



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Early Input on Regulatory Alternatives

### Committee on Regulation

Proposed Recommendation | June 17, 2021

#### Proposed Amendments

**This document displays manager's amendments (with no marginal notes) and a Conference Member comment (with source shown in the margin).**

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

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

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

<sup>3</sup> 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 the Small Business Regulatory Enforcement Fairness Act).

<sup>4</sup> Exec. Order No. 12866, § 1, 58 Fed. Reg. 51735, 51735-36 (Sept. 30, 1993).



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12 publicizing the alternatives considered when agencies are promulgating important rules.<sup>5</sup>

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  
15 in the early stages of shaping a rule.<sup>6</sup> 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.<sup>7</sup> 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,<sup>8</sup> 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.<sup>9</sup>

<sup>5</sup> See Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, ¶ 6, 79 Fed. Reg. 75114, 75116-17 (Dec. 17, 2014).

<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); 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).

<sup>7</sup> See Exec. Order No. 12866, *supra* note 4, § 4(c).

<sup>8</sup> 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).

<sup>9</sup> 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”).



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26 When seeking early input on rulemaking regulatory 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)<sup>10</sup> or agency rules (e.g., the Department of Energy’s “Process Rule”),<sup>11</sup>  
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.<sup>12</sup>

**Commented [CMA1]:** Comment from Senior Fellow Alan B. Morrison: Discussion is OK but with whom — inside agency or out?

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;

<sup>10</sup> 5 U.S.C. § 609.  
<sup>11</sup> 10 C.F.R. § 430, Subpart C, App. A.  
<sup>12</sup> See Carrigan & Shapiro, *supra* note 1, at 37.



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- 49           b. The extent to which the issue-conduct being regulated or any of the alternatives  
50           suggested 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;
- 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 agency's discretion to select among alternatives, given the  
58           statutory language it is implementingbeing implemented;
- 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).



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- 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  
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 interested persons who  
87 individuals and entities that have less time and fewer resources as easy as possible,  
88 particularly when those potential participants do not have experience in the rulemaking  
89 process. The agency should explain possible consequences of the potential rulemaking to  
90 help potential participants understand the importance of their input and to encourage their  
91 participation 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



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- 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  
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.