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DEVELOPING REGULATORY ALTERNATIVES THROUGH EARLY INPUT

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Developing Regulatory Alternatives through Early Input

Administrative Conference of the United States (ACUS) Consultant Report

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Executive Summary

Agencies face a multitude of requirements instituted by Congress and the president to guide their rulemaking procedures. In some cases, these laws and orders, such as Executive Order 12,866 and the Regulatory Flexibility Act, mandate that the agency consider a variety of regulatory approaches when developing a rule. Moreover, in certain instances, agencies themselves have developed internal guidance, which builds upon these executive and legislative requirements, to encourage rulemaking personnel to examine alternatives to a potentially preferred approach. Yet the limited research that analyzes the extent to which agencies, in practice, consider alternatives when developing rules offers only mixed support that they do so. Further, some of the scholarship on the topic questions whether agency incentives support their consideration and disclosure of any serious examination of alternatives.

This report offers evidence on whether and, if so, how agencies consider and disclose their review of alternative regulatory approaches as part of their rulemaking processes. Moreover, it provides information on when in the regulatory process agencies are most apt to concern themselves with alternative regulatory options. To do so, the evidence discussed in the report derives from an in-depth examination of 25 economically significant rules finalized during the Obama and Trump Administrations as well as a series of semi-structured interviews with current and former personnel from multiple agencies within five executive departments.

In combination, the evidence reveals four themes that describe how agencies vet various regulatory approaches as well as the degree to which they disclose both these alternatives and how they came to consider them. First, in practice, agencies almost universally engage in developing and considering alternatives, particularly for complex and novel rulemakings. Second, although the preferred approach to gathering information on alternatives varies substantially between agencies ranging from more formal mechanisms such as issuing an advance notice of proposed rulemaking to less formal approaches like convening monthly stakeholder meetings, nevertheless, those outside the agency remain the key source for generating alternatives and information about them. To the extent to which alternatives are developed internally, economists play an important role, including documenting those alternatives in regulatory impact analyses (RIAs).

Third, agency deliberations surrounding alternative regulatory approaches largely occur early in the process of developing the rule, long before the agency issues a notice of proposed rulemaking (NPRM). As a result, agencies will rarely receive comments during the NPRM stage

that would introduce an alternative approach that they had not already considered. Still, the robust engagement that agencies undertake early in the process is typically not disclosed in either the NPRM or the associated final rule. Further, to the extent alternatives are described in public rulemaking documents, this discussion most often occurs in RIAs, but even there, it may involve only limited assessment of somewhat unrealistic options. Fourth, although the current and former agency personnel interviewed universally indicated that contemplating various regulatory approaches results in better rules, they did acknowledge the tradeoffs in robust consideration of alternatives, especially the corresponding difficulties in issuing the rule in a timely fashion. Moreover, in certain instances, statutory language, potentially in connection with judicial review, and political considerations can limit agencies' perceptions of the extent to which they can consider certain alternatives.

These themes point to a series of recommendations described in more detail in the body of the report and summarized here. Collectively, they attempt to build on the successful, but sometimes idiosyncratic, practices that agencies currently employ to gather information on regulatory alternatives. Moreover, they recognize that these robust approaches are not always documented in public rulemaking documents. This practice has, in some cases, shifted some of the most desirable aspects of sound policy development that agencies currently employ, including engaging with the affected stakeholders and considering regulatory alternatives, to a part of the regulatory process that is generally not visible to the broader public. The following seven recommendations are, in large part, designed to help mitigate the inconsistency between what agencies do and what they describe in the documents they publicly release:

1) Any framework instituted to encourage agencies to consider alternative regulatory approaches early in the rulemaking process in a more systematic way should not involve broad mandates, thereby recognizing that consideration of alternatives is not appropriate for every rulemaking situation. Those situations where novel or complex issues are raised in a rulemaking are particularly appropriate for robust consideration of alternatives.

2) The Office of Information and Regulatory Affairs (OIRA) should consider convening an interagency working group to gather data on approaches agencies use to generate and solicit feedback on alternatives and the effectiveness of these approaches in order to produce a menu of options for agencies on best practices for early engagement with stakeholders and guidance on how different options may be appropriate in different circumstances.

3) In accordance with ACUS Recommendation 2019-5, agency economists should be involved early in the rulemaking process and encouraged to develop regulatory alternatives as part of this involvement.

4) Congress should consider making it clear that if an agency includes in the preamble to their proposed rule the consideration of realistic alternatives and documentation of early public involvement in this process, such action would offer evidence that can be used to suggest that agency is not acting in an "arbitrary" or "capricious" manner in reaching its regulatory decision; a specific place in the preamble should be created both for describing communications with stakeholders and for listing regulatory alternatives; and the Office of Management and Budget should consider updating Circular A-4 to be more specific about

the number of non-trivial alternatives an agency should discuss in the NPRM, assuming consideration of alternatives is warranted for that proposed rule.

5) Agencies should engage in pilot projects using different modes of soliciting public input on their regulations before issuing NPRMs. The results of these pilot projects should be shared broadly across the government and individually should be described in the NPRMs for which they are used.

6) OIRA should consider ways to incentivize agencies to engage stakeholders early in the rulemaking process particularly with regard to envisioning and vetting alternatives. Any incentives would need to provide agencies with the opportunity to save time later in the rulemaking process if they have documented such consideration early in the process.

7) Agencies should not avoid documenting, analyzing, and soliciting public input on reasonable alternatives in their NPRMs simply because they believe those alternatives are precluded by statute. Agencies should still present these alternatives along with an explanation of their views on the legality of those alternative policy choices.

