



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Early Input on Regulatory Alternatives

Committee on Regulation

Proposed Recommendation for Committee | April 27, 2021

1 Agency development and publication of regulatory alternatives prior to issuing a notice
2 of proposed rulemaking on important issues often results in a better-informed notice-and-
3 comment process, facilitates decision making, and improves rules. In this context, a “regulatory
4 alternative” is used broadly and could mean, among other things, a different method of
5 regulating, a different level of stringency in the rule, or not regulating at all.¹ Several statutes and
6 executive orders, including the National Environmental Policy Act (NEPA),² the Regulatory
7 Flexibility Act (RFA),³ and Executive Order 12866,⁴ require federal agencies to identify and
8 consider alternative regulatory approaches before proposing certain new rules. This
9 Recommendation suggests best practices for soliciting early input when developing regulatory
10 alternatives, whether or not it is legally required, before publication of a notice of proposed
11 rulemaking (NPRM). It also provides best practices for publicizing the alternatives considered,
12 when agencies are promulgating important rules.

13 The Administrative Conference has previously recommended that agencies engage with
14 members of the public throughout the rulemaking process, including seeking input while the

Commented [LAS1]: Note to Committee: Should this paragraph be reorganized or streamlined more to reduce any redundancy with other portions of the preamble?

¹ Christopher Carrigan & Stuart Shapiro, Developing Regulatory Alternatives Through Early Input 8 (April 1, 2021) (draft report to the Admin. Conf. of the U.S.).

² 42 U.S.C. § 4332(C)(iii) (requiring agencies to consider alternatives in environmental impact statements under NEPA).

³ 5 U.S.C. § 603(c) (requiring agencies to consider alternatives in regulatory flexibility analyses conducted under the Regulatory Flexibility Act of 1980, as amended by SBREFA).

⁴ Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).



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15 agency is still in the early stages of shaping a rule.⁵ Agencies might conduct this outreach while
16 developing their regulatory priorities, including in proposals for their regulatory plans.⁶ Seeking
17 early input before issuing a notice of proposed rulemaking can help agencies to identify
18 alternatives and learn more about the benefits, costs, distributional impacts, and technical
19 feasibility of alternatives to the proposal they are considering. Doing so is particularly important,
20 even if not required by law or executive order, for any proposal likely to draw significant
21 attention for its economic or other significance. It is also especially valuable for agencies seeking
22 early input on regulatory alternatives to reach out to a wide range of interested parties, including
23 affected groups that often are underrepresented in the administrative process and may suffer
24 disproportionate harms from a proposed rule.⁷ Additionally, when agencies' notices of proposed
25 rulemaking discuss the alternatives suggested and the contents of this early outreach (to the
26 extent doing so is consistent with legal requirements), it can inform and improve the subsequent
27 public notice and comment process and provide evidence of the agency's serious consideration
28 of the issues.⁸

29 Nevertheless, seeking early input on alternatives may not be appropriate in all cases. In
30 some instances, the alternatives may be obvious. In others, the subject matter may be so obscure

⁵ See Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, ¶ 5, 84 Fed. Reg. 2146, 2148 (Feb. 6, 2019) ("Public engagement should generally occur as early as feasible in the rulemaking process, including when identifying problems and setting regulatory priorities."); see also, e.g., Admin. Conf. of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61728 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*, 82 Fed. Reg. 31040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, 50 Fed. Reg. 28364 (July 12, 1985); Michael Sant'Ambrogio & Glen Staszewski, *Public Engagement with Agency Rulemaking 62-77* (Nov. 19, 2018) (report to the Admin. Conf. of the U.S.) (describing the methods and benefits of receiving early public input during agency rule development).

⁶ See Exec. Order No. 12866, *supra* note 4, § 4(c).

⁷ See Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 26, 2021) (requiring the Office of Management and Budget to produce recommendations regarding improving regulatory review that, among other things, "propose procedures that take into account the distributional consequences of regulations...to ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities"); Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021) (directing the Office of Management and Budget, in partnership with agencies, to ensure agency policies and actions are equitable with respect to race, ethnicity, religion, income, geography, gender identity, sexual orientation, and disability).

⁸ See Carrigan & Shapiro, *supra* note 1, at 37.



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31 that public input is unlikely to prove useful. And in all cases, agencies face resource constraints
32 and competing priorities, suggesting that, in general, rules with substantial impact will profit
33 most from this practice. Agencies will need to consider whether the benefits of early outreach
34 outweigh the costs, including the resources required to conduct the outreach. When agencies do
35 solicit early input, they will still want to tailor their outreach to ensure that they are soliciting
36 input in a way that is cost-effective; equitable; and maximizes the likelihood of obtaining
37 diverse, useful responses.

