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# Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration\*

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Virtually every major aspect of contemporary life is affected by government regulation. For good or ill, the administrative process affects the food people eat, the water they drink, and the air they breathe. Economic activity depends on the appropriate regulation of key sectors such as energy, communications, and transportation.

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\* This Article represents the authors' efforts to summarize and synthesize the views of a nonpartisan Task Force on Transparency and Public Participation, convened at the initiation of OMB Watch, a Washington, D.C., advocacy organization, and chaired by Professor Coglianese. This Article is a lightly copy-edited version of the Task Force report initially prepared by the authors. CARY COGLIANESE, HEATHER KILMARTIN & EVAN MENDELSON, *TRANSPARENCY AND PUBLIC PARTICIPATION IN THE RULEMAKING PROCESS: A NONPARTISAN PRESIDENTIAL TRANSITION TASK FORCE REPORT* (2008), available at <http://www.law.upenn.edu/academics/institutes/regulation/transparencyReport.pdf>. That report was current as of July 2008, when it was originally drafted and released during the lead-up to the presidential transition. The Task Force completed its mandate at that time, so we have kept the Article virtually unchanged, even though in the intervening period several of the Task Force recommendations have already been implemented by the Obama Administration and at least one member of the Task Force (Beth Noveck) has joined the administration to work on transparency and public participation. The Article would not have been possible but for the willingness of Task Force members to give generously of their time and insight. We thank them for their thoughtful deliberations and detailed comments on this summary. Eric Dillalogue and Anna Gavin helped in preparation of the manuscript, and OMB Watch provided financial support. However, the report on which this Article is based was neither vetted nor approved by OMB Watch or the steering committee of its regulatory reform project. Instead, the report was used to inform the project staff in its preparation of materials and recommendations to the steering committee. This Article reflects the perspectives that emerged from Task Force deliberations, but it does not necessarily represent the views of all the Task Force members or the authors, or of the institutions with which they are affiliated. It also should not be construed to represent a consensus statement or shared set of findings or recommendations. We believe, however, that the ideas and recommendations in this Article do represent their own, synthetic form of expert participation in the rulemaking process and warrant respectful consideration.

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Health care and prescription drugs, international trade and corporate finance—the list of areas of social and economic activity affected by regulation truly is a long one. Indeed, the degree to which people enjoy important social and economic rights and experience equality of opportunity depends in large part on regulation.

Given the importance of regulation, the process by which rules are made has important implications for democratic values and the advancement of overall social welfare. Although many legal requirements governing the administrative process originate in legislation adopted by Congress, even more are created by administrative agencies themselves, headed by officials appointed by the President (with Senate confirmation) who exercise 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, yet is greatly affected by their decisions.

The Task Force on Transparency and Public Participation was created to provide advice suitable for the new 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. The Task Force operated independently of OMB Watch, and the Task Force consisted of experienced professionals from outside OMB Watch with backgrounds in government service, business representation, nongovernmental organization advocacy, and academe. During the Task Force's meetings in Washington, D.C., members discussed the role of transparency and public participation in the rulemaking process, specifically focusing on the ends that transparency and public participation serve. The meetings were geared toward developing a set of policy recommendations to bring the rulemaking process closer to the ends of substantive quality and procedural legitimacy.

This Article 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 new 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.<sup>1</sup> The quality of regulatory outcomes can be assessed against agencies' statutory missions, as well as more broadly by asking 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 transparent 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 advantage certain groups and individuals over others. Still, those who end up "losing" should at least be able to understand the decisions made by regulators and to feel that their interests were treated fairly and respectfully.

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

How can the rulemaking process be designed to advance the twin goals of legitimacy and quality in agency decisionmaking? This Section of the Article explores answers to this question. 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 regulatory decisionmaking. Transparency also means that agency decisions are clearly articulated, the rationales for these decisions are fully explained, and the evidence on which the decisions 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 of government in helping develop agency rules, whether through the open comment process required by section 553(c) of the Administrative Procedure Act ("APA")<sup>2</sup> or through other participatory processes.

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<sup>1</sup> These twin goals have been long recognized. *Cf.* Roger C. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591-93 (1972) (arguing that although 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").

<sup>2</sup> 5 U.S.C. § 553(c) (2006).

Those seeking to reform the rulemaking process often treat transparency and public participation as ends in themselves, but we believe that transparency and public participation are more usefully seen as tools that can enhance regulators' ability to achieve society's goal of high-quality and legitimate rules. Public participation promotes legitimacy by creating a sense of fairness in rulemaking. The popular notion of a fair process is one in which all interested citizens have the ability to participate and to have an agency consider their interests even-handedly. Transparency helps because an agency's refusal to listen to 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—and contribute to a more robust record for judicial review,<sup>3</sup> the process through which judges exercise their authority to ensure that agency decisions comport with statutory mandates. Transparency allows both the public and the 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.

Not only will transparency and public participation inevitably help to achieve democratic goals, but they also can 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 decisionmakers better foresee and appreciate the impact of decisions they are contemplating. Additionally, a rule perceived as legitimate 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.<sup>4</sup>

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<sup>3</sup> 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 . . .”).

<sup>4</sup> Cf. 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 paternalistic enforcement efforts can, in some instances, lead to increased resistance by regulated parties).

Transparency contributes to the substantive goals of the rulemaking process by making information more readily available to more people. Such increased public access to information enables better public participation, which, in turn, produces the benefits discussed above. When people have access to the information upon which an 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 that information. 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. Transparency can also contribute to better substantive results by allowing the public to act as an effective check on the regulatory system. When the public monitors agency behavior, regulators are inclined to choose policies that best advance the overall public welfare and the agency's statutory mandate; while under the microscope of public scrutiny, regulators are reluctant to choose policies that are sloppy or expedient. Apart from its ability to pull the alarm on extreme forms of agency wrongdoing, such as corruption, the public also can ensure that even well-intentioned regulators do not stray from their statutory mandates.

Still, improved transparency and public participation are not necessarily unmitigated goods. Even if increasing participation and transparency makes the 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.<sup>5</sup> 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

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<sup>5</sup> 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 decisionmaking).