Introduction

Agencies issue thousands of regulatory decisions per year, and many of them have significant economic impacts and high political salience. For example, in 2020 alone, executive branch agencies issued over 130 rules deemed economically significant, meaning that they would likely have "an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."[1]

Given the salience and potential impacts of their regulatory policy decisions, politically appointed heads of agencies have an interest in ensuring choices are consistent with their organizations' delegations of authority and are made with consideration of public input. To assist in achieving this end, agencies are mandated to follow a multitude of procedures instituted by Congress and the president when issuing regulations based on the characteristics of the rule. For example, regulators must make their proposed regulations available for public comment, and in certain cases, submit them to the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) for review, analyze their impacts on small businesses, and measure their costs and benefits. Further, agencies must prepare to defend those rules when they are challenged in court.[2]

As a result, some regulatory procedures—such as the requirements that agencies provide opportunity for comment on their proposed rules and respond to those comments as well as analyze benefits and costs as part of their broader regulatory impact analyses (RIAs) for

[1] GW Regulatory Studies Center (website),"Economically Significant Final Rules Published by Presidential Year," accessed February 11, 2021, https://regulatorystudies.columbian.gwu.edu/reg-stats; Executive Order No. 12,866, Section (3)(f)(1), 58 Fed. Reg. 51735 (1993).
[2] Administrative Procedure Act, Pub. L. No. 79-404, 5 U.S.C. § 551 et seq. (1946).

significant regulations—can be viewed as vehicles to increase transparency and improve monitoring of a regulatory agency's decisions.[3] For instance, in performing a benefit-cost analysis (BCA), agencies are encouraged to identify clearly the rule's effects, thereby providing information about potential outcomes to the affected groups and other concerned parties.[4] Similarly, notice-and-comment rulemaking requires that agencies engage with the public's reaction to their proposed rules. Together, these procedures should encourage agencies to consider alternative policy options and solicit public input on these alternatives, especially since they are mandated to do so, at least for certain classes of rules.

Yet the extent to which these regulatory procedures achieve their goals of encouraging agencies to consider diverse approaches to regulating and to communicate their regulatory decisions transparently is unclear.[5] In fact, BCAs are not easy for even sophisticated users to comprehend.[6] Moreover, an agency's incentives in preparing its BCA may not always lend themselves to producing an analysis that is comprehensible to most observers.[7] Similarly, by the time the agency reaches the stage in the rulemaking process where the public is offered the opportunity to comment, it has already engaged in extensive planning around the proposed

[3] Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics, and Organization* 3, no. 2 (1987): 243-277.
[4] Christopher Carrigan, Mark Febrizio, and Stuart Shapiro, "Regulating Agencies: Using Regulatory Instruments as a Pathway to Improve Benefit-Cost Analysis" (Gray Center for the Study of the Administrative State Working Paper 20-01, February 2020).
[5] Susan Webb Yackee, "Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking," *Journal of Public Administration Research and Theory* 16, no. 1 (2006): 103-124.
[6] Christopher Carrigan and Stuart Shapiro, "What's Wrong with the Back of the Envelope? A Call for Simple (and Timely) Benefit-Cost Analysis," *Regulation and Governance* 11, no. 2 (2017): 203-212.
[7] Wendy E. Wagner, "The CAIR RIA: Advocacy Dressed Up as Policy Analysis," in *Reforming Regulatory Impact Analysis*, ed. Winston Harrington, Lisa Heinzerling, and Richard D. Morgenstern (New York: Routledge, 2009), 56-81.

regulation. As a result, the agency may feel wedded to its preferred approach.[8] Further, because it needs to prepare itself for the potential that the rule may later be challenged in court, an agency may not believe it will benefit from considering reasonable regulatory alternatives or inviting scrutiny of the rule or associated BCA in public documents.[9]

With this context as background, this project considers the extent to which agencies consider alternative regulatory approaches in their rulemakings. For purposes of our discussion, we define a regulatory alternative as simply an approach that differs from the agency's preferred or default mode of regulating. Thus, it can be a wholly different method of regulating. For example, imposing a planning requirement would be considered a regulatory alternative if the agency's preferred or default approach is a technology standard. However, it can also mean varying the stringency of the regulation. So, a performance standard in which the preferred stringency level would be reduced or increased is considered a regulatory alternative as well.[10]

In carrying out our analysis, we define our purpose as two-fold. First, we seek to examine the extent to which agencies consider alternative regulatory approaches in developing their rules, and, if so, when in the process they contemplate these alternatives as well as what approaches

[8] Steven J. Balla, "Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking," *I/S Journal of Law and Policy* 1, no. 1 (2004): 59-94.
[9] Wagner, "CAIR RIA," 56-81.
[10] The precise definition regarding what a planning requirement, sometimes referred to as management-based regulation, is relative to a technology standard or a performance standard is not central to the discussion. That said, a planning requirement refers to a mandate that a regulated entity create and, in some cases, adopt a plan to manage the risks in their business operations. In contrast, a technology standard, otherwise known as means-based regulation, requires the regulated entity to adopt a particular approach or technology to meet the regulatory requirement imposed by the regulator. Finally, a performance standard, which is alternatively referred to as ends regulation, does not specify the technology or approach a regulated entity must use to conform, but it does specify the end state in terms of what the entity must achieve is be considered compliant. See, e.g., Christopher Carrigan and Cary Coglianese, "The Politics of Regulation: From New Institutionalism to New Governance," *Annual Review of Political Science* 14 (2011): 107-129.

they take to do so. Connected to this, we study the degree to which agencies document that process and the alternatives they considered. In examining the methods agencies employ, we are particularly interested in whether public input plays a role both in the development of alternatives and in shaping agency decisions around which regulatory approach the agency ultimately chooses in any given situation. Second, to the extent we find that agencies and their rules could benefit from greater consideration of alternative regulatory approaches, particularly early in the rulemaking process and through public input, as well as more transparency around the efforts they already undertake, we offer a series of recommendations to position agencies to be able to contemplate and document alternatives in a relatively low-cost and relatively informal manner. More specifically, we make recommendations as to how agencies can encourage interested parties to engage with regulators early in the rulemaking process, recognizing that agencies may be more able to incorporate input at that stage. These recommendations also acknowledge the actions that agencies are already taking to gather and vet alternatives while positioning them to disclose these activities more extensively.

