

Comment from Kevin Bromberg, Member of the Public
April 7, 2021

Date: April 7, 2021

To: ACUS Committee on Regulation

From: Kevin Bromberg, Bromberg Regulatory Strategy, LLC

Subject: Draft April 8, 2021 ACUS Early Input on Regulatory Alternatives Recommendations

Introduction

I have spent 40 years in regulatory analysis and advocacy at the US Small Business Administration, and retired last year from the federal government. I have substantial experience with SBREFA, the early input mechanism cited in the report, having participated in over 25 SBREFA panels over about 20 years. I heartily endorse all the draft recommendations in this report, which I can validate from my own experience working with EPA panels.

I also endorse the report's recommendations 2, 4, and 6 which can be merged easily with the draft ACUS recommendations. There is some overlap with the draft recommendations that would need to be accommodated. I believe these report recommendations were well crafted by the experts with subject matter expertise and deserve separate consideration by the committee.

I also have additional recommendations to supplement the initial steps the ACUS draft recommends that should be adopted as additional recommendations, or at a minimum, identified as areas for additional study. Based on my SBREFA experience alone, I recommend that ACUS adopt specific best practices for implementing early input procedures for significant or very significant rulemakings. These early input practices are known today to rulemaking practitioners and others in the public policy field. There would be a substantial public benefit if robust early input mechanisms were implemented today, and not in the distant future.

The current draft ACUS recommendations focus on factors to consider in evaluating the merits of early input, some recommendations for the development of regulatory alternatives and discussion of early input in rulemaking documents. However, the draft ACUS recommendations fail to outline ANY best practices for the actual implementation of early input procedures, despite the substantial body of literature that identify such best practices.

Discussion

In summary, early input from stakeholders is a proven mechanism for enhancing both the identification of regulatory alternatives and the associated analysis of costs and benefits of a rule. After decades of rulemaking experience and policy analysis, this is no longer seriously subject to dispute. Agency personnel, no matter how erudite or experienced, cannot substitute their knowledge for the collective knowledge base of outside interested parties. Frankly, only agency hubris would lead to the conclusion that early public input is not desirable in almost

every case. It has been my experience under SBREFA (which addresses only significant small business rules) that every EPA rule benefited from outside small business input, without exception. This could be in the form of new regulatory alternatives, or simply refining the agency draft alternatives. More importantly, small business entities contributed substantially to the underlying analysis of the costs and benefits of the draft alternatives. The SBREFA process consistently provided the agency with information and ideas that it did not possess itself, often leading to very different proposals.¹ Further, the unanimous Panel Recommendations, which includes three Federal agency members, SBA Advocacy, EPA and OIRA, set the basis for the EPA proposals. As I recall, the draft report states that the EPA personnel universally praised the contributions of the SBREFA process to high quality EPA rulemakings, despite some concern about the related burden on the agency.² EPA staff regularly expressed this to me in the EPA SBREFA panels in which I participated.

In large part, I am relying on the research and findings of my colleague, Stuart Shapiro (co-author of the Early Input Report before the Committee) who has published extensively in this area. Perhaps Professor Shapiro is too modest to acknowledge his own work, but I cannot ignore the substantial lessons regarding the “deliberative analytic process” working with stakeholders that I acquired through reading his publications and joining him at a 2019 SBCA panel addressing EPA’s analytic detailed blueprints for planning high quality rulemakings. Professor’s Shapiro’s work provides substantial support for my best practice recommendations below.

There is a large body of research that Professor Shapiro has cited elsewhere supporting the merits of adopting the “deliberative analytic process” working with outside parties, including the pivotal NRC 1996 Study “Understanding Risk...” through his most recent treatise, “Analysis and public policy: Successes, failures and directions for reform,” Edward Elgar Publishing (2016). The central message is that both SBREFA panels and the available literature have identified the key elements of obtaining sound and cost-effective input from affected stakeholders. Indeed, the draft report at page 30 cites as “Theme 2”: “External stakeholders are the primary source of inspiration regarding alternative policy options when agencies are developing rules.” Given this acknowledgement by the agency personnel themselves, it appears a jarring omission that the recommendations provide no best practices for obtaining such advice.

¹ Equally importantly, several proposals were not issued by either OSHA or EPA after the small entity representatives (as they are called in SBREFA) made crucial arguments that the rules were not needed, supplanted by other regulations, or that the agency was addressing a non-problem. In the absence of early stakeholder input, agencies would proceed to a rulemaking that would likely be imperiled.

² I contest the widespread myth that early input elongates the rulemaking process. My observation is the exact opposite. Tasking outside parties to test EPA ideas and “facts” saved time, rather than added time. Besides, the stakeholder brought important information and ideas to EPA without significant agency cost. At a minimum, the agency proposals were better designed and supported by analysis. I have found that the most able and experienced rule managers knew how to harness timely and informed comments and benefited greatly from early public input.

Another significant reference document that should be considered in identifying best practices is the classic EPA Conflict Prevention and Resolution Center publication “Better Decisions through Consultation and Collaboration,” authored by Deborah Dalton and Phil Harter (undated) . <https://www.epa.gov/international-cooperation/better-decisions-through-consultation-and-collaboration>. I am certain that, given more time, Professors Carrington and Shapiro could develop an extensive bibliography supporting the specific recommendations I offer below.

