



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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Early Input on Regulatory Alternatives

What are regulatory alternatives?

Regulatory alternatives are the various possible approaches to addressing a given regulatory problem. They can include different methods of regulating, more (or less) stringent regulation, or no regulation at all.

What legal requirements address input on regulatory alternatives?

Several statutes and presidential orders (e.g., the Regulatory Flexibility Act, National Environmental Protection Act, the Unfunded Mandates Reform Act, and Executive Order 12866) require agencies to identify and consider regulatory alternatives before proposing certain new rules. Some agencies have also adopted rules or internal guidance directing or encouraging officials to consider regulatory alternatives.

Why should agencies seek early input on regulatory alternatives?

Seeking input on regulatory alternatives before issuing a notice of proposed rulemaking can help agencies identify alternatives and learn more about the benefits, costs, distributional impacts, and technical feasibility of alternatives. It can also save resources and promote fuller consideration of the issues at a time when such consideration might have the greatest impact.

But seeking early input may not be appropriate in all cases and can even trigger certain procedural requirements, such as those in the Federal Advisory Committee Act. Agencies should weigh the costs and benefits of seeking early input and tailor their solicitations of early input accordingly.

Important Considerations in Seeking Early Input on Regulatory Alternatives

ACUS Recommendation [2021-3](#), *Early Input on Regulatory Alternatives*, sets out best practices for obtaining early input on regulatory alternatives. A summary of recommended practices appears below.

When is early input on regulatory alternatives beneficial?

When deciding whether to seek early input on regulatory alternatives, agencies should consider factors such as:

- their familiarity with the issues and key alternatives;
- the novelty of the conduct being regulated or of the alternatives;
- the degree to which alternatives implicate specialized technical expertise;
- the complexity of the policy question and of the proposed alternatives;
- the potential magnitude of the proposed alternatives' costs and benefits;
- the likelihood that selecting an alternative will be controversial;
- the time and resources required for seeking early input; and
- any deadlines the agency faces and the harms that might occur from the delay required to solicit and consider early feedback.

Who may have useful input on regulatory alternatives?

Agencies should tailor their outreach to ensure engagement from a wide range of interested persons, including traditionally underrepresented communities that may be affected by the rulemaking. Relevant government officials, inside and outside the agency, should also have a chance to identify regulatory alternatives during early input processes.

How can agencies solicit input on regulatory alternatives?

Agencies should consider a variety of methods for soliciting input on regulatory alternatives, such as listening sessions, focus groups, requests for information, digital forums, advance notices of proposed rulemakings, advisory committees, and other meetings with interested persons. Agencies should test different methods for generating alternatives and share information with each other about the effectiveness of those different methods.

How should agencies share their early input efforts?

Agencies should be forthcoming about their efforts to solicit early input on regulatory alternatives. That means, among other things, that an agency should be clear in the preamble to any new rule about its processes for obtaining early input and its analysis of reasonable alternatives proposed through those processes.

Additional Resources

ACUS Rec. [2021-3](#), *Early Input on Regulatory Alternatives*
ACUS Rec. [2018-7](#), *Public Engagement in Rulemaking*
ACUS Rec. [2017-6](#), *Learning from Regulatory Experience*
Christopher Carrigan & Stuart Shapiro, [Developing Regulatory Alternatives Through Early Input](#) (2021)