To accomplish these tasks, we engaged in a systematic and intensive review of a sample of 25 economically significant rules promulgated during the last two years of the Obama Administration and the first two and a half years of the Trump Administration. Doing so allowed us to observe agency practices with respect to disclosing which options they considered, when they were discussed, and what was the source of those alternatives. In addition, we conducted a series of semi-structured interviews with current and former agency officials involved in the rulemaking process from several agencies within five different executive departments. The purpose of these interviews was to learn about general agency processes around vetting regulatory alternatives and the role that those inside and outside the agency play in their

development and evaluation. Unlike with the document review, the interviews themselves did not involve discussion of particular rules, except to the extent agency officials raised specific examples to support their points.

As we describe in greater detail in the body of the report, the analysis yielded a number of themes that describe how agencies can and do encourage interested parties, including members of the public, to engage in identifying alternative approaches to regulating when it is most relevant for them to receive this feedback. First, agencies almost universally make efforts to consider alternatives when developing their rules, particularly when those rulemakings involve novel or complex issues. Moreover, although analysis of alternative regulatory options and solicitation of public input on those alternatives is statutorily required only in limited circumstances, it is embedded in guidance from OIRA as well as general good practice for developing rules. Our interview subjects in particular highlighted this latter point as they unanimously agreed that serious consideration of alternatives made for more effective final rules.

Second, although regulatory alternatives can derive from internal deliberations, especially when an agency's economists have a role in the rule development process, external input forms the primary source of inspiration for regulatory alternatives. Still, the general process for soliciting information varies greatly among agencies and depends upon their specific preferences. In fact, approaches they use range quite substantially from issuing advance notices of proposed rulemaking (ANPRMs) and convening negotiated rulemakings, which may or may not be statutorily required in particular circumstances, to organizing periodic stakeholder meetings and relying on advisory groups.

Third, through these various mechanisms, agencies typically gather information on alternative approaches early in the process of developing a regulation. By the time the notice of

proposed rulemaking (NPRM) is issued by the agency, it has largely vetted the alternatives recommended by stakeholders. Thus, any recommended alternatives offered by the public through comments do not typically break new ground, and thus, are not influential in shaping the final rule. Further, in most cases, the preambles of these NPRMs do not typically document the rich consideration of alternatives that occurs at agencies well before the agency releases that NPRM for public comment.[11] And, when agencies do discuss alternatives in their NPRMs, how they present the information varies significantly. Moreover, to the extent that alternatives are described in the documents released with the proposed rule, that discussion largely resides in the associated RIA, most especially where the results of the BCA are described.

Fourth, although agency personnel almost universally agreed that serious consideration of alternatives helps them produce better final rules, engaging in this process is not without tradeoffs, particularly since much of the information used to consider other approaches is informed by interactions with external stakeholders. Given public concerns with the length of the rulemaking process as it is, inviting recommendations on alternatives can have the effect of further elongating the time it takes to promulgate a rule. Moreover, statutory language and political considerations can, at times, limit the ability of the agency to consider a broad range of options for regulating in particular cases, an effect which can be exacerbated by the need for the agency to later defend its rule in court.

Collectively, these themes provide the impetus for a series of recommendations we highlight in the body of the report. They range from developing greater knowledge around the best practices for agencies to use when engaging with stakeholders on regulatory alternatives through

[11] This in part explains the view expressed in Donald Elliot's work that the notice and comment process resembles "kabuki theater." See E. Donald Elliott, "Re-Inventing Rulemaking," *Duke Law Journal* 41 (1992): 1490-1496.

working groups and pilot projects to procedural changes to provide agencies with the opportunity to more clearly convey the significant outreach they already perform to generate and evaluate regulatory alternatives in their rulemaking processes. Moreover, our recommendations consider agency incentives by suggesting OIRA consider ways to encourage agencies to provide evidence that they considered alternatives in good faith as well as by explicitly encouraging agencies to consider alternatives that they may view as precluded by statute to provide information for future policy changes. Our overarching goal in offering recommendations is to highlight and recommend ways that agencies might gather and incorporate feedback on alternatives when doing so can produce tangible improvements in the resulting rules, while also simultaneously remaining cognizant of the real burdens associated with doing so.

The remainder of the report proceeds as follows. In the next section, we review the legal requirements for soliciting input on alternative regulatory policies and the literature on agency practice in doing so. This is followed by a section where we outline our methodology. The results of this work are then presented in the succeeding section along with our recommendations for improving the solicitation of public input on alternative policies in the regulatory process. Finally, we offer a short conclusion, summarizing our primary findings and recommendations.

