed meetings. 5 U.S.C. § 552b(f)(1). This documentation must be kept on file for at least two years and be made "promptly available" for public inspection and copying (excepting some exempt information). 5 U.S.C. § 552b(f)(2).

### *Information Quality Act*

The Information Quality Act (IQA), sometimes referred to as the Data Quality Act, was passed as a two-sentence rider in Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554). The Act required the Office of

Management and Budget (OMB) to issue guidelines to federal agencies that "provide policy and procedural guidance . . . for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." It also required agencies to issue their own information quality guidelines and establish administrative mechanisms that allow affected persons to "seek and obtain" correction of information maintained and disseminated by the agencies that does not comply with the OMB guidance. Some observers believed that the Act would make the government accountable for information it disseminates, an issue exacerbated by creation of the Internet. Others viewed the Act as a boon to corporations and regulated interests, allowing them to encourage suppression of government reports detrimental to their private interests.

Following the IQA's direction to establish guidelines under the Paperwork Reduction Act, OMB issued guidelines stating that the IQA applies to virtually all federal agencies and defined "information" as "any communication or representation of knowledge such as facts or data, in any medium or form." Similarly, the guidelines define "dissemination" as any "agency initiated or sponsored distribution of information to the public." Finally, "quality" was defined in terms of utility, objectivity, and integrity, and agencies can generally presume that data are "objective" if they have been subject to an independent peer review process.

The guidelines also establish that when agencies disseminate information related to the analysis of risks to human health, safety, and the environment, they are required to "adopt or adapt" the "quality principles" that Congress established in the Safe Drinking Water Act Amendments of 1996, 42 U.S.C. §§ 300g-1(b)(3)(A),(B).

Finally, OMB's guidelines also describe the "administrative mechanisms" that agencies are required to establish to allow "affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines." Specifically, the guidelines state that the mechanisms should be "flexible, appropriate to the nature and timeliness of the disseminated information, and incorporated into agency information resources management and administrative practices." Agency decisions regarding corrections must be made in "appropriate time periods," and must "notify the affected persons of any corrections made." Agencies also must establish an "administrative appeal process" to review the agencies' initial decisions, and must specify "appropriate time limits" for the resolution of requests for reconsideration.

### *Lloyd-La Follette Act*

Passed in 1912, the Lloyd-La Follette Act, 5 U.S.C. §§ 7211, 7511 *et seq.*, was the first federal whistleblower protection statute. The Act was designed to prevent retaliation against executive branch whistleblowers who communicate their concerns to Congress with just cause. It provides that "[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." *Id*.

### *OPEN Government Act of 2007 (Pub L. No. 110-175)*

The Openness Promotes Effectiveness in our National Government Act of 2007 (the OPEN Government Act of 2007), amending 5 U.S.C. § 552, addresses a range of administrative and procedural issues affecting FOIA administration. In part, it codifies what was already widespread agency practice, such as the assigning of tracking numbers (section 7) and the designation of Chief FOIA Officers and FOIA Public Liaisons (section 10). Other provisions establish new reporting requirements, such as the additional statistics required in agency annual FOIA reports (section 8) and the reports required of the Attorney General and the Special Counsel concerning disciplinary actions for arbitrary and capricious rejection of FOIA requests (section 5). Still other provisions change existing practice, such as section 6, which specifies procedures for the calculation of FOIA's time periods and limits the assessment of search (or duplication) fees for certain requests not responded to within the applicable time period.

Specifically, section 6(a) provides that the statutory time period commences "on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests." An agency "may make one request to the requester for information and toll" the statutory time period "while it is awaiting such information that it has reasonably requested from the requester." The agency may also toll the time period "if necessary to clarify with the requester issues regarding fee assessment." The requester's response to the agency's request "ends the tolling period." Section 6(b) precludes an agency from assessing search fees (and in some cases, duplication fees), if the agency fails to comply with FOIA's time limits, unless "unusual" or "exceptional" circumstances "apply to the processing of the request."

Section 7 amends 5 U.S.C. § 552(a) by requiring agencies to assign a tracking number for each request that will require more than ten days to process. In addition, agencies must furnish a phone number or an Internet site to enable requesters to inquire about the status of their request.

