

MEMORANDUM

From: Keith Holman
To: ACUS Committee on Regulation
Date: October 9, 2020
Re: Legal Requirements for Early Public Input on Regulatory Alternatives

I. INTRODUCTION

The consideration of alternatives early in the rule development process can be enormously beneficial in designing superior regulatory outcomes.¹ The public can play an important role in identifying and evaluating alternative policy options. ACUS Recommendation 2018-7² advises that agencies should consider conducting early public engagement for planned rules that “are complex, affect a wide range of interests in specific ways, or implicate controversial issues.”³

When federal agencies provide robust information about regulatory alternatives to the public early in the rulemaking process, interested parties are often able to:

- Contribute valuable, sometimes essential, information into the decision-making process;
- Identify additional viable alternatives the agency may not have considered;
- Provide a real-world check on assumptions agencies make about costs, benefits, technical feasibility, markets, demand elasticities, and regulated parties’ access to capital; and,
- Assess the strength of key data—including studies, modeling, and other information—the agency intends to rely on, thereby beginning the process of addressing uncertainty.

Not only is public involvement in reviewing alternatives desirable, for several decades it has been legally *required* when agencies conduct or authorize actions that will have substantial environmental impacts, or will have significant impacts on small entities, or that will result in large-scale economic impacts on the national economy.⁴ This Memorandum surveys the

¹ An example of an alternative in the pollution control context is “any policy that seeks to achieve the same end through a different method (e.g., self-regulation or pollution trading or taxation) or at a different level (e.g., emissions are capped but at a higher or lower level).” Robert Hahn & Patrick Dudley, *How Well Does the U.S. Government Do Benefit-Cost Analysis?* Vol 1(2) REV. OF ENVTL. ECON. & POL’Y 202 (Summer 2007).

² Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2139, 2146 (Feb. 6, 2019).

³ *Id.*

⁴ See 42 U.S.C. § 4321 *et seq.* (the National Environmental Policy Act of 1969); 5 U.S.C. § 601 *et seq.* (the Regulatory Flexibility Act); Exec. Order No. 12,866, “Regulatory Planning and Review,” 58 Fed. Reg. 51,735 (Sept.

principal legal authorities that require public participation in the evaluation of alternatives during the early stages of rule development, and provides examples of the application of these requirements.

II. BACKGROUND

The requirement that federal agencies consider potential impacts and alternative options early in the action-development process has its roots in the **National Environmental Policy Act of 1969** (NEPA).⁵ NEPA requires federal agencies to (1) assess the environmental effects of their proposed action, and (2) consider potential alternatives before making committing to a final action. Critically, NEPA gives the public the opportunity to get information about and participate in the environmental assessment process, including the evaluation of alternatives. Agencies must consider less environmentally-harmful alternatives to the proposed action, including taking no action at all. An agency that fails to adequately consider alternatives faces substantial risk of litigation.⁶

Subsequently, Congress enacted legislation requiring agencies to address the impact their new regulations would have on small entities. The **Regulatory Flexibility Act of 1980** (RFA)⁷ requires agencies intending to issue a regulation that will significantly affect small entities to consider the specific impacts of the rule and to consider less-harmful alternatives. In some situations, interested parties can meet directly with agency staff to explain how they will be harmed and explore alternatives. The courts have remanded rules to agencies for failing to properly consider alternatives under the RFA.⁸

Moreover, agencies planning to issue significant new regulations have been required by several **Executive Orders** issued since 1981 to consider alternatives to their intended rule.⁹ Identifying

30, 1993); Exec. Order No. 13,563, “Improving Regulation and Regulatory Review,” 76 Fed. Reg. 3,821 (Jan. 18, 2011).

⁵ 42 U.S.C. § 4321 *et seq.*

⁶ *See, e.g., NRDC v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *NRDC v. Calloway*, 524 F.2d 79 (2d Cir. 1975); *Sierra Club v. Marsh*, 714 F. Supp. 539 (D. Me. 1989); *Marble Mountain Audubon Society v. Rice*, 914 F.2d 179 (9th Cir. 1990). In 1969, ACUS recommended that agencies undertaking licensing proceedings that “must explore and give adequate consideration to possible alternatives” and develop procedures to assure appropriate consideration of alternatives while “embodying a rule of reason concerning the number and character of alternatives to be considered.” Admin. Conf. of the U.S., Recommendation 69-7, *Consideration of Alternatives in Licensing Procedures* (Oct. 1969). *See Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

⁷ 5 U.S.C. § 601 *et seq.*

⁸ *See, e.g., Southern Offshore Fishing Ass’n v. Daley*, 995 F. Supp. 1411 (M.D. Fla. 1998) (court remanded Dept. of Commerce quota imposed on Atlantic shark fishery because agency failed to assess less burdensome alternatives); *Nat’l Assoc. of Psychiatric Health System v. Shalala*, 120 F. Supp. 2d 33 (D.D.C. 2000) (court remanded Dept. of Health and Human Services’ “one-hour” consultation rule because agency failed to consider alternatives).

