



Early Input on Regulatory Alternatives

Committee on Regulation

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1 Agency development of and outreach concerning regulatory alternatives prior to issuing a
2 notice 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, the term
4 “regulatory alternative” is used broadly and could mean, among other things, a different method
5 of regulating, a different level of stringency in the rule, or not regulating at all.¹ Several statutes
6 and 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 publishing 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 the public throughout the rulemaking process, including by seeking input while agencies are still

¹ See 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 in the early stages of shaping a rule.⁵ Agencies might conduct this outreach while developing
16 their regulatory priorities, including in the proposed regulatory plans agencies are required to
17 prepare under Executive Order 12866.⁶ Seeking early input before issuing a notice of proposed
18 rulemaking can help agencies identify alternatives and learn more about the benefits, costs,
19 distributional impacts,⁷ and technical feasibility of alternatives to the proposal they are
20 considering. Doing so is particularly important, even if not required by law or executive order,
21 for a proposal likely to draw significant attention for its economic or other significance. It can
22 also be especially valuable for agencies seeking early input on regulatory alternatives to reach
23 out to a wide range of interested persons, including affected groups that often are
24 underrepresented in the administrative process and may suffer disproportionate harms from a
25 proposed rule.⁸

26 When seeking early input on rulemaking alternatives, agencies might consider
27 approaches modeled on practices that other agencies already use. In so doing, they might look at
28 agency practices that are required by statute (e.g., the Small Business Regulatory Enforcement
29 Fairness Act (SBREFA))⁹ or agency rules (e.g., the Department of Energy’s “Process Rule”),¹⁰

⁵ See Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, ¶ 5, 84 Fed. Reg. 2146, 2148 (Feb. 6, 2019); 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).

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

⁷ A distributional impact is an “impact of a regulatory action across the population and economy, divided up in various ways (e.g., income groups, race, sex, industrial sector, geography).” OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS 14 (2003).

⁸ See Exec. Order No. 13985, 86 Fed. Reg 7009 (Jan. 25, 2021) (directing the Office of Management and Budget, in partnership with agencies, to ensure that agency policies and actions are equitable with respect to race, ethnicity, religion, income, geography, gender identity, sexual orientation, and disability); 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”).

⁹ 5 U.S.C. § 609.

¹⁰ 10 C.F.R. § 430, Subpart C, App. A.



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30 or practices that agencies have voluntarily undertaken in the absence of any legal requirement.
31 To the extent permitted by law, agencies might also discuss the extent of their early outreach
32 efforts and their process for selecting among the various alternatives considered in their notices
33 of proposed rulemaking. Doing so allows agencies to demonstrate their serious consideration of
34 the possible alternatives and provides information that will be useful to public commenters
35 during the notice-and-comment process.¹¹

36 Nevertheless, seeking early input on alternatives may not be appropriate in all cases. In
37 some instances, the alternatives may be obvious. In others, the subject matter may be so obscure
38 that public input is unlikely to prove useful. And in all cases, agencies face resource constraints
39 and competing priorities, so agencies may wish to limit early public input to a subclass of rules
40 such as those with substantial impact. Agencies will need to consider whether the benefits of
41 early outreach outweigh the costs, including the resources required to conduct the outreach and
42 any delays entailed. When agencies do solicit early input, they will still want to tailor their
43 outreach to ensure that they are soliciting input in a way that is cost-effective, is equitable, and
44 maximizes the likelihood of obtaining diverse, useful responses.

RECOMMENDATION

- 45 1. When determining whether to seek early input from knowledgeable persons to identify
46 potential regulatory alternatives or respond to alternatives an agency has already
47 identified, the agency should consider factors such as:
- 48 a. The extent of the agency's familiarity with the policy issues and key alternatives;
 - 49 b. The extent to which the issue being regulated or any of the alternatives suggested
50 are novel;
 - 51 c. The degree to which potential alternatives implicate specialized technical or
52 technological expertise;
 - 53 d. The complexity of the underlying policy question and the proposed alternatives;

¹¹ See Carrigan & Shapiro, *supra* note 1, at 37.