Evidence on Early Consideration of Regulatory Alternatives

Agency Requirements and Recommendations

Incorporated in some of the key statutory and executive requirements that guide the administrative rulemaking process is the mandate that agencies consider alternatives when issuing certain regulations. For example, Executive Order 12,866, which governs rulemaking at

executive branch agencies and requires them to subject their rules to review by OIRA, directs agencies to include for all economically significant regulations:

> 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.[12]

In addition to its call for analysis of alternatives for economically significant rules specifically, Executive Order 12,866 also highlights the importance of contemplating alternatives in developing regulations more broadly, including considering options such as performance standards, market-based approaches, information-based alternatives, and the possibility of not regulating.[13]

Similarly, OMB Circular A-4, which provides guidance to agencies on preparing RIAs to support their rules, 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."[14] Agencies are told that "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."[15]

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[12] Executive Order No. 12,866, Section (6)(a)(3)(C)(iii).
[13] Executive Order No. 12,866, Sections (1)(b)(3) and (8).
[14] Office of Management and Budget, *Circular A-4: Regulatory Analysis* (Sept. 17, 2003): 2, https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/.
[15] Office of Management and Budget, *Circular A-4*,2.

Still, the requirement that agencies consider alternatives is not simply restricted to executive orders and agency guidance. Rather, it is often embedded in the statutory direction that informs how agencies proceed in their rulemaking efforts as well. Moreover, these statutes can be specific to the particular rulemaking in question, such as when Congress mandates through law that an agency promulgate a certain rule and choose the least costly alternative or one that is "reasonable."[16]

Alternatively, these requirements can apply more broadly to certain classes of regulations. In addition to laws affecting particular agencies or types of policy decisions such as the Small Business Regulatory Enforcement Flexibility Act (SBREFA)[17] and the National Environmental Policy Act (NEPA),[18] the Regulatory Flexibility Act (RFA), for example, was passed in 1980 to encourage agencies to consider the impacts of their regulations on small businesses. Specifically, the RFA contains the requirement that agencies examine alternative regulatory options for those rules that have a significant impact on a substantial number of small businesses. Section 603(c) of the RFA directs agencies to include in their regulatory flexibility analyses, "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."[19] In much the same way, for regulations that would impose significant burdens on state and local governments, the 1995 Unfunded Mandates Reform Act (UMRA) requires

[16] Reeve T. Bull and Jerry Ellig, "Statutory Rulemaking Considerations and Judicial Review of Regulatory Impact Analysis," *Administrative Law Review* 70 (2018): 873-960.
[17] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 5 U.S.C. § 601-612 (1996). This law was an amendment to the Regulatory Flexibility Act, Pub. L. No. 96-354, 5 U.S.C. § 601-612 (1980).
[18] National Environmental Policy Act of 1969, Pub. L. No. 91-190, *as amended*, 42 U.S.C. § 4321-4370h (1969).
[19] Regulatory Flexibility Act, 5 U.S.C. § 601-612.

agencies to "identify and consider a reasonable number of regulatory alternatives and from those alternatives select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule."[20]

ACUS has made several recommendations focused on agency consideration of alternatives. For example, Recommendation 2018-7, "Public Engagement in Rulemaking,"[21] highlights methods for supplementing the ordinary notice-and-comment process under the Administrative Procedure Act of 1946 (APA),[22] which is the law that, among other provisions, mandates that agencies subject their proposed rules to public comment as well as consider those comments in finalizing the associated rules.[23] ACUS proposals associated with Recommendation 2018-7 include having agencies more often utilize requests for information (RFIs) as well as publishing ANPRMs. In a similar vein, ACUS Recommendation 2017-6, "Learning from Regulatory Experience," urges agencies to look for alternative solutions and to conduct pilot studies and solicit input on possible alternatives.[24]

Beyond the requirements and recommendations to consider alternative approaches to regulating that originate from outside the agency, at least two regulatory agencies have developed internally directed guidance to elaborate on the executive and legislative requirements to consider alternatives in their rulemakings. For example, the Environmental Protection Agency's (EPA) Office of Policy established guidance for its rule writers in 1994, later updated in 2004 and 2011, which requires pre-proposal identification and analysis of alternatives and

[20] Unfunded Mandates Reform Act, Pub. L. No. 104-4, 2 U.S.C. § 1501-1504 (1995).
[21] Administrative Conference of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 Fed. Reg. 2139 (Feb. 6, 2019).
[22] Administrative Procedure Act, 5 U.S.C. § 551 et seq.
[23] Administrative Procedure Act, 5 U.S.C. § 553.
[24] Administrative Conference of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).

public engagement on alternatives for planned significant rules.[25] In 2019, the Department of Transportation revised its rulemaking procedures to require its agencies to seek the public's early input on alternatives to planned economically significant and "high-impact" rules, although these procedures were recently repealed in April 2021.[26]

Agency Consideration of Alternatives in Practice

The Government Accountability Office (GAO) has conducted several examinations of the rulemaking process that included observation of agencies' solicitation of early input on their rules as well as consideration of regulatory alternatives. In a 2014 report, GAO described a sample of 203 regulations, noting that executive agencies included a discussion of alternatives in about 81 percent of economically significant rules and in about 22 percent of significant rules.[27] The report also noted that agency officials explained to GAO that often their enabling statutes left little discretion for consideration of alternatives.