⁹ *See* Exec. Order No. 12,291, “Federal Regulation,” 46 Fed. Reg. 13,193 (Feb. 17, 1981); Exec. Order No. 12,866, “Regulatory Planning and Review,” 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order No. 13,563, “Improving Regulation and Regulatory Review,” 76 Fed. Reg. 3,821 (Jan. 18, 2011). The requirement to conduct a regulatory

and considering alternatives is a critical component of the regulatory impact analysis (RIA) process mandated by these executive orders.¹⁰ Within the RIA process, the evaluation of alternatives has been describes as “critical in determining which policies among competing alternatives yields the highest net benefits.”¹¹ A detailed discussion of the alternatives analysis required by executive orders is discussed in detail in the companion report for this Project prepared by Professors Stuart Shapiro and Christopher Carrigan.

III. THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

NEPA¹² was signed into law on January 1, 1970 as the nation’s first comprehensive statement of national environmental policy. The law was prompted by public concern in the late 1960s that federal agencies, motivated by economic and technical considerations, did not consider the environment when they issued permits, awarded federal funds, and undertook construction projects such as building highways. NEPA instructs agencies to put environmental considerations on an equal footing with other relevant decision factors. Section 102 of NEPA establishes that:

The Congress authorizes and directs that, to the fullest extent possible:

* * *

(a) all agencies of the Federal government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and

impact analysis for significant rules dates back to 1978. See Exec. Order No. 12,044, “Improving Government Regulation,” 43 Fed. Reg. 12,661 (March 23, 1978). These executive orders specifically apply to executive branch agencies, not to the independent regulatory agencies listed in 44 U.S.C. § 3502(5).

¹⁰ Section 6(a)(3)(C)(iii) of Executive Order 12866 requires agencies to conduct “an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions).” In general, “the purpose of the RIA is to inform agency decisions in advance of regulatory actions and to ensure that regulatory choices are made after appropriate consideration of the likely consequences . . . Regulatory analysis also has an important democratic function; it promotes accountability and transparency and is a central part of open government.” OFFICE OF MGMT & BUDGET, Circular A-4, *Regulatory Impact Analysis: A Primer* (Aug. 15, 2011) at 2.

¹¹ Hahn & Dudley, *How Well Does the U.S. Government Do Benefit-Cost Analysis?*, *supra* note 1, at 202.

¹² National Environmental Policy Act of 1969, Pub. L. 91-190, *as amended*, 42 U.S.C. §§ 4321-4370h.

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

* * *

*(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.*¹³

NEPA's Environmental Review Process

Agencies comply with the “detailed statement” requirement of NEPA section by completing a multi-step process to identify and evaluate potential environmental impacts and potential alternative approaches. The Council of Environmental Quality (CEQ) issued comprehensive regulations in 1978 that govern the procedural aspects of the NEPA review process.¹⁴ CEQ also issued guidance to members of the public who wish to participate in the NEPA process.¹⁵

The first step in the review process is to perform a screening-level analysis of a planned major action and determining whether (a) the action is one of a category of actions the agency has determined will not have a significant effect on the environment (“categorical exclusion”), (b) the agency must conduct an Environmental Assessment (EA), or (c) the agency will need to prepare a full Environmental Impact Statement (EIS).¹⁶ According to the Council on Environmental Quality (CEQ), the EA is “a concise document that (1) briefly provides sufficient evidence and analysis for determining whether to prepare an EIS, (2) aids an agency’s compliance with NEPA when no environmental impact statement is necessary, and (3) facilitates preparation of an Environmental Impact Statement when one is necessary.”¹⁷ The EA process concludes with either a Finding of No Significant Impact (FONSI) or a determination to proceed to preparation of an EIS. A FONSI documents the reasons why the planned action is not anticipated to have significant environmental impacts.¹⁸

If the screening-level analysis at the EA stage reveals that an EIS is required, the agency must prepare a Notice of Intent describing the proposed action, potential alternatives, and the agency’s proposed scoping process—including any meetings and how the public can get involved.¹⁹ Agencies are required to identify and invite interested persons to participate, and select the best methods to involve communities, whether local, regional, or national, that are interested in the

¹³ 42 U.S.C. §§ 4332(2)(C), 4332(2)(E) (emphasis added).