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 contest based on the comments received.

Just as there may be such a thing as too much participation, total transparency, too, may 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 overseers, could be monitoring everything said or written within the agency.<sup>6</sup> If regulatory officials feel inhibited, they may engage in much less dissent, discussion, and self-criticism than necessary for sound policymaking. Decisionmakers do need some protected space in which to think critically and even ask "dumb" questions.

In addition to the possibility of inhibiting internal debate, a commitment to transparency could reduce the likelihood that private firms would voluntarily provide agencies with potentially helpful information, especially if doing so were to mean that the agencies must disclose confidential business information obtained from such regulated firms.<sup>7</sup> Because rulemaking demands extensive gathering of information held by regulated firms, rulemakers need to strike a balance between the critical objective of letting the public know the full basis for the agency's decisions on the one hand, and the protection of confidential business information on the other.<sup>8</sup> Although agency decisions about the disclosure of information used to justify new rules should generally adhere to a policy of full transparency, the presumption of disclosure can be overcome where a sufficient need for confidential

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<sup>6</sup> See, e.g., Special Comm., Admin. 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, 421-22 (1997) (listing ways in which open-meeting requirements can inhibit the communications that occur at affected meetings).

<sup>7</sup> See Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 337-39 (2004).

<sup>8</sup> Indeed, the Office of Information and Privacy ("OIP"), housed within the Justice Department, has noted that

[s]ociety'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 a 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.

OFFICE OF INFO. & PRIVACY, U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE 5-6 (2007) (footnotes omitted), available at [http://www.justice.gov/oip/foia\\_guide07.htm](http://www.justice.gov/oip/foia_guide07.htm).

treatment of private information is established or where a statutory requirement compels such treatment.

Finally, achieving transparency and providing meaningful opportunities for public participation are not entirely cost-free undertakings. They may lengthen the time and increase the 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 were for the agency merely to make an expedient or otherwise erroneous decision. In designing processes to handle information and public participation, then, regulators are well advised not 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*

Once it is recognized 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”),<sup>9</sup> and the Government in the Sunshine Act,<sup>10</sup> agencies regularly make information available to the public and give the public opportunities to comment on proposed rules. Additionally, oversight of agency rulemaking has, over the past twenty-five years, generally grown more transparent—the Office of Management and Budget’s (“OMB”) review process is a prime example.<sup>11</sup> The trend in

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<sup>9</sup> Freedom of Information Act, 5 U.S.C. § 552 (2006).

<sup>10</sup> Government in the Sunshine Act, 5 U.S.C. § 552b (2006).

<sup>11</sup> The Clinton administration adopted procedures intended to improve the transparency of OMB’s review process, a process centered in OMB’s 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, 827–828 (2003) (noting that Executive Order 12,866 “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. See Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J.



recent years toward allowing members of the general public to access information about the rulemaking process via the Internet is yet a further step in the direction of enhanced transparency.<sup>12</sup> Still, the government can continue to improve its use of public participation and transparency as tools for better rulemaking decisions. Without diminishing the positive aspects of, and recent improvements to, the regulatory system, Part II of this Article addresses how the government can work toward these goals.

One complaint leveled at 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. The first concern is that the input agencies receive is not meaningful because by the time the notice of proposed rulemaking (“NPRM”) is published and the comment period begins the agency is highly unlikely to alter its policy significantly.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> If public participation does not affect an agency’s actual

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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[.] . . . it would disclose substantive telephone calls with outside parties that were initiated by the Administrator,” and “that it would be expanding its web site [and] posting lists of regulations currently under review” (footnotes omitted)).

<sup>12</sup> See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT’S MANAGEMENT AGENDA: FISCAL YEAR 2002, at 23–25 (2001), 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) (explaining how information technology has been applied to the rulemaking process).

<sup>13</sup> See William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 69–71 (2004).

<sup>14</sup> 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) (providing that “agencies shall publish at least semiannually an agenda of significant regulations under development or review” and that agencies “shall give the public an early and meaningful opportunity to participate in the development of agency regulations”), *revoked by* Exec. Order No. 12,291, 3 C.F.R. pt. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1988). Currently, section 4 of Executive Order No. 12,866 contains a requirement that agencies prepare regulatory agendas, Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993), as does section 3(a) of the Regulatory Flexibility Act, 5 U.S.C. § 602 (2006).

<sup>15</sup> See, e.g., *Nat’l Mining Ass’n v. Mine Safety & Health Admin.*, 116 F.3d 520, 530–31

decisionmaking process because such participation occurs after rules are already formulated, it is hard to see how it can significantly enhance either the quality or legitimacy of rulemaking.

Second, 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 politically popular or well-organized interests, which may make up only a subset of the overall interests that will be affected by many regulatory decisions.<sup>16</sup> In this way, failure to hear from all interests can detract from both the substantive and procedural goals of rulemaking. Although 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.<sup>17</sup> Agencies may view public comment as a formality in the rulemaking process, at least partly because, as noted above, many decisions have largely been made by the time agencies solicit public commentary. Also, agencies generally share a mistaken perception that interactions with external entities following the issuance of the NPRM constitute improper *ex parte* communications, even though the courts have clarified that there is no *inherent* legal bar to such contacts.<sup>18</sup> 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* decision arguably

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(D.C. Cir. 1997) (finding that a regulation governing preshift inspection of mine ventilation was not a logical outgrowth of proposed rule and thus required additional notice).

<sup>16</sup> See Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 453 (2004) (“For the most part, each agency has a regular constituency of regulated parties and inside-the-Beltway interest groups.”).

<sup>17</sup> See *id.* at 435–36 (stating that interactive technology can help address rulemaking’s “democratic deficit” by allowing for greater collaboration between government and citizens).