In another report from 2012, GAO examined how often agencies used the "good cause" exception in the APA, which allows agencies to bypass the NPRM stage in the regulatory process if the associated procedures are "impracticable, unnecessary, or contrary to the public

[25] Environmental Protection Agency, *EPA's Action Development Process: Guidelines for Preparing Analytical Blueprints* (Policy Economics Innovation: OPEI Regulatory Development Series, 2004), https://nepis.epa.gov/Exe/ZyPDF.cgi/9101X7DX.PDF?Dockey=9101X7DX.PDF.
[26] Department of Transportation, Final Rule, *Administrative Rulemaking, Guidance, and Enforcement Procedures*, 84 Fed. Reg. 71,714 (Dec. 27, 2019) (49 C.F.R. § 5.17a-b). This rule was rescinded through Department of Transportation, Final Rule, *Administrative Rulemaking, Guidance, and Enforcement Procedures*, 86 Fed. Reg. 17,292 (Apr. 2, 2021).
[27] General Accountability Office, GAO-14-714, *Federal Rulemaking, Agencies Included Key Elements of Cost-Benefit Analysis, but Explanations of Regulations' Significance Could Be More Transparent* (Sept. 2014). Significant rules refer to those rules which, although they may not reach the $100 million threshold for annual impact that would designate them as economically significant, are still subject to the requirements of Executive Order 12,866, as they may interfere with another agency's actions or raise "novel legal or policy issues," among other possibilities.

interest."[28] GAO determined that agencies published about 35 percent of major rules and about 44 percent of non-major rules without an NPRM during those years.[29] The academic literature is supportive of GAO's finding that agencies often bypass mandated procedures in promulgating rules. A study by Connor Raso, for example, suggested that agencies exempt roughly half of their rule proposals from undergoing notice and comment, over 90 percent from the RFA requirements to consider impacts on small businesses, and over 99 percent from considering effects on state, local, and tribal governments as mandated by UMRA.[30] It seems likely that an agency that bypasses the step in which they would receive formal comments on a proposed rule would also be more apt to skip other, more informal, methods of securing early input on their regulatory initiatives. Further, to the extent an agency ignores the RFA and UMRA in developing rules, they are bypassing two laws that explicitly require them to consider alternative approaches to regulating.

In addition to analyzing whether the proposed rule itself incorporates consideration of various regulatory approaches, several academic studies have alternatively examined the question of whether agencies give serious consideration to alternatives when preparing regulations by studying RIAs. Researching the preparation of RIAs across two administrations,

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[28] Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(B). The good cause exception in the APA has been examined by ACUS in Administrative Conference of the U.S., Recommendation 83-2, *The "Good Cause" Exemption from APA Rulemaking Requirements*, 48 Fed. Reg. 31,180 (July 7, 1983).

[29] General Accountability Office, GAO-13-21, *Federal Rulemaking, Agencies Could Take Additional Steps to Respond to Public Comments* (Dec. 2012). Major rules are defined in much the same way as economically significant rules. The Congressional Review Act labels a major rule as one that "has resulted in or is likely to result in (a) an annual effect on the economy of $100,000,000 or more; (b) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (c) 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 and export markets" (5 U.S.C. § 804(2)).

[30] Connor Raso, "Agency Avoidance of Rulemaking Procedures," *Administrative Law Review* 67, no. 1 (2015): 65-132.

Robert Hahn and Patrick Dudley found that the percentage of RIAs that considered at least one alternative standard or stringency level decreased from 85 percent during the Reagan administration to 74 percent during the Clinton administration.[31] A similar study that focused on 48 RIAs prepared between 1996 and 1999 found that only two-thirds of the RIAs discussed alternatives at all, and only 25 percent estimated the costs and benefits of alternatives.[32]

Other studies have evaluated agency consideration of alternatives as part of a broader effort to ascertain the extent to which agencies fulfill their requirements in conducting analysis more generally. In one case, Jerry Ellig, Patrick McLaughlin, and John Morrall examined agency RIAs across a variety of dimensions. Their work showed that a considerable number of RIAs omitted discussion or economic assessment of alternatives.[33] In contrast, Art Fraas and Randy Lutter demonstrate that some agencies do appear adept at considering alternatives in their RIAs. Specifically, for a small sample of 12 RIAs, they find that EPA does typically examine regulatory alternatives, even to the point to which the agency monetized either costs or benefits of alternatives for 75 percent of the RIAs the authors reviewed.[34]

The somewhat mixed existing evidence measuring the extent to which agencies consider alternatives in either their NPRMs or, more commonly, their supporting RIAs is consistent with an argument that these documents can, at times, be used more to justify agency decisions rather

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[31] Robert W. Hahn and Patrick M. Dudley, "How Well Does the US Government Do Benefit-Cost Analysis?" *Review of Environmental Economics and Policy* 1, no. 2 (2007): 192-211.
[32] Robert W. Hahn, Jason K. Burnett, Yee-Ho I. Chan, Elizabeth A. Mader, and Petra R. Moyle, "Assessing the Quality of Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866," *The Harvard Journal of Law and Public Policy* 23, no. 23 (2000): 859-886.
[33] Jerry Ellig, Patrick A. McLaughlin, and John F. Morrall III, "Continuity, Change, and Priorities: The Quality and Use of Regulatory Analysis Across US Administrations," *Regulation and Governance* 7, no. 2 (2013): 153-173.
[34] Art Fraas and Randall Lutter. "The Challenges of Improving the Economic Analysis of Pending Regulations: The Experience of OMB Circular A-4," *Annual Review of Resource Economics* 3, no. 1 (2011): 71-85.

than to inform them.[35] Agencies might be inclined to write more detailed rules and supporting documents, which include a robust defense of the chosen approach but less consideration of reasonable alternatives, in an effort to brace themselves for OIRA review and judicial scrutiny.[36] The fact is that RIAs, for example, have become increasingly lengthy over time, and the associated complexity can serve as a barrier to outside parties who desire to engage with the agency in providing feedback on both the agency's regulatory preference and alternatives to that preference.[37]

Other Statutory Requirements for Early Participation and Consideration of Alternatives

In addition to the aforementioned statutes that apply to certain classes of rules, executive directives and guidance, and recommendations from inside and outside agencies, at least two other statutes create requirements for agencies, in specific contexts, to engage the public early as well as consider alternatives. These are SBREFA[38] and NEPA.[39] NEPA applies broadly to agency policy decisions that affect the environment while the small business panel requirements in SBREFA[40] only focus on regulations that have significant impacts on small businesses. Moreover, these provisions apply to only three agencies: EPA, the Occupational Safety and Health Administration (OSHA), and the Consumer Financial Protection Bureau (CFPB).