¹⁴ 40 C.F.R. §§ 1500-1508. Individual agencies adopt their own NEPA compliance procedures based on the CEQ requirements. CEQ recently revised its NEPA procedural regulations. See COUNCIL ON ENVIRONMENTAL QUALITY, Final Rule, *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43,304 (July 16, 2020).

¹⁵ See COUNCIL ON ENVIRONMENTAL QUALITY, *A Citizen’s Guide to the NEPA* (December 2007).

¹⁶ *Id.* at 11.

¹⁷ *Id.*

¹⁸ *Id.* at 12.

¹⁹ *Id.* at 13.

proposed action.²⁰ The agency prepares a draft EIS for public review, and the Environmental Protection Agency (EPA) publishes a Notice of Availability of the draft EIS in the *Federal Register*.²¹ The public has the opportunity to comment on the draft EIS during a comment period that lasts 45 days or more.

As CEQ notes, “[s]ome of the most constructive and beneficial interaction between the public and an agency occurs when citizens identify or develop reasonable alternatives that the agency can evaluate in the EIS.”²² CEQ offers the following perspective on considering regulatory alternatives:

*The identification and evaluation of alternative ways of meeting the purpose and need of the proposed action is the heart of the NEPA analysis. The lead agency or agencies must, “objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” Reasonable alternatives are those that substantially meet the agency’s purpose and need. If the agency is considering an application for a permit or other federal approval, the agency must still consider all reasonable alternatives. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant. Agencies are obligated to evaluate all reasonable alternatives or a range of reasonable alternatives in enough detail so that a reader can compare and contrast the environmental effects of the various alternatives.*²³

If an agency has a preferred alternative when it publishes a draft EIS, the draft must identify which alternative the agency prefers and agencies must also identify a preferred alternative in the final EIS, unless another law prohibits it from doing so.²⁴

When the public comment period is finished, the agency analyzes comments, conducts further analysis as necessary, and prepares the final EIS.²⁵ In the final EIS, the agency must respond to the substantive comments received from other government agencies and from members of the public.²⁶ The agency’s response can be in the form of changes in the final EIS, factual corrections, modifications to the analyses or the alternatives, or the consideration of wholly new alternatives. The agency submits the final EIS for public review and EPA publishes a Notice of Availability in the *Federal Register*.²⁷

²⁰ *Id.* at 14.

²¹ *Id.* at 14

²² *Id.* at 16.

²³ *Id.* (citation omitted).

²⁴ *Id.* at 17.

²⁵ *Id.* at 18.

²⁶ *Id.*

²⁷ *Id.*

The Record of Decision (ROD) is the final step for agencies in the EIS process. The ROD is a public document that states what the final decision is, identifies the alternatives considered, including the agency's preferred alternative, and discusses whether the agency adopted all practical means to avoid or minimize environmental harm, and if not, why they were not.²⁸ Significantly, NEPA does not require the decisionmaker to select the environmentally preferable alternative or prohibit adverse environmental effects.²⁹ NEPA does require that decisionmakers be informed of the environmental consequences of their decisions.³⁰

IV. THE REGULATORY FLEXIBILITY ACT OF 1980

The RFA³¹ which was enacted in September 1980, requires agencies to consider the impact of their regulatory proposals on small entities, analyze effective alternatives that minimize small entity impacts, and make their analyses available for public comment. The RFA applies to a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. The RFA requires agencies to analyze the economic impact of proposed regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities.³²

The concept underlying the RFA's analytical requirement is that agencies will revise their decision-making processes to take account of small entity concerns in the same manner that agency decision-making processes were modified subsequent to the enactment of NEPA.³³ In the same way that NEPA requires agencies to consider the environmental impacts of their planned actions and potential alternatives, the RFA requires agencies to consider the economic impacts of their planned regulations and potential alternatives.

Congress strengthened the RFA in 1996, with the Small Business Regulatory Enforcement Fairness Act (SBREFA).³⁴ The amendments made by SBREFA include:

- Judicial review of agency compliance with some of the RFA's provisions.
- Requirements for more detailed and substantive regulatory flexibility analyses.
- Expanded participation by small entities in the development of rules by the Occupational Safety and Health Administration (OSHA) and the EPA. Subsequently, the Consumer

²⁸ *Id.* at 19.