The benefit of early input from stakeholders is hardly news to EPA. The agency formulated a small business policy, with my assistance, in 1984 (almost forty years ago) identifying pre-proposal consultation with small entities as EPA small business policy. It set out a requirement to consult early with two small business trade associations or two small business entities. I developed a short-hand for this “rule of two,” only partly in jest. Call two small businesses about the draft proposal and see if they laugh. They always did! It was obvious to the 1984 EPA small business task force that early public input with small businesses was critical to sound rulemaking.

EPA established a formal policy for public participation in rulemaking in the early 1990’s. Thus, there is nothing novel about the idea that early public input can substantially improve agency proposals and the identity of the steps to do so. Unfortunately, despite the recognition of the importance of early input, it is also well known that EPA and other agencies regularly fail to effectively obtain informed early public input as part of the rulemaking process. The plethora of Executive Orders from Republican and Democrat Presidents and a variety of laws (some cited in the draft report) over several decades requiring informed public input in rulemakings offer evidence of this recognition. The combination of these factors demonstrates the importance of identifying best practices for the actual implementation of early input procedures.

The draft report mentions the EPA Action Development Process (ADP), but fails to address its significance in any detail. At the 2019 Society for Benefit Cost Analysis (SBCA) meeting, Alan Basala, a retired EPA economist, Stuart Shapiro, and I addressed the EPA’s Action Development Process (ADP): Guidance for EPA Staff on Developing Quality Actions, which dates to 1994. The ADP requires the development of a “detailed analytic blueprint” that addresses all rulemaking activities, including specific plans for obtaining early input. Unfortunately, EPA has had trouble following the dictates of the ADP process, despite the considerable inhouse training of rule writing personnel throughout EPA history. I cite but two examples. In 2004, EPA Administrator Johnson wrote that the ADP procedures were not consistently followed. In 2021, the GAO found the same inconsistency regarding the past several years of EPA rulemaking under President Trump. This inadequacy is a constant across EPA history, and likely attributable to agency culture and leadership. Therefore, it is imperative that ACUS adopt recommendations that will incentivize or require agencies to follow robust procedures and carefully execute rulemaking activities.

The current ADP process was the culmination of years of EPA experience at developing rulemakings.³ EPA provides an excellent model because these rulemakings have long benefited from a large infrastructure of highly skilled rule writers, a separate policy office, and a cadre of regulatory economists. The next version of the draft report should address the ADP process and the content of the detailed analytic blueprint in some detail, since it offers excellent guidance for best practices for developing rules, including designing early input processes. I will outline a few key elements of the ADP process that should be captured in additional recommendations.

EPA requires the completion of two analytic blueprint documents, one during the pre-proposal period, and one following the proposal. These documents outline the environmental purposes of the draft rule, the statutory and other goals, and perhaps most importantly here, the best regulatory options to be explored and the methods for obtaining the needed information to support the EPA decision making. Performance of these steps help guarantee that early public input will be obtained, and that this public input will be both informed by EPA's draft plans and timely received by the agency. As Professor Shapiro documented in his earlier research, the SBREFA process was designed to provide informed and timely input to the agency and was regularly successful at doing so. Therefore, I recommend the following recommendations based on the SBREFA model.

As in the SBREFA process practiced at EPA in past years, I recommend a two stage strategy. Agencies should consider providing two "white papers" sequentially to the affected stakeholders, an initial version before consultation, and a later version after incorporating stakeholder input. Agencies should generally delineate a minimum of three alternatives – all of which could reasonably be adopted by the agency – and not the conventional alternatives of no action, full regulation, or more stringent regulation that the agency would not seriously consider (the goldilocks formulation cited in the draft report).

In the past, the major deficiency in the SBREFA panels has been EPA's frequent failures to conform to its own guidance to "describe in sufficient detail, including analysis of the impact on small entities and environmental benefits, each significant regulatory alternative that you have identified that accomplishes the statutory mandate." EPA Regulatory Flexibility Act (RFA) Guidance, Chapter 5 (2006). The failure to provide what is described as "timely and adequate materials" to support informed small entity comments was the Achilles heel in the SBREFA process and led to several panel reports without unanimous recommendations. Thus, these recommendations offer some specific language designed to alleviate this deficiency.

- 1. Agencies should establish specific procedures for developing an analytic detailed blueprint, which would require consideration of the key issues, the plan for early input with affected stakeholders, identification of the key regulatory alternatives, along with the "back of the envelope" calculations to support the key regulatory**

³ The Department of Transportation and other agencies are also likely to have detailed rulemaking procedures that would be worth exploring.

alternatives. Internal approval of analytic detailed blueprints by key agency offices should be obtained.

2. Agencies should identify affected stakeholders and consider providing two “white papers” sequentially to the stakeholders, an initial version before consultation, and a later version after incorporating stakeholder input.
3. Legal regulatory alternatives with a reasonable opportunity of being chosen in a final rule need to be identified and analyzed. Generally, three regulatory alternatives should be identified. The agency should explain why these alternatives were chosen for analysis, and what costs and benefits accompany each alternative.
4. An early version of a (BOTE) BCA analysis, using information available at this early stage, should accompany a discussion of the regulatory alternatives that would constitute the “white paper.” The BCA analyses should transparently include the bases for the cost and benefit estimates, and, to the extent feasible, the uncertainty in the estimates. BCA analyses could be either qualitative or quantitative, or a combination of both, as appropriate.

Respectfully submitted,

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