[35] Wagner, "CAIR RIA," 56-81.
[36] Wendy Wagner, Katherine Barnes, and Lisa Peters, "Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards," *Administrative Law Review* 63, no. 1 (2011): 99-158. See also Sean Gailmard and John W. Patty, "Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise," *American Journal of Political Science* 51, no. 4 (2017): 873–89.
[37] Carrigan and Shapiro, "Simple (and Timely) Benefit-Cost Analysis," 203-212.
[38] Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601-612.
[39] National Environmental Policy Act of 1969, 42 U.S.C. § 4321-4370h.
[40] These requirements are found in section 609(b) of the Regulatory Flexibility Act (5 U.S.C. § 601-612), which the Small Business Regulatory Enforcement Fairness Act amended.

SBREFA requires that when EPA, OSHA, or CFPB is formulating a rule with significant effects on small businesses, the associated agency must convene a review panel before the publication of its proposal. A SBREFA panel consists of representatives from the rulemaking agency, OIRA, and the Chief Counsel for Advocacy at the Small Business Administration. The panel solicits information and advice from small entity representatives, who are individuals that represent small entities affected by the proposal. 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. A panel can develop, consider, and recommend less burdensome alternatives to a regulatory proposal when warranted.[41]

The SBREFA process is specifically geared toward a particular constituency and hence tends to only produce alternatives that would benefit that constituency (although the agencies are not required to adopt those alternatives). But, notwithstanding this caveat, it does lead to a level of engagement by affected agencies with a subsection of the affected public as well as examples where the process did spur changes in the regulatory proposal that the SBREFA panel was originally given.[42]

In contrast, NEPA has a much broader purview than SBREFA, not only with regard to the agencies to which it applies, but also with respect to the types of policy decisions it considers as well. The law encompasses government actions, and not just regulations, that have an impact on the environment. If the impact is major, the agency must develop an environmental impact statement (EIS) that includes a discussion of "appropriate alternatives to recommended courses

[41] Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601-612.
[42] Stuart Shapiro, *Analysis and Public Policy: Successes, Failures and Directions for Reform* (Cheltenham, UK: Edward Elgar, 2016).

of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."[43] Implementation of this requirement often involves a scoping process, where stakeholders can suggest alternatives before the draft EIS is prepared. The agency then makes its preferred policy option and any alternatives available to the public to accept feedback on them.

Given its greater scope and longer history, the literature studying NEPA is much broader than that considering SBREFA, and it would be impossible to consider it adequately here.[44] In general, NEPA's impact on public participation and agency consideration of alternatives has received mixed reviews. There are documented instances where NEPA encouraged meaningful input, including from disadvantaged communities, as well as examples where agencies changed their policy choices as a result of this input.[45] However, much like RIAs, the EIS requirement has also been criticized for leading to documents that are thousands of pages long and impenetrable to lay audiences. In such cases, research suggests that agencies may appear to be less interested in public input and generally make few changes to their policy choices.[46]

The statutory requirements, including those like SBREFA and the RFA that apply to regulatory questions specifically as well as NEPA which applies more broadly, embody the idea of trying to ensure that analysis of alternatives includes meaningful public input. The National Academy of Sciences (NAS) has written several reports regarding the potential for stakeholder

[43] National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C), 4332(2)(E).
[44] See, e.g., Lynton Keith Caldwell, *The National Environmental Policy Act: An Agenda for the Future* (Bloomington, IN: Indiana University Press, 1998). And, Serge Taylor, *Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform* (Palo Alto, CA: Stanford University Press, 1984).
[45] Michael R. Greenberg, *The Environmental Impact Statement After Two Generations: Managing Environmental Power* (New York: Routledge, 2012).
[46] Bradley C. Karkkainen, "Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance," *Columbia Law Review* 102, no. 4 (2002): 903-972.

participation and analysis of alternatives to work together to improve policy decisions on complex questions. In one such publication from 1996, they introduce the idea of the "analytical-deliberative" process, suggesting, "Analysis and deliberation can be thought of as two complementary approaches to gaining knowledge…. Deliberation is important at each step of the process that informs risk decisions, such as deciding which harms to analyze, and how to describe scientific uncertainty and disagreement."[47] They expand on this idea to encompass environmental decision making in a 2008 report noting, "environmental decisions present very complex choices among interests and values so that the choices are political, social, cultural, and economic at least as much as they are scientific and technical."[48]

The promise held out in these NAS reports might seem, at best, only realized on occasion in the regulatory process. Yet, as discussed in the results section, this synthesis between thoughtful analysis and public participation is occurring more often than is realized. Still, somewhat counterintuitively, it is occurring at a place in the regulatory process when agency actions are largely invisible to the broader public and the research community. We discuss this idea further in the results section. However, we first review the methodological approach we used to reach this conclusion.