²⁹ *Id.* at 5.

³⁰ *Id.*

³¹ Pub. L. No. 96-354 (codified at 5 U.S.C. §§ 601-612).

³² U.S. SMALL BUSINESS ADMINISTRATION, Office of Advocacy, *How to Comply with the Regulatory Flexibility Act: A Guide for Government Agencies* (Aug. 2017).

³³ *Id.* at 1-2. *See* Associated Fisheries of Maine v. Daley, 127 F.3d 104, 114 (1st Cir. 1997) noting parallels between NEPA and the RFA.

³⁴ Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121 (codified at 5 U.S.C. § 601-612).

Financial Protection Bureau (CFPB) was included in the requirement for expanded participation by small entities.³⁵

The RFA's Regulatory Flexibility Analysis Process

The RFA's regulatory flexibility analysis process mirrors the iterative process required by NEPA. An agency planning to develop a regulation must perform a screening-level (or "threshold") analysis of the planned rule to determine (a) the entities likely to be affected by the rule, (b) the types of affected small entities, and (c) the magnitude of regulatory impacts created by the planned rule.³⁶ If the threshold analysis finds adequate factual evidence that the rule will not have a "significant economic effect on a substantial number of small entities"³⁷ the head of the agency may so certify.³⁸ The RFA certification is conceptually analogous to the FONSI required by NEPA. The certification shall be published in the *Federal Register* at the time the proposed or final rule is published for public comment.³⁹

If the threshold analysis shows that the planned rule will have a significant economic impact on a substantial number of small entities (*or* there is inadequate factual information to make a final determination), the agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) with the available data, and solicit comments from small entities regarding impacts and potential alternatives.⁴⁰ The IRFA should identify cost burdens for the sector and for the individual small entities affected, as well as alternatives to the proposed regulation that would accomplish the agency's goals while not disproportionately burdening small businesses.⁴¹ If economic data are not readily available, the agency should seek such data directly from industry sources or other third parties. The results of the analysis should allow interested parties to compare the impacts of regulatory alternatives on the differing sizes and types of entities affected by the rule, enabling direct comparison of small and large entities to determine the degree to which the alternatives chosen disproportionately affect small entities or a specific subset of small entities.⁴²

Section 603(c) of the RFA gives agencies some alternatives that they must consider:

- Establishment of different compliance or reporting requirements for small entities or timetables that take into account the resources available to small entities.
- Clarification, consolidation, or simplification of compliance and reporting requirements for small entities.
- Use of performance rather than design standards.

³⁵ OFFICE OF ADVOCACY, *How to Comply with the Regulatory Flexibility Act*, *supra* note 45, at 2.

³⁶ *Id.* at 11.

³⁷ *Id.* The RFA defines "small entities" to include small businesses, small not-for-profit organizations, and small government jurisdictions. *See* 5 U.S.C. §§ 601(3)-(5).

³⁸ 5 U.S.C. § 605(b).

³⁹ OFFICE OF ADVOCACY, *How to Comply with the Regulatory Flexibility Act*, *supra* note 45, at 11.

⁴⁰ *Id.*

⁴¹ *Id.* at 32.

⁴² *Id.* at 33.

- Exemption for certain or all small entities from coverage of the rule, in whole or in part.
- Adoption of different size standards or modifying the types of equipment that are required for large and small entities.⁴³

Agencies should identify regulatory alternatives at the earliest stage of rulemaking and not wait until after the proposed rule is finished to develop alternatives. This is crucial because otherwise the agency may have already committed to one particular regulatory approach without considering alternatives.⁴⁴

The RFA requires the completed IRFA, or a summary thereof, to be published in the *Federal Register* at the same time the agency publishes the Notice of Proposed Rulemaking for the rule.⁴⁵ In conjunction with the comment period on the proposed rule, and consistent with an agency's obligations under section 609(a) of the RFA, agencies should continue to perform outreach to interested groups.⁴⁶

Upon receiving public comments on the IRFA, the agency must revise their initial regulatory flexibility analysis to reflect the comments received. If the agency obtains sufficient factual data to certify that the rule will not have a significant economic impact on a substantial number of small entities, the agency may certify to that effect and include the certification in the final rule's *Federal Register* notice.⁴⁷ Conversely, if the agency determines that, based on the information it has gathered to that point, it cannot certify the final rule under section 605(b), the agency must prepare a FRFA.⁴⁸ When the agency publishes its final rule, it must also publish the FRFA, or a summary of the FRFA, in the *Federal Register*.⁴⁹

Section 604(a) of the RFA outlines the central issues the agency must address in the FRFA. In short, agencies must evaluate the impact of a rule on small entities and describe their efforts to minimize the adverse impact.⁵⁰ Significantly, the agency must include a statement of the factual,

⁴³ *Id.* at 38.

