



Administrative Conference Recommendation 2021-3

Early Input on Regulatory Alternatives

Adopted June 17, 2021

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

The Administrative Conference has previously recommended that agencies engage with 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 (June 4, 2021) (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 RFA, as amended by the Small Business Regulatory Enforcement Fairness Act).

⁴ Exec. Order No. 12866, § 1, 58 Fed. Reg. 51735, 51735–36 (Sept. 30, 1993).

⁵ 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).



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in the early stages of shaping a rule.⁶ Agencies might conduct this outreach while developing their regulatory priorities, including in the proposed regulatory plans agencies are required to prepare under Executive Order 12866.⁷ Seeking early input before issuing a notice of proposed rulemaking can help agencies identify alternatives and learn more about the benefits, costs, distributional impacts,⁸ and technical feasibility of alternatives to the proposal they are considering. Doing so is particularly important, even if not required by law or executive order, for a proposal likely to draw significant attention for its economic impact or other significance. It can also be especially valuable for agencies seeking early input on regulatory alternatives to reach out to a wide range of interested persons, including affected groups that often are underrepresented in the administrative process and may suffer disproportionate harms from a proposed rule.⁹

When seeking early input on regulatory alternatives, agencies might consider approaches modeled on practices that other agencies already use. In so doing, they might look at agency practices that are required by statute (e.g., the Small Business Regulatory Enforcement Fairness Act)¹⁰ or agency rules (e.g., the Department of Energy’s “Process Rule”),¹¹ or practices that

⁶ 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) (report to the Admin. Conf. of the U.S.).

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

⁸ 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).” OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS 14 (2003).

⁹ 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”).

¹⁰ 5 U.S.C. § 609.

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



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agencies have voluntarily undertaken in the absence of any legal requirement.

Nevertheless, seeking early input on alternatives may not be appropriate in all cases and may trigger certain procedural requirements.¹² In some instances, the alternatives may be obvious. In others, the subject matter may be so obscure that public input is unlikely to prove useful. And in all cases, agencies face resource constraints and competing priorities, so agencies may wish to limit early public input to a subclass of rules such as those with substantial impact. Agencies will need to consider whether the benefits of early outreach outweigh the costs, including the resources required to conduct the outreach and any delays entailed. When agencies do solicit early input, they will still want to tailor their outreach to ensure that they are soliciting input in a way that is cost-effective, is equitable, and maximizes the likelihood of obtaining diverse, useful responses.

RECOMMENDATION

1. When determining whether to seek early input from knowledgeable persons to identify potential regulatory alternatives or respond to alternatives an agency has already identified, the agency should consider factors such as:
 - a. The extent of the agency's familiarity with the policy issues and key alternatives;
 - b. The extent to which the conduct being regulated or any of the alternatives suggested are novel;
 - c. The degree to which potential alternatives implicate specialized technical or technological expertise;
 - d. The complexity of the underlying policy question and the proposed alternatives;
 - e. The potential magnitude of the costs and benefits of the alternatives proposed;
 - f. The likelihood that the selection of an alternative will be controversial;
 - g. The time and resources that conducting such outreach would require;
 - h. The extent of the agency's discretion to select among alternatives, given the

¹² See, e.g., Federal Advisory Committee Act, 5 U.S.C. App. 2 §§ 1–16.



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statutory language being implemented;

- i. The deadlines the agency faces, if any, and the harms that might occur from the delay required to solicit and consider early feedback;
 - j. The extent to which certain groups that are affected by the proposed regulation and have otherwise been underrepresented in the agency's administrative process may suffer adverse distributional effects from generally beneficial proposals; and
 - k. The extent to which experts in other agencies may have valuable input on alternatives.
2. In determining what outreach to undertake concerning possible regulatory alternatives, an agency should consider using, consistent with available resources and feasibility, methods of soliciting public input including:
- a. Meetings with interested persons held episodically or as-needed based on rulemaking activities;
 - b. Listening sessions;
 - c. Internet and social media forums;
 - d. Focus groups;
 - e. Advisory committees, including those tasked with conducting negotiated rulemaking;
 - f. Advance notices of proposed rulemakings; and
 - g. Requests for information.

The agency should also consider how to ensure that its interactions with outside persons are transparent, to the maximum extent permitted by law.

3. An agency should consider whether the methods it uses to facilitate early outreach in its rulemaking process will engage a wide range of interested persons, including individuals and groups that are affected by the rule and are traditionally underrepresented in the agency's rulemaking processes. The agency should consider which methods would best facilitate such outreach, including providing materials designed for the target participants. For example, highly technical language may be appropriate for some, but not all, audiences. The agency should endeavor to make participation by interested persons who



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have less time and fewer resources as easy as possible, particularly when those potential participants do not have experience in the rulemaking process. The agency should explain possible consequences of the potential rulemaking to help potential participants understand the importance of their input and to encourage their participation in the outreach.

4. If an agency is unsure what methods of soliciting public input will best meet its needs and budget, it should consider testing different methods to generate alternatives or receive input on the regulatory alternatives it is considering before issuing notices of proposed rulemaking (NPRMs). As appropriate, the agency should describe the outcomes of using these different methods in the NPRMs for rules in which they are used.
5. An agency should ensure that all of its relevant officials, including economists, scientists, and other experts, have an opportunity to identify potential regulatory alternatives during the early input process. As appropriate, the agency should also reach out to select experts in other agencies for input on alternatives.
6. An agency should consider providing in the NPRM a discussion of the reasonable regulatory alternatives it has considered or that have been suggested to it, including alternatives it is not proposing to adopt, together with the reasons it is not proposing to adopt those alternatives. To the extent the agency is concerned about revealing the identity of the individuals or groups offering proposed alternatives due to privacy or confidentiality concerns, it should consider characterizing the identity (e.g., industry representative, environmental organization, etc.) or listing the alternatives without ascribing them to any particular person.
7. When an agency discusses regulatory alternatives in the preamble of a proposed or final rule, it should also consider including a discussion of any reasonable alternatives suggested or considered through early public input, but which the agency believes are precluded by statute. The discussion should also include an explanation of the agency's views on the legality of those alternatives.
8. To help other agencies craft best practices for early engagement with the public, an agency should, when feasible, share data and other information about the effectiveness of



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its efforts to solicit early input on regulatory alternatives.