Methodological Approach

As described, the aforementioned literatures in law, public policy, and political science have revealed only mixed evidence that agencies both seriously consider alternatives in their

[47] National Research Council, *Understanding Risk: Informing Decisions in a Democratic Society* (Washington, DC: National Academies Press, 1996), 5.
[48] National Research Council, *Public Participation in Environmental Assessment and Decision Making* (Washington, DC: National Academies Press, 2008).

rulemakings as well as encourage participation to develop these other approaches. In fact, if one theme emerges from this scholarship, it is that the procedural requirements embedded in the various laws, directives, and guidance can provide perverse incentives for agencies that tend to nudge them toward being less likely to entertain alternatives seriously, especially at the point in which they publish their rules for public comment.[49] Moreover, rather than transparently designing rules and supporting documents such as RIAs, agencies appear to be inclined to create detailed documents that do not include viable alternatives in an effort to prepare themselves to successfully defend their policy choices against OIRA oversight and judicial review.[50] This pattern seems to hold despite statutory and executive order requirements to consider alternatives and the possibility that doing so could protect agencies from lawsuits pursuant to these statutes.[51]

That said, this literature is by no means conclusive. Rather, it is relatively scant as well as somewhat speculative, especially with respect to portraying the motives of agency officials. For these reasons, we engaged in data collection along two dimensions to inform our conclusions. With the first approach, we collected data using publicly available documents, including proposed and final rules as well as RIAs supporting both, to determine the extent to which agencies record their consideration of alternative regulatory approaches as well as disclose their engagement with stakeholders in those documents. With the second, we conducted semi-structured interviews with current and former agency personnel intimately involved in the rulemaking process, asking questions to reveal if and when their agencies consider alternatives as well as how they gather information to develop them. In combination, the two approaches

[49] Wagner, "CAIR RIA," 56-81.
[50] Carrigan and Shapiro, "Simple (and Timely) Benefit-Cost Analysis," 203-212; Wagner, "CAIR RIA," 56-81.
[51] Bull and Ellig, "Statutory Rulemaking Considerations," 873-960.

provide us with a means to capture information on agency approaches to examining regulatory alternatives that is not subject to selective recall bias while also having the opportunity to explore what agencies do that they may not directly disclose in public documents.

In collecting data on agency regulations, we were cognizant of the need to focus on rules in which the associated agency was technically required to present alternatives to the public so that we could document the extent to which that agency described its compliance with this requirement. For this reason, we limited our data collection to regulations that were economically significant under Executive Order 12,866 and were listed in the annual reports from OMB to Congress on the costs and benefits of federal regulations.[52] Using these reports, we singled out for analysis those regulations that OMB listed as presenting estimates for the costs and benefits of the regulation, as these rules not only were the most likely candidates to be subject to the requirements under the RFA and Executive Order 12,866 to consider alternatives but also were the most likely to have the most detailed RIAs. If any rules were to document an agency's consideration of alternatives, these would be the most likely candidates.

To control for the very different regulatory priorities of the Obama and Trump Administrations, we created a dataset that was roughly evenly divided between regulations from each of these two presidencies. The 2019 and 2020 OMB reports listed ten regulations from the Trump Administration in which the associated agency compiled both benefits and costs. The 2018 report, covered both the end of the Obama Administration and the beginning of the Trump Administration and contained 18 more such regulations, the vast majority of which were issued

[52] The annual reports are available at the OMB website at https://www.whitehouse.gov/omb/information-regulatory-affairs/reports/. The regulations we examined are summarized in Office of Management and Budget, *2018, 2019, and 2020 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act* (2020), https://www.whitehouse.gov/wp-content/uploads/2021/01/2018_2019_2020-OMB-Cost-Benefit-Report.pdf.

before the presidential transition in early 2017. Combining the listings from these three reports and eliminating duplicates gave us a dataset of 25 regulations, including 12 from the Trump Administration and 13 from the Obama Administration.

For each of these regulations, we searched for four documents, namely the published NPRM, the final rule, and the RIAs accompanying each. Although, in most cases, we were able to find all four documents, a few rules were interim or direct final rules and hence had no proposal. In addition, a few others had only one RIA that was used to accompany both the NPRM and the final rule. A complete list of the rules and associated documents we reviewed is provided in Appendix 1. For the available documents, data were collected to answer a combination of the following eight questions. Specifically, the questions relevant to the examination of the RIAs were as follows:

1) How many alternatives were listed in the document?
2) What portion of that document involved discussion of alternatives? To answer this question, word counts of both the sections that considered alternatives as well as the document as a whole were computed.
3) Did the agency consider benefits of the alternatives? If so, was the discussion qualitative, quantitative, or both?
4) Did the agency consider costs of the alternatives? If so, was the discussion qualitative, quantitative, or both?

Consideration of the NPRM preamble involved answering the aforementioned first two questions plus the following two questions:

1) Did the agency solicit comments on the alternatives? If so, for how many of them?
2) Did the agency mention consultations with outside parties?

Finally, for the preamble to the final rule, coding involved answering the following two questions:

1) Did the agency receive comments on alternatives? If so, for how many?
2) Did they adopt any of the alternatives? If so, what did they adopt?

For the first two rules on our list, we, as well as our research assistant, collected the data to ensure that the research assistant had the same understanding of the fields as us. At that point, one of us coded an additional three rules with the research assistant. After inter-coder reliability was established, the research assistant collected the data for the remainder of the regulations under our supervision.

In addition to collecting data through an examination of rulemaking documents, we also conducted interviews with nine current or former agency representatives from five executive branch departments, including the Department of Transportation, Department of Labor, Department of Health and Human Services, Department of Energy, and Department of Agriculture. Each of these departments or agencies within them had issued rules that were in our database. However, because of pending legal or policy decisions on the regulations, we did not ask about any rules in particular. Rather, the interviews focused on the general process that agencies follow when developing alternatives and soliciting input from stakeholders. The current and former officials we interviewed were intimately familiar with a wide variety of regulations promulgated by the agencies.