⁴⁴ *Id.* at 39. The SBA Office of Advocacy asserts that agency predeterminations of a preferred regulatory approach without consideration of alternatives violates the basic tenet of rational rulemaking under the Administrative Procedure Act by making the notice and comment process "irrelevant." *Id.* The SBA Office of Advocacy further argues that "[i]nterpretations of the notice and comment provisions of the APA contemplate a dialogue between the agency and the regulated community. An agency already predisposed to only one way of thinking undermines the notice and comment procedure, thereby leaving itself open to a finding by a court that the agency action was arbitrary, capricious, or otherwise not in accordance with the law under section 706 of the APA." *Id.* (citing *McLouth Steel Prods. v. EPA*, 838 F.2d 1317, 1324 (D.C. Cir. 1988); *Levesque v. Block*, 723 F.2d 175, 187 (1st Cir. 1983); *United States Steel Corp. v. EPA*, 595 F.2d 207, 214 (5th Cir. 1979)).

⁴⁵ 5 U.S.C. § 603(a).

⁴⁶ 5 U.S.C. § 609(a).

⁴⁷ OFFICE OF ADVOCACY, *How to Comply with the Regulatory Flexibility Act*, supra note 45, at 44.

⁴⁸ 5 U.S.C. § 604.

⁴⁹ 5 U.S.C. § 604(b).

⁵⁰ OFFICE OF ADVOCACY, *How to Comply with the Regulatory Flexibility Act*, supra note 45, at 44.

policy, and legal reasons for selecting the alternative adopted in the final rule, and also detail for the public record why each of the other significant alternatives was rejected.⁵¹

In 1996, when Congress amended the RFA, SBREFA⁵² added the requirement that certain agencies must conduct special outreach efforts to ensure that small entity views are carefully considered prior to the issuance of a proposed rule.⁵³ This outreach is accomplished through the work of small business advocacy review panels, sometimes referred to as SBREFA or SBAR (small business advocacy review) panels. The statute requires that EPA, CFPB, and OSHA evaluate their regulatory proposals to determine whether SBREFA panels should be convened.⁵⁴ Whenever EPA, CFPB, or OSHA determines that a regulatory proposal may have a significant economic impact on a substantial number of small entities, the law further requires that the agency convene a review panel. SBREFA panels are required for all EPA, CFPB, and OSHA rules for which an IRFA is required. Panel outreach must take place before the publication of the proposed rule.⁵⁵

A SBREFA panel consists of a representative or representatives from the rulemaking agency, OMB's Office of Information and Regulatory Affairs (OIRA) and the Chief Counsel for Advocacy. The panel solicits information and advice from small entity representatives (SERs), who are individuals that represent small entities affected by the proposal.⁵⁶ The purpose of the panel process is threefold. First, the panel process ensures that small entities that would be affected by a regulatory proposal are consulted about the pending action and offered an opportunity to provide information on its potential effects. Second, a panel can develop, consider, and recommend less burdensome alternatives to a regulatory proposal when warranted. Finally, the rulemaking agency has the benefit of input from both real-world small entities and the panel's report and analysis prior to publication.⁵⁷

V. EXECUTIVE ORDERS ON REGULATORY IMPACT ANALYSIS

In addition to requirements under NEPA and the RFA, federal agencies planning to issue "major" new rules have also been required by various Executive Orders issued since 1981 to consider potential alternatives to their intended rule.

⁵¹ *Id.* at 48.

⁵² Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121 (March 29, 1996).

⁵³ OFFICE OF ADVOCACY, *How to Comply with the Regulatory Flexibility Act*, supra note 45, at 51.

⁵⁴ 5 U.S.C. § 609(d)(2).

⁵⁵ OFFICE OF ADVOCACY, *How to Comply with the Regulatory Flexibility Act*, supra note 45, at 52.

⁵⁶ *Id.*

⁵⁷ *Id.* at 53.

