



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Early Input on Regulatory Alternatives

### Committee on Regulation

#### Proposed Recommendation for Committee | April 8, 2021

1           Several statutes and executive orders, including the National Environmental Policy Act  
2 (NEPA),<sup>1</sup> the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>2</sup> and Executive  
3 Order 12866,<sup>3</sup> require federal agencies to identify and consider alternative regulatory approaches  
4 before proposing certain new rules. Even when agencies are not required to consider alternatives,  
5 however, it often results in better-informed decision making and improved regulations. In this  
6 context, a “regulatory alternative” is used broadly and could mean, among other things, a  
7 different method of regulating, a different level of stringency in the regulation, or not regulating  
8 at all.<sup>4</sup>

9           When considering these alternatives, agencies can also solicit input early in the process  
10 from members of the public or government officials who have relevant and useful knowledge.<sup>5</sup>  
11 The Administrative Conference has recommended that agencies engage with members of the  
12 public throughout the rulemaking process, including seeking input while the agency is still in the

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<sup>1</sup> 42 U.S.C. § 4332(C)(iii) (requiring agencies to consider alternatives in environmental impact statements under NEPA).

<sup>2</sup> 5 U.S.C. § 603(e) (requiring agencies to consider alternatives in regulatory flexibility analyses conducted under the Regulatory Flexibility Act of 1980, as amended by SBREFA).

<sup>3</sup> Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

<sup>4</sup> Christopher Carrigan & Stuart Shapiro, *Developing Regulatory Alternatives Through Early Input 8* (April 1, 2021) (draft report to the Admin. Conf. of the U.S.).

<sup>5</sup> 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).



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13 early process of shaping a rule.<sup>6</sup> Seeking early input before issuing a notice of proposed  
14 rulemaking can often help agencies learn more about the benefits, costs, and technical feasibility  
15 of the alternatives they are considering and identify different approaches they might not have  
16 considered otherwise. This is especially true when agencies reach out to a wide range of  
17 interested parties, including affected groups that are traditionally underrepresented in the  
18 administrative process.<sup>7</sup>

19 Nevertheless, seeking early input on alternatives may not be appropriate in all cases. In  
20 some instances, the alternatives may be obvious. In others, the subject matter may be so obscure  
21 that public input is unlikely to prove useful. And in all cases, agencies face resource constraints  
22 and competing priorities, so they will need to consider whether the benefits of early outreach  
23 outweigh the costs, including the resources required to conduct the outreach. Similarly, if  
24 agencies choose to solicit early input, they will need to tailor their outreach to ensure that they  
25 are soliciting input in a way that is cost-effective and that maximizes the likelihood that they will  
26 get useful information.

27 When agencies seek early input, documenting this outreach and what alternatives were  
28 suggested, subject to confidentiality and privacy concerns, benefits both agencies and the  
29 public.<sup>8</sup> Transparency around these discussions gives the public a full picture of the agency's  
30 work, avoids comments that suggest alternatives the agency has already analyzed, and makes it

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<sup>6</sup> 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, e.g., Recommendation 2018-7, *supra* note 4; 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).

<sup>7</sup> See also 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).

<sup>8</sup> See Carrigan & Shapiro, *supra* note 4, at 37.



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31 easier for a court to review the agency’s decision-making process.

**RECOMMENDATION**

- 32 1. When determining whether or not to seek early input on regulatory alternatives from  
33 knowledgeable parties, agencies should consider factors such as:
- 34 a. The extent of the agency’s familiarity with the key regulatory alternatives;
  - 35 b. Whether the issue being regulated or any of the alternatives suggested are novel;
  - 36 c. The amount of new technology or technical knowledge involved in the  
37 alternatives;
  - 38 d. The complexity of the underlying policy question and the proposed alternatives;
  - 39 e. The potential magnitude of the costs and benefits of the alternatives proposed;
  - 40 f. Whether the selection of an alternative is likely to be controversial; and
  - 41 g. The time and resources that conducting such outreach would require.
- 42 2. Agencies should consider, consistent with available resources, the following methods of  
43 soliciting public input in determining what outreach they wish to undertake concerning  
44 possible regulatory alternatives:
- 45 a. Meetings with interested parties, held regularly or as-needed based on rulemaking  
46 activities;
  - 47 b. Listening sessions;
  - 48 c. Internet and social media forums;
  - 49 d. Advisory groups;
  - 50 e. Focus groups;
  - 51 f. Advance notices of proposed rulemakings (ANPRMs);
  - 52 g. Requests for information (RFIs);
  - 53 h. Citizen juries; and
  - 54 i. Negotiated rulemaking.

55 Agencies should consider whether these methods will engage a wide range of interested  
56 parties, including individuals and groups who are affected by the rule and traditionally

**Commented [LAS1]:** For Committee Consideration: The Committee members may wish to suggest additional factors that agencies should consider, based on their own experiences.

**Commented [LAS2]:** For Committee consideration: The Committee members may wish to suggest additional methods of soliciting early input, based on their own experiences.



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- 57 underrepresented in the rulemaking process.
- 58 3. If agencies are unsure of which methods will best meet their needs and budgets, they  
59 should consider testing different modes of soliciting public input on the regulatory  
60 alternatives they are considering before issuing notices of proposed rulemaking  
61 (NPRMs). As appropriate, the results of this outreach should be detailed in the NPRMs  
62 for which they are used.
- 63 4. Agencies should ensure that all relevant officials within the agency, including  
64 economists, scientists, and other experts, have an opportunity to identify potential  
65 regulatory alternatives during the early input process. As appropriate, agencies should  
66 also reach out to select experts in other agencies for input on alternatives.
- 67 5. Agencies should provide a full discussion of the alternatives considered, including  
68 alternatives they ultimately rejected in the NPRM. To the extent that agencies are  
69 concerned about revealing the identity of the individuals or groups offering proposed  
70 alternatives due to privacy or confidentiality concerns, they should list the alternatives  
71 without ascribing them to any particular individual or group.
- 72 6. In the discussion of alternatives in the preamble of a proposed rule, agencies should also  
73 include any alternatives that were suggested through early public input, but which  
74 agencies believe are precluded by statute, along with an explanation of their views on the  
75 legality of those alternative policy choices.
- 76 7. [An interagency working group] should be convened to share the results of agency efforts  
77 to solicit early input on regulatory alternatives and to systematically gather other data on  
78 the effectiveness of these approaches in order to produce guidance on best practices for  
79 early engagement with interested parties.

**Commented [LAS3]:** For Committee consideration: The committee should consider what agency or organization should be tasked with convening such an interagency group.