RECOMMENDATION

- 38 1. When determining whether to seek early input from knowledgeable parties to identify
39 potential regulatory alternatives or respond to alternatives the agency has already
40 identified, an agency should consider factors such as:
 - 41 a. The extent of the agency's familiarity with the policy issues and key alternatives;
 - 42 b. Whether the issue being regulated or any of the alternatives suggested are novel;
 - 43 c. The degree to which potential alternatives implicate specialized technical or
44 technological expertise;
 - 45 d. The complexity of the underlying policy question and the proposed alternatives;
 - 46 e. The potential magnitude of the costs and benefits of the alternatives proposed;
 - 47 f. Whether the selection of an alternative is likely to be controversial;
 - 48 g. The time and resources that conducting such outreach would require;
 - 49 h. The extent of the discretion to select among alternatives, given the statutory
50 language it is implementing;
 - 51 i. The timing of the rule, including any deadlines the agency may face and any
52 harms that might occur from the delay required to consider alternatives;
 - 53 j. Whether affected groups have otherwise been underrepresented in the agency's
54 administrative process, or may suffer adverse distributional effects from generally
55 beneficial proposals; and
 - 56 k. Whether experts in other agencies may have valuable input on alternatives.
- 57 2. In determining what outreach to undertake concerning possible regulatory alternatives,



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- 58 agencies should consider, consistent with available resources and feasibility, the
59 following methods of soliciting public input:
- 60 a. Meetings with interested parties, held regularly or as-needed based on rulemaking
61 activities;
 - 62 b. Listening sessions;
 - 63 c. Internet and social media forums;
 - 64 d. Focus groups;
 - 65 e. Advance notices of proposed rulemakings (ANPRMs);
 - 66 f. Requests for information (RFIs); and
 - 67 g. Negotiated rulemaking.

68 Agencies should consider whether these methods will engage a wide range of interested
69 parties, including individuals and groups who are affected by the rule and traditionally
70 underrepresented in the agencies' rulemaking processes. Agencies should also consider
71 how to ensure that their interactions with outside persons are transparent, to the
72 maximum extent permitted by law. In soliciting feedback through these possible
73 methods, agencies should be cognizant of the ability of individuals to provide input.

74 3. If agencies are unsure what methods of soliciting public input will best meet their needs
75 and budgets, they should consider testing different methods on the regulatory alternatives
76 they are considering before issuing notices of proposed rulemaking (NPRMs). As
77 appropriate, agencies should describe the outcomes of using these different methods in
78 the NPRMs for rules in which they are used.

79 4. Each agency should ensure that all its relevant officials, including economists, scientists,
80 and other experts, have an opportunity to identify potential regulatory alternatives during
81 the early input process. As appropriate, agencies should also reach out to select experts in
82 other agencies for input on alternatives.

83 5. Agencies should [consider providing/provide] in the NPRM a discussion of the
84 reasonable regulatory alternatives they have considered or that have been suggested to the
85 agency, including alternatives they are not proposing to adopt, together with the reasons
86 they are not proposing to adopt those alternatives. To the extent agencies are concerned

Commented [LAS2]: Note to Committee: Should this sentence be clarified or made more specific? Or is this point already addressed in the preamble and is unnecessary to include here?

Commented [LAS3]: Note to Committee: The Committee should consider clarifying whether this recommendation is to (1) create a pilot program to test different approaches to outreach, followed by a decision as to which approach works best and will be implemented permanently and across the board; or (2) try different methods in a given rule, followed by a discussion of what worked best in that particular rule.

Commented [LAS4]: Note to Committee: The Committee should vote on which of these options it prefers.



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- 87 about revealing the identity of the individuals or groups offering proposed alternatives
88 due to privacy or confidentiality concerns, they should consider characterizing the
89 identity (e.g., industry representative, environmental organization, etc.) or listing the
90 alternatives without ascribing them to any particular individual or group.
- 91 6. When an agency discusses regulatory alternatives in the preamble of a proposed rule, it
92 should also [consider including/include] a discussion of any reasonable alternatives
93 suggested or considered through early public input, but which the agency believes are
94 precluded by statute. The discussion should also include an explanation of the agency's
95 views on the legality of those alternative policy choices.
- 96 7. To help agencies craft best practices for early engagement with the public, agencies
97 should, when feasible, share data and other information about the effectiveness of their
98 efforts to solicit early input on regulatory alternatives.

Commented [LAS5]: Note to Committee: The Committee should vote on which of these options it prefers.