- **Executive Order 12,291**⁵⁸ required agencies to prepare a preliminary RIA for proposed major rules,⁵⁹ including “a description of alternative approaches that could substantially achieve the same regulatory goal at lower cost . . . and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted.”⁶⁰
- **Executive Order 12,866**⁶¹ supplanted and built upon E.O. 12,291, and requires agencies to include in their RIAs for significant rules, “an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.”⁶²
- **Executive Order 13,563**⁶³ supplements and reaffirms Executive Order 12,866, and requires agencies to “select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits” and to “identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.”⁶⁴
- **OMB Circular A-4** (2003) states that “a good regulatory analysis is designed to inform the public and other parts of the Government (as well as the agency conducting the analysis) of the effects of alternative actions.”⁶⁵ Agencies are instructed “once you have determined that Federal regulatory action is appropriate, you will need to consider alternative regulatory approaches. Ordinarily, you will be able to eliminate some alternatives through a preliminary analysis, leaving a manageable number of alternatives to be evaluated.”⁶⁶ OMB’s Office of Information and Regulatory Affairs (OIRA) has authority under Executive Order 12,866 to return a planned rule to an agency for further consideration if OIRA believes the rule fails to meet the requirements of the Executive Order.

⁵⁸ Exec. Order No. 12,291, “Federal Regulation,” 46 Fed. Reg. 13,193 (Feb. 17, 1981). The requirement to conduct a regulatory impact analysis for significant rules dates back to 1978. Exec. Order No. 12,044, “Improving Government Regulation,” 43 Fed. Reg. 12,661 (Mar. 23, 1978).

⁵⁹ “Major rule” is defined in Executive Order 12,291 as “any regulation that is likely to result in (1) an annual effect on the economy of \$100 million or more, (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

⁶⁰ Exec. Order No. 12,291, Section 3(d)(4).

⁶¹ Exec. Order No. 12,866, “Regulatory Planning and Review,” 58 Fed. Reg. 51,735 (Sept. 30, 1993).

⁶² *Id.* at 51,741.

⁶³ Exec. Order No. 13,563, “Improving Regulation and Regulatory Review,” 76 Fed. Reg. 3821 (Jan. 18, 2011).

⁶⁴ *Id.* at 3822.

⁶⁵ OFFICE OF MANAGEMENT AND BUDGET, Circular A-4, “Regulatory Analysis” (September 17, 2003) at 2.

⁶⁶ *Id.* at 7.

Despite the clear directive in these executive orders to consider alternatives in the RIA documents that must be developed for major rulemakings, it is uncertain to what extent agencies comply. For this reason, Professors Stuart Shapiro and Christopher Carrigan are currently studying the RIAs that agencies developed for rulemakings in recent years.⁶⁷ From this research, they will be able to determine how often agencies identify and consider regulatory alternatives, rather than focusing on single, preferred regulatory approach.

VI. CONCLUSION

The consideration of alternatives early rulemaking process can be critical in designing superior regulatory outcomes. As some commenters have observed, “if an RIA is truly designed to inform and guide regulatory decisionmaking . . . it must examine a reasonable set of alternative policy options. An RIA that only compares the proposed action to the existing regulation . . . or that considers only very limited options . . . does little to help decisionmakers determine the appropriate course to take.”⁶⁸

The public can play an important role in providing information and real-world perspective that allows an agency to choose better policy options. Moreover, not only is public involvement in reviewing alternatives desirable, it is legally required under statutes, executive orders, and agency procedures. These requirements to identify and evaluate regulatory alternatives have proven highly beneficial in a variety of agency decision making examples under NEPA and the RFA, despite the time and resources commitments that they may involve. that they. Agencies should consider whether the benefits of early public engagement in a the consideration of alternatives outweighs the costs of more intensive early outreach and analysis.

Early public input on regulatory alternatives may be especially beneficial for planned actions that are likely to:

- Have major economic impacts on states/localities;
- Be controversial or precedent-setting with respect to scientific or economic issues;
- Set a precedent affecting multiple departments within an agency;
- Impose unusually high costs or new legal liabilities, particularly if the costs will be borne disproportionately by specific communities or industries; or,
- The planned rule relies on unproven compliance technologies.

⁶⁷ Stuart Shapiro and Christopher Carrigan, Draft Report to the Administrative Council of the United States, *Early Public Input on the Evaluation of Regulatory Alternatives* (anticipated Spring 2021).

⁶⁸ Resources for the Future, *Reforming Regulatory Impact Analysis* (April 2009) at 221.