<sup>18</sup> In *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), the Court of Appeals for the District of Columbia Circuit noted that although *ex parte* contacts made after the issuance of a notice of proposed rulemaking were to be discouraged, such contacts were not per se impermissible. See *id.* at 57.

have the unintentional side effect of suppressing outreach and thus keeping regulators less informed of differing points of view.<sup>19</sup> Similarly, because compliance with the Federal Advisory Committee Act (“FACA”)<sup>20</sup>—enacted to ensure that Congress and the public receive information about various groups advising, among others, the President<sup>21</sup>—may be costly and time intensive,<sup>22</sup> agency lawyers also sometimes interpret FACA’s requirements conservatively to avoid inadvertently triggering the Act. In other words, agency officials are reluctant to meet with and engage in an ongoing dialogue with affected individuals and organizations, lest agencies be required to allocate resources toward FACA compliance.

As for transparency, some observers complain that agencies fail to make information available to the public in a timely fashion and in a manner that allows for its meaningful use, especially as a prerequisite for public participation. For example, important data might not be included in a rulemaking docket until late in the comment process, or the data might 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. And 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 the average citizen and for the sophisticated “repeat player” in the rulemaking process who is typically better able to overcome informational obstacles. A fairer process would give all parties the opportunity 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 really is all that important.<sup>23</sup> Perhaps an agency policy should

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<sup>19</sup> This potential barrier to communication is both unfortunate and unnecessary because the D.C. Circuit has clarified that the holding in *Home Box Office* is limited to its facts and that there is no “ex parte contacts doctrine” in informal rulemaking. See *Sierra Club v. Costle*, 657 F.2d 298, 402 (D.C. Cir. 1981) (noting that the D.C. Circuit has, in the past, “declined to apply *Home Box Office* to informal rulemaking of the general policymaking sort” and referencing *United Steelworkers v. Marshall*, 647 F.2d 1189, 1215–19 (D.C. Cir. 1980), and *Action for Children’s Television v. FCC*, 564 F.2d 458, 474–77 (D.C. Cir. 1977)).

<sup>20</sup> Federal Advisory Committee Act, 5 U.S.C. app. §§ 1–16 (2006).

<sup>21</sup> Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 452 (1997).

<sup>22</sup> See *id.* at 493–502.

<sup>23</sup> After all, the Supreme Court long ago held that “it [is] not the function of the court to

simply stand on its own merits, and if a post-hoc rationalization provides sound reasoning for a sound policy, the actual motivation may well be unimportant. Others could claim, however, that post-hoc rationalizations still can inhibit the ability of the public and the courts to monitor the substantive goals of rulemaking by evaluating agency policy.<sup>24</sup> 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 to administrative agencies may be justified for other reasons, deference would not be warranted on the basis of expertise when agencies do not rely on expert judgment, but rather on other factors, such as political expediency. Furthermore, a post-hoc rationalization, to the extent that it becomes detected, can detract from the perceived legitimacy of administrative rules. A process that is grounded upon an illusion will 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 sets forth policy recommendations for advancing rulemaking's dual goals of quality and legitimacy while also addressing, in greater specificity, the current deficiencies in the process. 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 that agencies, or, more specifically, the new administration,

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probe the mental processes" of administrators. *Morgan v. United States*, 304 U.S. 1, 18 (1938); *see also* *United States v. Morgan*, 313 U.S. 409, 420, 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").

<sup>24</sup> In the context of litigation, the Supreme Court disfavors rationalizations developed by an agency, or its attorneys, after an agency decision has been made, even if such rationalizations would have been adequate to sustain the decision had they been announced contemporaneously with it. *See SEC 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").

can establish a framework for continuous evaluation of the implementation of transparency and public-participation policies.

*A. Transparency*

Information is essential to rulemaking, not only for agency officials to make good decisions, but also for the public to understand and participate in the rulemaking process. To monitor an agency effectively and to contribute meaningful comments, the public needs access to the information upon which the agency relies.

Access to such information is required both before and after the issuance of a proposed rule. As noted above, much of an agency's decisionmaking can and does occur prior to both the agency's publication of the NPRM and the opening of a public docket. Current docketing practices do not encompass all of the information needed to ensure transparency and inform public participation during the time when the agency reaches many of its crucial decisions. Taking steps to increase the transparency of agency decisionmaking at every stage of the rulemaking will enable the public and interested organizations to contribute more meaningfully to the process. This Section of the Article, therefore, makes recommendations aimed at promoting the disclosure and improving the accessibility of agency information—especially during the pre-NPRM period and during the notice-and-comment period that follows the issuance of the NPRM.

As discussed in Part I, not only does transparency contribute directly to increased quality and legitimacy in the rulemaking process—primarily by allowing the public to monitor agencies—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 at a time and in a manner that allows for meaningful public access. By ensuring the release of the right information in an accessible manner, the government takes important steps toward realizing the benefits of transparency in the rulemaking process. 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 decisionmaking can be detected.

1. *Adopt Proactive Practices to Improve Public Access to Agency Information*

The Freedom of Information Act promotes government-wide transparency by creating a presumption that information held by an agency is releasable to the public.<sup>25</sup> FOIA therefore represents a legislative acknowledgment of the benefits of transparency in the rulemaking context: enhanced legitimacy of the rulemaking process and improved quality of regulations. The statute, however, contains nine exemptions,<sup>26</sup> 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. Still, FOIA makes plain that any document not covered by an exemption is available upon request.

Currently, most parties seeking agency records under FOIA must submit a formal request (with the exception of some categories of agency-controlled records that are statutorily required to be made available automatically).<sup>27</sup> The agency then determines whether to release the requested records or to invoke a statutory exemption. Requests for information are often delayed, either as a result of routine disclosure procedures or agencies' hesitancy to release information (even when the information requested falls outside any FOIA exemptions). Although many requests for information are handled in a routine manner, sometimes even simple requests subject to the standard FOIA disclosure procedures involve long and unnecessary delays.

The timely release of information is essential to meaningful public participation in agency rulemaking; consequently, the process by which an agency decides what information to release could—and should—be streamlined. The Electronic Freedom of Information Act Amendments of 1996<sup>28</sup> already require that certain categories of documents be posted on agency Web sites.<sup>29</sup> Accordingly, agencies should publish, on their Web sites, any information that they, or the courts, determine does not fall within a FOIA exemption. To enhance timely access, such information should be made available without forcing the

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<sup>25</sup> 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.”).