Section 10 created a new office, the Office of Government Information Services, which Congress intended to be situated within the National Archives and Records Administration. This new office will have two main functions: (1) to review agency FOIA activities and recommend changes to Congress and the President; and (2) to offer mediation services to FOIA requesters as a "non-exclusive alternative to litigation." Section 10 of the Act also directs the Government Accountability Office (GAO) to conduct audits "on the implementation of this section" and to issue reports. The Section also codified several practices that were mandated under Executive Order 13,392, including the requirement that each agency appoint a Chief FOIA Officer (charged with "agency-wide responsibility for efficient and appropriate compliance" with FOIA) and one or more FOIA Public Liaisons (responsible for "assisting in reducing delays, increasing transparency" and also "resolving disputes").

### *Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, enacted in 1980 and expanded in 1996, requires agencies to consider the special needs and concerns of small entities whenever they engage in notice-and-comment rulemaking. The Act requires agencies engaged in notice-and-comment rulemaking to prepare and publish a "regulatory flexibility analysis" (RFA) in the Federal Register describing the impact of the proposed rule on small entities (small businesses, small organizations, and small governmental jurisdictions). If the proposed regulations would have a significant impact on a substantial number of small entities, agencies must specify alternative regulatory approaches that would minimize such burdens.

Like proposed notice-and-comment rules, RFAs are open to comment by the public, and agencies are encouraged to actively engage with small entities that will be significantly affected by the proposed rule. The final RFA must explain why the various alternatives were adopted or abandoned. 5 U.S.C. §§ 603, 604. Agencies are also required to develop and publish plans for the periodic review of rules that have significant long-term impacts on a large number of small entities. 5 U.S.C. § 610.

Agencies are exempted from the requirements of the Act if the agency head "certifies that the rule will not have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605.

### *Small Business Regulatory Enforcement Fairness Act*

Adopted in 1996, the Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C. §801 *et seq.*, modifies the requirements for economic impact analyses under the Regulatory Flexibility Act. It establishes a procedure for Congressional review of "major" rules before they are promulgated, and allows Congress to review and/or reject individual regulations regardless of whether they have an impact on small entities. 5 U.S.C. §§ 801, 802.

The Act also requires agencies to adopt additional procedures to ensure the receipt of small entity comments on rules promulgated by either the Environmental Protection Agency (EPA) or the Occupational Health and Safety Administration (OSHA). Both agencies are required to convene "Small Business Advocacy Review Panels" to shape each rule that is expected to have a major economic impact on small businesses. Secondary panels, consisting entirely of small entity representatives, must also review proposed rules and submit recommendations to the issuing agency. Once regulations are promulgated, their impact must be assessed by Small Business Administration Regulatory Enforcement Ombudsmen, and regional regulatory fairness boards. Under the authority of the Ombudsman, regional boards must advise agencies on small business concerns and submit annual reports to Congress.

### *Whistleblower Protection Act*

In 1989, Congress adopted the Whistleblower Protection Act (WPA) to "strengthen and improve protection for the rights of federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government." 5. U.S.C. § 1201 *et seq*. The Act prohibits agencies from taking negative personnel action against federal employees who disclose information that they "reasonably believe" shows that governmental officials are violating the

law, engaging in gross mismanagement or waste of funds, or posing a significant public health or safety risk. Whistleblowers are not protected if they disclose publicly information that is prohibited from disclosure by law, but they can be protected for disclosing even such protected information to their agencies' Inspector General office or to Congress. Employees subjected to negative personnel action due to the disclosure of information may raise their rights under the WPA in one of the following: an appeal to the Merit Systems Protection Board (MSPB), actions initiated by the Office of Special Counsel (OSC), an individual action brought to the MSPB, and grievance proceedings provided under union contract rules.

Recent legislative proposals seek to enhance the protections afforded to federal workers under the WPA. For example, S. 274, the Federal Employee Protection of Disclosures Act, would clarify existing whistleblower law and enhance the protection for federal employee whistleblowers by expanding the scope of protected activity to cover complaints within an employee's chain of command. The legislation also would make several changes to the laws governing the MSPB and the OSC, which implement provisions of the WPA. S. 274 would expand the definition of protected whistleblowing, create new avenues of appeal for employees who lose their security clearances in retaliation for whistleblowing, authorize the OSC to become more involved in such cases, and suspend the U.S. Court of Appeals exclusive jurisdiction over whistleblower appeals for five years. The bill would also require agencies to inform employees on how to make a lawful disclosure of "credible information" regarding any violation of law, fraud, waste, abuse, or gross mismanagement without restriction as to time, place, form, motive, context, or prior disclosure.

