

Comment from Kevin Bromberg, Member of the Public
April 23, 2021

After speaking with several colleagues, I concluded that my previous recommendation for a single structured mandatory approach for early input based solely on the experience of one federal agency was too broad in scope. However, it would be inappropriate for ACUS to overlook two agencies with two decades of successful and extensive experience with two models of structured early input, namely the Environmental Protection Agency (EPA) and the Department of Energy (DOE). Since ACUS states in the draft preamble that this “Recommendation suggests best practices for soliciting early input,” it would be helpful to include consideration of some specific, well-developed early input procedures.

In the case of EPA, agencies can examine the structured early input procedures used to obtain pre-proposal outreach from small entities under the Small Business Regulatory Enforcement Fairness Act (SBREFA), enacted in 1996. The utility of this approach was discussed in the underlying research paper for this project. In the case of DOE, agencies can look to the experience since 1996 with the so-called “Process Rule,” which applies to the early input procedures used in the development of energy conservation standards for Consumer and Commercial Equipment. 10 CFR 430 and 431 (February 14, 2020, 85 Fed. Reg. 8626). Under the process rule, DOE provides a pre-proposal framework document containing the available data with a preliminary analysis that identifies the tentative alternative standards and provides related information to inform the choice among the alternatives, such as the costs and energy saving estimates. Agencies would benefit from considering the key elements of the early input procedures applied by both agencies.

I propose an amendment to the current draft recommendation #3 (proposed additional language in bold):

Draft Recommendation #3:

If agencies are unsure of which methods will best meet their needs and budgets, they should consider testing different modes of soliciting public input on the regulatory alternatives they are considering before issuing notices of proposed rulemaking (NPRMs). **Agencies could consider the approaches under the 1996 Small Business Regulatory Enforcement Fairness Act used by the Environmental Protection Agency, the Occupational Health and Safety Administration and the Consumer Finance Protection Board (5 U.S.C. 609) and the “Process Rule” procedures applied by the Department of Energy. 10 CFR 430 and 431.** As appropriate, the results of this outreach should be detailed in the NPRMs for which they are used.

Note: The Department of Energy recently proposed a rule to refine the Process Rule. 86 Fed. Reg. 18901 (April 12, 2021). Agree to Privacy policy: 1