<sup>26</sup> 5 U.S.C. § 552b(c)(1)–(9) (2006).

<sup>27</sup> See *id.* § 552(a)(1)–(3).

<sup>28</sup> Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (amending 5 U.S.C. § 552).

<sup>29</sup> See 5 U.S.C. § 552(a)(2).

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 believes in good faith that FOIA exempts the agency from disclosing requested information, the agency can and should deny FOIA requests and, if necessary, litigate the matter. If, however, the agency loses, the information should be made available not just to the requester, but to the public (via the agency Web site) without others needing to file a request for it. Finally, it should go without saying that an agency should make available all documents that fall within FOIA's automatic disclosure provisions (currently, such automatic disclosures are not always made).

Agencies should also experiment with alternative procedures for responding to standard FOIA requests in order to make the FOIA disclosure process more efficient. For example, consistent with a presumption in favor of the prospective release of government information, agencies could preemptively label certain documents "exempt," "nonexempt," or "uncertain" at the time of their creation. Documents deemed "nonexempt" could be made publicly available on the agency's Web site, while documents labeled "exempt" would require the usual FOIA request.

Such a system could involve the use of a document management system that would require an agency employee to specify the nature of a document—nonexempt, exempt, or uncertain—upon saving that document. The agency could then publish on the Internet those documents that have been labeled nonexempt. Such a system may have the downside of requiring agencies to dedicate excessive resources to making *ex ante* FOIA exemption determinations or of encouraging agency officials simply to label everything "exempt" to avoid inadvertent disclosure of exempt materials. These potential drawbacks should not necessarily stop agencies from experimenting with this, or a similar, procedure. A more modest alternative would be simply to create online, searchable repositories of all documents that agencies have released in response to FOIA requests.

Although FOIA creates a presumption in favor of disclosure vis-à-vis *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. By way of example, section 307 of the Clean Air

Act<sup>30</sup> establishes a standard of transparency for Environmental Protection Agency (“EPA”) rulemaking dockets that other agencies would do well to emulate.<sup>31</sup>

The Act requires that dockets for certain rules or other administrative actions undertaken by the 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.”<sup>32</sup> Dockets must also include pre-NPRM drafts of proposed rules sent to OMB, in addition to drafts of final rules and comments exchanged between the EPA, OMB, and other agencies reviewing the rules.<sup>33</sup> Perhaps most important, rulemaking dockets must be open to the public at certain specified times during each comment period.<sup>34</sup>

The docket-related practices observed by the EPA for air pollution rules deserve consideration by other agencies. The publishing of documents of “central relevance” and of draft rules and comments to and from OMB allows public access to the kind of information that can 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 interested parties to comment meaningfully. Although the next section of this Article elaborates on *how* 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

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<sup>30</sup> Clean Air Act, 42 U.S.C. §§ 7401–7671 (2006).

<sup>31</sup> For the Act’s docket requirements, see *id.* § 7607(d).

<sup>32</sup> *Id.* § 7607(d)(4)(B)(i).

<sup>33</sup> *Id.* § 7607(d)(4)(B)(ii).

<sup>34</sup> *Id.* § 7607(d)(4)(A).



document at the time of creation and releasing all documents for which there is no claimed exemption, or (ii) online document repositories.

**Recommendation T2.** Agencies should adapt, as government-wide best practices for docket-related transparency, the requirements of Clean Air Act § 307 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, the agency should release that information in ways that allow the public to access the information easily and use it to participate thoughtfully 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, contributes to a rule's legitimacy, but improving the organization and "searchability" of agency information would substantially improve the quality of public engagement in the rulemaking process.

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.<sup>35</sup> 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.<sup>36</sup> In 2003, the Bush Administration launched Regulations.gov, a Web portal designed (1) to facilitate electronic filings of public comments on pro-

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<sup>35</sup> See, e.g., AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS, REENGINEERING THROUGH INFORMATION TECHNOLOGY 23–28 (1993), available at <http://govinfo.library.unt.edu/npr/library/reports/it03.html> (recommending development of integrated electronic access to government information and services); AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS, IMPROVING REGULATORY SYSTEMS 38–39 (1993), available at <http://govinfo.library.unt.edu/npr/library/reports/reg04.html> (recommending steps to enhance public awareness and participation).

<sup>36</sup> See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 12, at 23–25.

posed regulations, and (2) to serve as a clearinghouse of information stored in the Federal Docket Management System (“FDMS”). Although Regulations.gov makes rulemaking dockets accessible via the Internet, it currently fails to function in a manner well suited to use by the general public. The site is not nearly as user-friendly as technology now allows, as is evidenced by the greater usability of many commercial Web sites. More importantly, Regulations.gov does not greatly enhance transparency in a way that facilitates public participation, thereby failing to achieve its aim: to improve rulemaking.

Improvement of Regulations.gov could be a useful starting point for the new administration’s e-rulemaking initiatives. The focus of the new 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, the Web site has minimal browsing capability and requires users to rely on its search engine, which at present is woefully inadequate. The search engine does not allow for easy identification of an unknown docket, nor does it have sophisticated data mining capability. Although 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; less-informed users (especially those who may not even know what a “docket” is) are still unlikely to find the dockets relevant to their interests.

Prior to implementation of the FDMS, many agencies administered their own online docket databases. Several agency Web sites had useful features that have yet to be introduced on Regulations.gov. For example, the EPA’s site allowed users to perform full-text searches inside each docket. The EPA and Department of Transportation (“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.

Moreover, recent advances in information technology offer government the opportunity to do much more, namely 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 Web sites, relevant provisions in the Federal Register, and other online resources. Information concerning the history of a rule, back to the authorizing statute and past or related rules, could also be cross-linked within the site.