H.R. 985, the Whistleblower Protection Enhancement Act of 2007, was introduced by Reps. Waxman, Platts, Van Hollen, and T. Davis on February 12, 2007. It provides some general whistleblower protections in response to court decisions by the U.S. Court of Appeals for the Federal Circuit limiting the scope of disclosures protected under the current law, as well as specific protection for certain classes of federal employee whistleblowers. As a general matter, the bill clarifies that "any" disclosure regarding waste, fraud, or abuse means "without restriction as to time, place, form, motive, context or prior disclosure" and includes formal or informal communication. The bill also provides that whistleblowers can rebut the presumption that federal officials performed their duties in accordance with the law by providing substantial evidence to the contrary. This would lower the standard of "irrefutable proof" that has been essentially propounded by the Court of Appeals. If the MSPB does not take action on whistleblower claims within 180 days, the bill would allow whistleblowers direct access to the federal courts. The bill provides specific whistleblower protections to federal workers who specialize in national security issues, federal contractor employees, and employees who make disclosures regarding actions that threaten the integrity of federal science. This last protection is intended to have an impact on the alleged retaliatory practices within science-based agencies.

# Appendix 4: Related ACUS Recommendations

*During its operation from 1968 to 1995, the Administrative Conference of the United States (ACUS) issued many recommendations related to transparency and public participation in the regulatory process.*

305.71-2 Principles and Guidelines for Implementation of the Freedom of Information Act (Recommendation No. 71-2), *available at* http://www.law.fsu.edu/library/admin/ac-us/305712.html

305.72-8 Adverse Actions Against Federal Employees (Recommendation No. 72-8), *available at* http://www.law.fsu.edu/library/admin/acus/305728.html

305.76-2 Strengthening the Informational and Notice-Giving Functions of the "Federal Register" (Recommendation No. 76-2), *available at* http://www.law.fsu.edu/library/admin/ac-us/305762.html

305.76-3 Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking (Recommendation No. 76-3), *available at* http://www.law.fsu.edu/library/admin/acus/305763.html

305.77-3 Ex parte Communications in Informal Rulemaking Proceedings (Recommendation No. 77-3), *available at* http://www.law.fsu.edu/library/admin/acus/305773.html

305.80-6 Intragovernmental Communications in Informal Rulemaking Proceedings (Recommendation No. 80-6), *available at* http://www.law.fsu.edu/library/admin/ac-us/305806.html

305.81-1 Procedures for Assessing and Collecting Freedom of Information Act fees (Recommendation No. 81-1), *available at* http://www.law.fsu.edu/library/admin/ac-us/305811.html

305.82-4 Procedures for Negotiating Proposed Regulations (Recommendation No. 82-4), *available at* http://www.law.fsu.edu/library/admin/acus/305824.html

305.84-3 Improvements in the Administration of the Government in the Sunshine Act (Recommendation No. 84-3), *available at* http://www.law.fsu.edu/library/admin/ac-us/305843.html

305.87-2 Federal protection of private sector health and safety whistleblowers (Recommendation No. 87-2), *available at* http://www.law.fsu.edu/library/admin/ac-us/305872.html

305.88-9 Presidential review of agency rulemaking (Recommendation No. 88-9), *available at* http://www.law.fsu.edu/library/admin/acus/305889.html

305.89-3 Conflict-of-interest requirements for Federal Advisory Committees (Recommendation No. 89-3), *available at* http://www.law.fsu.edu/library/admin/acus/305893.html

305.90-2 The Ombudsman in Federal Agencies (Recommendation No. 90-2), *available at* http://www.law.fsu.edu/library/admin/acus/305902.html

305.93-4 Improving the Environment for Agency Rulemaking (Recommendation No. 93-4), *available at* http://www.law.fsu.edu/library/admin/acus/305934.html