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- 54 e. The potential magnitude of the costs and benefits of the alternatives proposed;
- 55 f. The likelihood that the selection of an alternative will be controversial;
- 56 g. The time and resources that conducting such outreach would require;
- 57 h. The extent of the discretion to select among alternatives, given the statutory
- 58 language it is implementing;
- 59 i. The deadlines the agency faces, if any, and the harms that might occur from the
- 60 delay required to solicit and consider early feedback;
- 61 j. The extent to which certain groups that are affected by the proposed regulation
- 62 and have otherwise been underrepresented in the agency's administrative process
- 63 may suffer adverse distributional effects from generally beneficial proposals; and
- 64 k. The extent to which experts in other agencies may have valuable input on
- 65 alternatives.
- 66 2. In determining what outreach to undertake concerning possible regulatory alternatives, an
- 67 agency should consider using, consistent with available resources and feasibility,
- 68 methods of soliciting public input including:
- 69 a. Meetings with interested persons held regularly or as-needed based on rulemaking
- 70 activities;
- 71 b. Listening sessions;
- 72 c. Internet and social media forums;
- 73 d. Focus groups;
- 74 e. Advisory committees, including those tasked with conducting negotiated
- 75 rulemaking;
- 76 f. Advance notices of proposed rulemakings (ANPRMs); and
- 77 g. Requests for information (RFIs).
- 78 The agency should also consider how to ensure that its interactions with outside persons
- 79 are transparent, to the maximum extent permitted by law.
- 80 3. An agency should consider whether the methods it uses to facilitate early outreach in its
- 81 rulemaking process will engage a wide range of interested persons, including individuals
- 82 and groups that are affected by the rule and are traditionally underrepresented in the



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83 agency's rulemaking processes. The agency should consider which methods would best
84 facilitate such outreach, including providing materials designed for the target participants.
85 For example, highly technical language may be appropriate for some, but not all,
86 audiences. The agency should endeavor to make participation by individuals and entities
87 that have less time and fewer resources as easy as possible, particularly when those
88 potential participants do not have experience in the rulemaking process. The agency
89 should explain possible consequences of the potential rulemaking to help potential
90 participants understand the importance of their input and to encourage their participation
91 in the outreach.

- 92 4. If an agency is unsure what methods of soliciting public input will best meet its needs and
93 budget, it should consider testing different methods to generate alternatives or receive
94 input on the regulatory alternatives it is considering before issuing notices of proposed
95 rulemaking (NPRMs). As appropriate, the agency should describe the outcomes of using
96 these different methods in the NPRMs for rules in which they are used.
- 97 5. An agency should ensure that all its relevant officials, including economists, scientists,
98 and other experts, have an opportunity to identify potential regulatory alternatives during
99 the early input process. As appropriate, the agency should also reach out to select experts
100 in other agencies for input on alternatives.
- 101 6. An agency should consider providing in the NPRM a discussion of the reasonable
102 regulatory alternatives it has considered or that have been suggested to it, including
103 alternatives it is not proposing to adopt, together with the reasons it is not proposing to
104 adopt those alternatives. To the extent the agency is concerned about revealing the
105 identity of the individuals or groups offering proposed alternatives due to privacy or
106 confidentiality concerns, it should consider characterizing the identity (e.g., industry
107 representative, environmental organization, etc.) or listing the alternatives without
108 ascribing them to any particular person.
- 109 7. When an agency discusses regulatory alternatives in the preamble of a proposed or final
110 rule, it should also consider including a discussion of any reasonable alternatives
111 suggested or considered through early public input, but which the agency believes are



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- 112 precluded by statute. The discussion should also include an explanation of the agency's
113 views on the legality of those alternatives.
- 114 8. To help other agencies craft best practices for early engagement with the public, an
115 agency should, when feasible, share data and other information about the effectiveness of
116 its efforts to solicit early input on regulatory alternatives.