The Task Force recommends that the new administration take major steps to improve the search capability of Regulations.gov; even users who are not sure of the particular docket or document for which they are searching should nevertheless be able to find the most relevant materials. The new administration should also encourage agencies to enhance their own Web sites' search capabilities and maintain "major-rule" Web pages that link to Regulations.gov. The new administration should continue expansion of e-rulemaking capabilities, especially in light of the enactment of the E-Government Act of 2002,<sup>37</sup> which directs federal agencies to use information technologies in adjudicatory and rulemaking proceedings.<sup>38</sup>

Improvements similar to those recommended with regard to e-rulemaking can and should be applied to agency records in general. As noted above, a document that either the agency or a court has declared to be nonexempt from public disclosure under FOIA should be made available to the public via the agency's Web site. In the same way that agencies can create searchable dockets, they can and should create document libraries and allow the public to browse records previously disclosed by the agency. Even documents that an agency does not believe to be releasable could be referenced in citation entries in the document library, thereby permitting requesters to challenge a specific document's status under FOIA without forcing the agency to engage in a time-consuming search process.

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, requesters would be able to access agency information much more efficiently, and nonspecific or redun-

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<sup>37</sup> E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2006) (codified as amended in scattered sections of 5, 10, 13, 31, 40, 41, and 44 U.S.C.).

<sup>38</sup> *See id.* § 206, 116 Stat. at 2915–16.

dant requests would be minimized. The agency would also presumably save the time and money associated with locating the requested information.

Largely because of the difficulty associated with 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. FOIA provides a fee exemption—often relied upon by organized groups—for requests made in the public interest.<sup>39</sup> 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 arrangement creates conflicts that are repetitive and wasteful, both for the government as well as for outside organizations. The agencies and the public could be better served if the new administration were to create a procedure whereby established public interest groups could qualify for a permanent FOIA fee exemption, or at least an exemption that remains in effect for a specified 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 Openness Promotes Effectiveness in our National Government Act of 2007.<sup>40</sup> The Act contemplates OGIS serving as a government-wide FOIA ombudsman that would oversee agencies’ FOIA compliance and review agencies’ FOIA policies and procedures.<sup>41</sup> The Act also provides that OGIS is to be located “within the National Archives and Records Administration.”<sup>42</sup> President Bush, however, recommended shifting the funding for OGIS to the Department of Justice.<sup>43</sup> Given the statute’s direc-

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<sup>39</sup> See 5 U.S.C. § 552(a)(4)(A)(iii) (2006) (“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.”).

<sup>40</sup> Openness Promotes Effectiveness in our National Government Act of 2007, Pub. L. No. 110-175, § 10, 121 Stat. 2524, 2529–30 (codified at 5 U.S.C. § 552(h)).

<sup>41</sup> See *id.* (enumerating the obligations of the Office of Government Information Services).

<sup>42</sup> *Id.*

<sup>43</sup> 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)).

tive, 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.<sup>44</sup> Although the Department of Justice has expertise in FOIA matters, and some of OGIS's contemplated functions overlap with those currently provided by Justice's Office of Information and Privacy ("OIP"), locating OGIS within the Department of Justice poses the risk that OGIS 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 new administration should improve the e-rulemaking system by focusing on (i) the ease of access and usability of the Regulations.gov Web site, (ii) the quality of data being uploaded, and (iii) the timeliness of agency data entry into the Federal Docket Management System.

**Recommendation T4.** Individual agencies should improve search capabilities on their own Web sites 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.

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

As discussed in Part I, transparency facilitates public monitoring of agencies so as to encourage agency decisionmakers to exercise

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<sup>44</sup> See 154 CONG. REC. S1050-51 (daily ed. Feb. 14, 2008) (statement of Sen. Leahy).

greater care in developing rules—and to avoid making decisions on the basis of expediency or improper considerations. But this raises the question: How can the public monitor agencies' compliance with transparency requirements? After all, many failures to comply with transparency requirements will be nontransparent. If agencies fail to abide by transparency-related policies, then the public will often be unable to perform the monitoring that transparency generally facilitates.

Perhaps the most promising solution to this problem lies in federal whistleblower statutes. Whistleblower protections provide an important means of bolstering transparency requirements and ensuring the public is properly informed about agency decisionmaking. Whistleblowers often reveal agency information that may have been improperly withheld from public view, and they also uncover wrongdoing that the general public cannot readily detect. Because whistleblowers have access to agency information that is beyond what transparency rules like FOIA can 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—those employed by the federal government and those working in the private sector. The Task Force focused mainly on the category of federal employees and concluded that federal whistleblowers need to be afforded better and more meaningful protections than they currently receive. Specifically, the new administration should take steps to (1) achieve timely processing of whistleblower complaints, (2) adjust the burden of proof in whistleblower cases, and (3) strengthen protections for whistleblowers who release information to Congress.

First, 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 for timely hearings before an impartial panel.

Second, Congress could also strengthen whistleblower protections by reevaluating the legal standards of proof in whistleblower-complaint cases. Under the Notification and Federal Employee An-

tidiscrimination and Retaliation Act,<sup>45</sup> 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.<sup>46</sup> Although the Act requires only an objectively reasonable belief of agency wrongdoing, in practice this standard 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 because most of the relevant evidence needed to prove whistleblower claims is controlled by agencies or their administrators. The Task Force therefore recommends that evaluating tribunals adopt a reasonableness standard that takes into account the difficulties that whistleblowers face in gathering information to substantiate their claims. This evidentiary standard 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, the Task Force recommends, should there be a presumption in favor of any party in whistleblower-retaliation complaints.

Third, and finally, there must be adequate protection provided for lawful whistleblower disclosures. Congress should make clear that the Lloyd-La Follette Act<sup>47</sup> protects whistleblowers that make disclosures to Congress. Because channeling whistleblower disclosures directly to Congress is preferable to channeling disclosures to the media, whistleblowers who do go to Congress should receive especially clear protection against agency retaliation.

Several recent bills introduced in Congress would expand whistleblower protection.<sup>48</sup> At a minimum, when and if this legisla-

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<sup>45</sup> Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, 5 U.S.C. §§ 2301–2305 (2006).

<sup>46</sup> *Id.* § 2302(b)(8).

<sup>47</sup> Lloyd-La Follette Act, ch. 389, § 6, 37 Stat. 555 (1912) (codified at 5 U.S.C. § 7211 (2006)).

<sup>48</sup> The Federal Employee Protection of Disclosures Act would have clarified existing whistleblower law and enhanced the protection for federal employee whistleblowers. *See* S. 274, 110th Cong. (2007). The Whistleblower Protection Enhancement Act of 2007, H.R. 985, 110th Cong. (2007), would have refined 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; it also would have provided specific whistleblower protections to federal workers

tion passes into law, its implementation should be carefully monitored, 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 toward determining whether there should be more uniformity between protections for public- and private-sector whistleblowers.<sup>49</sup> Like their counterparts in the public sector, private-sector whistleblowers can provide valuable information concerning suboptimal agency behavior.<sup>50</sup>

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

**Recommendation T9.** The adjudication of whistleblower-protection claims should be governed by an “objective reasonableness” standard without a presumption of nonretaliation 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-protection policies passed by Congress should be carefully monitored by a government-wide entity that is independent from regulatory agencies.

### *B. Public Participation*

Agencies need up-to-date and relevant information about the activities they are charged with regulating. Robust public participation in the rulemaking process allows agencies to obtain information that helps them (1) improve the quality of new regulations, (2) increase the probability of compliance, and (3) create a more complete record for judicial review.<sup>51</sup> Public participation is also fundamentally linked to

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who specialize in national security issues, federal contractor employees, and federal employees who make disclosures regarding actions that threaten the integrity of federally funded research.

<sup>49</sup> In the past, the Administrative Conference of the United States (“ACUS”) has fruitfully examined the issue of gaps in whistleblower protection, 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), 1 C.F.R. § 305.87-2 (1993).

<sup>50</sup> *See* Coglianese et al., *supra* note 7, at 299–300 (recounting how the Securities and Exchange Commission and the Food and Drug Administration promulgated rules after private-sector whistleblowers in the mutual fund and tobacco industries, respectively, came forward).

<sup>51</sup> *See supra* Part I.A.



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. Because comments are one-shot attempts at persuasion, commenters often file their comments on the last day possible, for both practical and 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 Part II.B.2—regulators are too often unwilling to solicit responses or clarification from commenters.

To enhance the value of public comments, the new administration should encourage pilot experiments with interactive comment processes.<sup>52</sup> Interactive comment periods would 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 allow for interaction among commenters. Persons who 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 evaluating underlying data, assessing arguments of-

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<sup>52</sup> 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), 1 C.F.R. § 305.76-3 (1993).

ferred by others, and improving the quality of information available to decisionmakers. Such a two-round approach also may well have a secondary effect of removing the strategic incentives to make extreme or unsupported claims or to file last-minute commentary.

Although 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 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”)<sup>53</sup> could be charged with monitoring the results of these experiments, conducting careful empirical evaluation, and recommending future expansion of the pilot programs if they prove successful.

**Recommendation P1.** The new 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 Agency Communications with External Actors*

Informal communications with external actors outside the comment process can provide agency decisionmakers with valuable information needed for rulemaking. Often these informal communications are the most efficient means for agencies to gather and develop information for rulemaking.<sup>54</sup> The communications are also the most di-

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<sup>53</sup> See *infra* Part II.C.2.

<sup>54</sup> See *Sierra Club v. Costle*, 657 F.2d 298, 400–01 (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

rect means of public access to administrative officials. As such, agencies should not discourage communications with external actors, provided that agency staff members timely disclose their occurrence and place an accurate summary of the topics discussed in the public docket, and provided further that staff members remain open to even-handed communication with a variety of relevant interests or groups.<sup>55</sup> The new 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.<sup>56</sup> 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 decisionmakers may tend to be less than optimally informed and knowledgeable on topics of regulation.

Anxieties over appropriate versus inappropriate communications may begin to permeate agency culture to a degree that *all* communication is somewhat chilled. Thus, agency confusion on this issue not only suppresses openness and outreach to interest groups, but may even 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 decisionmaker, subject to disclosure requirements.

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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." (footnote omitted)).

<sup>55</sup> The Task Force's recommendations on this point bear a close resemblance to recommendations made by the Administrative Conference of the United States in the mid-1970s. See *Ex Parte Communications in Informal Rulemaking Proceedings* (Recommendation No. 77-3), 1 C.F.R. § 305.77-3 (1993) ("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.").

<sup>56</sup> See *supra* text accompanying notes 18–22.

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 also 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.<sup>57</sup> 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.

Agencies are already required by statute<sup>58</sup> and Executive order<sup>59</sup> to publish regulatory agendas and plans of new rules under development. By following the Task Force's Recommendation T2 to create regulatory dockets at the moment they begin the development of any new rulemaking, agencies would provide an institutional forum for disclosure of early communications with external actors. 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 verbatim or even highly detailed accounts of the communications between the agency and the interested parties. Rather, a simple disclosure that a contact occurred, a brief description of the topics discussed, and a listing of all participating parties would enhance the legitimacy of the process without adding any great burden to agency staff.

Some agencies have already adopted such disclosure policies. For example, the DOT now provides information on its Web site regard-

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<sup>57</sup> See *supra* text accompanying notes 13–15.

<sup>58</sup> 5 U.S.C. § 602 (2006) (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”).

<sup>59</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993), available at [http://www.whitehouse.gov/omb/inforeg/eo12866/eo12866\\_amended\\_01-2007.pdf](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).

ing the status of all significant DOT rulemakings.<sup>60</sup> 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.<sup>61</sup> 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.

As a complement, or as an alternative, to this type of transparency, agencies could take affirmative steps to ensure that more interest groups are given an opportunity to participate meaningfully in the early stages of a rulemaking. As the public gains confidence that the rule development process incorporates a true diversity of interests and perspectives, it will likely view the rulemaking process as more legitimate.

Today, as a general matter, the rulemaking process does not provide all interest groups—particularly those without significant funding or legal representation—with sufficient access during the crucial, early stages of rule development. Taking affirmative steps to involve the public early in the process will therefore likely improve the integrity of an agency’s decisionmaking. 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, at a minimum, that they maintain a passive “open door” policy or have adopted other mechanisms to ensure broad-based public involvement (e.g., technical assistance grants,<sup>62</sup> ombudspersons, or consumer advocates). Under “open door” policies, agencies that have contact with some interest groups commit to making themselves available to all interest groups in an even-handed manner. Such policies would be feasible to implement and quite effective if agencies adhered to them faithfully.

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<sup>60</sup> U.S. DEP’T OF TRANSP., REPORT ON DOT SIGNIFICANT RULEMAKINGS, <http://regs.dot.gov/rulemakings/index.htm> (last visited May 8, 2009).

<sup>61</sup> U.S. Env’tl. Prot. Agency, Actions Initiated by Month, <http://www.epa.gov/lawsregs/search/ail.html> (last visited May 8, 2009).

<sup>62</sup> A Technical Assistance Grant provides nonprofit citizens’ groups with funding to hire independent expert advisors to enable them to participate in regulatory decisions. Such grants are sometimes used in complex, scientific regulatory actions such as in Superfund cleanup actions. *See, e.g.*, U.S. Env’tl. Prot. Agency, Technical Assistance Grants, <http://www.epa.gov/superfund/community/tag/> (last visited May 8, 2009).

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.<sup>63</sup> Alternatively, this responsibility 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 new 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.

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<sup>63</sup> See *The Ombudsman in Federal Agencies* (Recommendation 90-2), 1 C.F.R. § 305.90-2 (1993) (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).

- 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.

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

The Federal Advisory Committee Act<sup>64</sup> governs when and how agencies may consult with external actors through ongoing consultative panels. Advisory committees can be particularly useful in helping to establish agency priorities and developing possible approaches to rulemakings prior to publication of an NPRM. The requirements FACA imposes on agencies, however, along with restrictions on the use of advisory committees imposed by Executive Order 12,838 and an array of GSA and OMB guidance documents, have significantly curtailed or even inhibited agencies' use of advisory committees.<sup>65</sup> 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. In fact, 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. For example, 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").<sup>66</sup> Procedural barriers and other disincentives to the use of advisory committees should be reduced, and agencies should be encouraged to use advisory committees whenever they would be useful and appropriate.

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<sup>64</sup> Federal Advisory Committee Act, 5 U.S.C. app. §§ 1–16 (2006).

<sup>65</sup> Executive Order 12,838 mandates the elimination of a significant number of advisory committees and requires OMB approval to establish new committees. See Exec. Order No. 12,838, 58 Fed. Reg. 8207, 8207 (Feb. 10, 1993).

<sup>66</sup> See *Oversight of the Federal Advisory Committee Act: Hearing Before the Subcomm. on Gov't Mgmt., Info., and Tech. of the H. Comm. on Gov't Reform and Oversight*, 105th Cong. 139–41 (1998) (testimony of J. Clarence Davies, Director, Center for Risk Management, Resources for the Future).

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.<sup>67</sup> Agencies' response to this balance requirement—and to other procedural restrictions on the formation of committees—may be to avoid creating new advisory committees altogether. As a result, perspectives that are absent or underrepresented in agencies' deliberative processes often remain so.

Instead of promoting diverse engagement with the public, FACA and its related requirements pose the risk of inhibiting public participation. At a minimum, the new 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. In this way, 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. Specifically, 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.<sup>68</sup>

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.<sup>69</sup> These requirements are (and should be) drafted so as to establish more restrictive conflict-of-inter-

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<sup>67</sup> See 5 U.S.C. app. § 5(b)(2).

<sup>68</sup> Cf. U.S. EPA SCI. ADVISORY BD., OVERVIEW OF THE PANEL FORMATION PROCESS AT THE ENVIRONMENTAL PROTECTION AGENCY SCIENCE ADVISORY BOARD 10 (2002) ("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.").

<sup>69</sup> Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified in scattered sections of 2, 5, and 28 U.S.C.).



est and bias standards for advisory committees comprising technical experts.<sup>70</sup> Under existing law, an expert advisory committee participant must disclose conflicts of interest and biases. Participants with significant conflicts are generally disqualified from participation, although potential biases may appropriately be considered in seeking a balanced committee.<sup>71</sup> 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 permits exemptions to its open-meeting requirements for expert advisory committees in some agencies that regularly deal with technical or scientific matters, specifically the National Academy of Sciences and the National Academy of Public Administration.<sup>72</sup> In general, expert advisory committees should have sufficient privacy to allow them to deliberate more openly and candidly, and the new administration should consider which additional committees would benefit from the opportunity to engage in nonpublic deliberations.

**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 new 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.

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<sup>70</sup> For general ACUS recommendations regarding standards governing conflicts of interest, see Administrative Conference of the United States, Conflict-of-Interest Requirements for Federal Advisory Committees (Recommendations 89-3), 1 C.F.R. § 305.89-3 (1993). A leading example for expert bodies was published by the National Academies. See NAT’L ACADS., POLICY ON COMMITTEE COMPOSITION AND BALANCE AND CONFLICTS OF INTEREST FOR COMMITTEES USED IN THE DEVELOPMENT OF REPORTS (2003), available at [http://www.nationalacademies.org/coi/bi-coi\\_form-0.pdf](http://www.nationalacademies.org/coi/bi-coi_form-0.pdf).

<sup>71</sup> Craig S. Barrow & James W. Conrad Jr., *Assessing the Reliability and Credibility of Industry Science and Scientists*, 114 ENVTL. HEALTH PERSPECTIVES 153, 155 (2006).

<sup>72</sup> See 5 U.S.C. app. § 3(2)(c)(ii).

**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 nonpublic deliberations of certain expert committees.

### *C. Strategic Management*

The issues surrounding transparency and public participation in the administrative process are numerous and ever evolving. This Article could not possibly respond to or anticipate all of these issues. A number of institutional mechanisms exist, however, that could allow the government to address the issues taken up here as well as issues that are beyond the scope of this Article. 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 transparency and public-participation issues likely will not 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 decisionmaking, OMB issued a bulletin, pursuant to Executive Order 12,866, mandating peer review of “influential scientific information” disseminated by agencies.<sup>73</sup> The 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, how-

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<sup>73</sup> See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW 2 (2004), available at <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-03.pdf>.

ever, 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 developed “for each of its forthcoming influential scientific disseminations.”<sup>74</sup>

Similarly, each agency’s Public Participation Plan could include elements identifying goals and core values (for example, the identification and solicitation of systematically underrepresented 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 that internal agency discussions during development of the Plans, as well as the periodic internal reassessments, might generate information that would help regulatory policymakers 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 decisionmaking. 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 EPA used an asynchronous online public process to solicit input for its public-participa-

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<sup>74</sup> *Id.* at 7.

tion policy.<sup>75</sup> 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.

**Recommendation S1.** The new 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. Although agencies should internally identify and engage issues relating to transparency and public participation through the development of Public Participation Plans, broader study of these issues needs to be conducted by an objective, nonpartisan 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 ACUS.

From 1968 to 1995, ACUS operated as an independent agency and advisory committee that studied administrative processes, procedures, and practices for the purpose of recommending improvements and reforms to Congress and agencies. It drew on the expertise of

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<sup>75</sup> See generally THOMAS C. BEIERLE, *DEMOCRACY ON-LINE: AN EVALUATION OF THE NATIONAL DIALOGUE ON PUBLIC INVOLVEMENT IN EPA DECISIONS* (2002), available at <http://www.rff.org/rff/Documents/RFF-RPT-demonline.pdf> (describing and evaluating the undertaking).

individuals from government, academia, and the private sector and over its twenty-eight 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 the 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,<sup>76</sup> the Negotiated Rulemaking Act,<sup>77</sup> the Equal Access to Justice Act,<sup>78</sup> and the Congressional Accountability Act.<sup>79</sup>

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 earning the Conference's endorsement. 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; 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 ACUS, on September 13, 1995, a joint House-Senate conference committee voted to terminate funding for the Conference.<sup>80</sup> The elimination of ACUS resulted in government budgetary savings of only approximately \$1.8 million per year,<sup>81</sup> at the cost of millions of dollars in potential savings

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<sup>76</sup> Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (codified in scattered sections of 5, 10, 28, 29, 31, and 41 U.S.C.).

<sup>77</sup> Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561-570 (2006)).

<sup>78</sup> Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified in scattered sections of 5, 15, 28, and 42 U.S.C.).

<sup>79</sup> Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (codified at 2 U.S.C. §§ 1301-1438 (2006)). 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." Sally Katzen, *The Role of the Administrative Conference in Improving the Regulatory Process*, 8 ADMIN. L.J. AM. U. 649, 665 (1994) (reproducing testimony taken at congressional hearings regarding reauthorization of ACUS).

<sup>80</sup> See Treasury, Postal Service, and General Government Appropriations Act, Pub. L. 104-52, Title IV, 109 Stat. 468, 480 (1996).

<sup>81</sup> See Memorandum from Morton Rosenberg & T.J. Halstead, Cong. Research Serv., to

at the agency level as the result of implementation of future ACUS recommendations for administrative reform.<sup>82</sup> 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.<sup>83</sup> The new 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 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 the Task Force, if implemented, would be promising focal points for ACUS-sponsored research and program evaluation.

**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 oper-

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Hon. Chris Cannon, Chairman, House Subcomm. on Commerce and Admin., Comm. on the Judiciary 2 (Oct. 7, 2004), available at [http://www.abanet.org/poladv/documents/acus\\_crs\\_7oct04.pdf](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).

<sup>82</sup> 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.

Katzen, *supra* note 79, at 659.

<sup>83</sup> However, ACUS recommendations are now available online. See, e.g., Florida State University College of Law, Recommendations of the Administrative Conference of the United States, <http://www.law.fsu.edu/library/admin/acus/acustoc.html> (last visited May 8, 2009).

ations. As the new 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 Article has identified ways that the rulemaking process can be reformed to meet these goals most effectively, 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 yield information that will help agencies better fulfill their statutory mandates, while society will benefit from substantively superior rules as well as a regulatory process with enhanced legitimacy. Improved transparency allows for more effective and useful participation while simultaneously establishing public oversight as a check on agency behavior.

The Task Force on Transparency and Public Participation recognizes that, although 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 pre-NPRM policy development; 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. If adopted, the recommendations discussed in this Article 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 new administration should seriously consider, but they are not an exclusive set of options for constructive engagement with the challenges associated with agency rulemaking. Nor should the new 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 Article are adopted, the importance of government regulation in our society means that the new administration must take serious, affirmative steps to renew our 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) online document repositories.

**Recommendation T2.** Agencies should adapt, as government-wide best practices for docket-related transparency, the requirements of Clean Air Act § 307 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 new administration should improve the e-rulemaking system by focusing on (i) the ease of access and usability of the Regulations.gov Web site, (ii) the quality of data being uploaded, and (iii) the timeliness of agency data entry into the Federal Docket Management System.

**Recommendation T4.** Individual agencies should improve search capabilities on their own Web sites 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-retaliation claims.

**Recommendation T9.** The adjudication of whistleblower-protection claims should be governed by an “objective reasonableness” standard without a presumption of nonretaliation 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-protection 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 new 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 new 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.

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**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.

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#### *Strategic Management Recommendations*

**Recommendation S1.** The new 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 was 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 U.S. Department of Justice, the Pennsylvania Department of Environmental Protection, and a large national law firm; she has also served as a policy analyst for the nonprofit organization Information Renaissance. She has taught law at the University of Kentucky College of Law and has served 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 J.D. from the University of Pittsburgh School of Law and an LL.M. 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

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**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.

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**Fred Emery** is a principal in The Regulatory Group, Inc., a small consulting firm that specializes in federal regulations and the regulatory process. He has worked in the regulatory field for almost fifty years at both the state and federal levels. Mr. Emery 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*.

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**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 websites 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:

*Related ACUS Recommendations*

During its operation from 1968 to 1995, the Administrative Conference of the United States 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/acus/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/acus/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/acus/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/acus/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/acus/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/acus/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>