The questions we asked each individual are attached as Appendix 2. Follow up questions were asked as appropriate during the interviews, and the interview subjects were promised confidentiality in order to secure the interviews as well as to ensure that they felt comfortable

speaking freely.[53] The interviews generally lasted one hour, and several interviews included multiple officials from the same agency. After the interviews were completed, we scanned them for common themes. In the next section, we review these themes along with the data analysis we performed for the aforementioned 25 regulations.

Discussion of Results and Accompanying Recommendations

We have organized our results into themes that emerged from an examination of the data gathered from analyzing the regulations and conducting the interviews. Because our recommendations flow naturally from these results, they are highlighted in bold where appropriate in this section. In combination, the data and interviews paint a picture of agencies that are generally committed to engaging with stakeholders early in the rulemaking process, recognize the value of doing so, and utilize a variety of practices for engaging with alternative regulatory options. Still, these efforts to engage with interested parties to develop and consider alternative approaches taper significantly by the time the formal NPRM is released and are not always described in the associated more formal rulemaking documents. Moreover, the practices vary considerably across agencies, and as a result, opportunities for agencies to learn from each other are certainly available. Finally, any efforts to expand consideration of alternatives by agencies should be done with a clear recognition of the costs in terms of rulemaking timeliness and political and statutory feasibility.

Theme 1: Agencies almost universally engage in the consideration of alternative approaches when developing rules, particularly when they involve novel or complex issues.

[53] Herbert J. Rubin and Irene S. Rubin, *Qualitative Interviewing: The Art of Hearing Data*, 3rd ed. (Thousand Oaks, CA: Sage, 2011).

Our interviews clearly illustrated that current and former personnel closely involved in agencies' rulemaking processes are cognizant of the value of considering a variety of approaches in developing their rules. This was evident in both the direct responses to our questions as well as the rich description interviewees were able to provide in highlighting their approaches to soliciting feedback and imagining options. Interviewees noted that considering a variety of approaches makes for better rules, with one suggesting, "Everybody agrees that alternatives are a good thing…. When agencies are encouraged to provide them, that improves the proposal." Moreover, they were able to describe numerous instances in which soliciting feedback, both from external and internal sources, raised novel ideas and resulted in an improved final rule.

That said, agency personnel also noted that soliciting and considering alternatives is more important in some instances and relatively less so in others. As we describe in association with Theme 3, agencies frequently confer with stakeholders early in the rulemaking process or even before a decision has been made to proceed with a rulemaking. In deciding to seek that input from the public, a number of our interview subjects made clear that there were times when it was more crucial. The general theme associated with these contexts is that agencies seek input when such input would be most valuable to helping them produce a final rule.

These circumstances occur when the agency is considering regulating in an area where its expertise is limited. This was often described as a policy space where an agency was regulating for the first time and so the issues it was facing were novel. It could also be an area that is high in technical complexity or involving a new technology of which the agency had limited understanding. As one agency representative suggested, "Complex rules require an ANPRM so the agency can ask a lot of questions to determine either the need for an NPRM or the scope and

content of an NPRM." Another noted, "The more complex the question, the more information we need from outside parties."

In contrast, in cases in which the agency was merely updating a rule, particularly when it was associated with a reoccurring process, those interviewed felt receiving input on alternatives was likely less important, particularly given the time needed to gather information on other approaches. However, even in cases of what some referred to as "routine rulemaking," the vetting of alternatives occurred, just at an earlier stage when the regulatory framework was initially being developed. Moreover, as the interviewees suggested, these were policy areas in which agency personnel had developed extensive expertise already based on the fact that the rule itself was already in place.

Generally, these findings accord with the academic literature studying the regulatory process, which has long recognized that regulatory politics vary in part due to the complexity of the issue at hand.[54] The same seems to be true for the question of whether and the degree to which agencies seek early input on regulatory policy decisions. Given that the decision to gather data on alternative approaches to regulation is not without cost as our discussion of Theme 4 below highlights, any framework or series of recommendations to encourage agencies to consider alternative approaches should recognize that rule proposals are not "all created equal." Instead, forcing agencies to consider alternatives when those alternatives are not likely to shed any new light on the rulemaking at hand, perhaps because that rulemaking is routine or iterative,

[54] William T. Gormley Jr., "Regulatory Issue Networks in a Federal System," *Polity* 18, no. 4 (1986): 595-620.

will only serve to lead agencies to tend to treat the associated requirement as a procedural "check box."[55] This leads to our first recommendation.

> **Recommendation 1: Any framework instituted to encourage agencies to consider alternative regulatory approaches early in the rulemaking process in a more systematic way should not involve broad mandates, thereby recognizing that consideration of alternatives is not appropriate for every rulemaking situation. Those situations where novel or complex issues are raised in a rulemaking are particularly appropriate for robust consideration of alternatives.**

In addition to serving as a guiding principle for more effective reforms to spur agencies more generally to continue and expand upon their current processes for considering regulatory alternatives, this recommendation also largely informs the remaining six recommendations that we highlight below.

Theme 2: External stakeholders are the primary source for inspiration regarding alternative policy options when agencies are developing rules.

Although ideas about substitute policies can come from within an agency, frequently alternatives—whether they be entirely different approaches to the problem the agency is trying to solve or marginal differences in stringency levels or compliance dates—originate from outside parties. In fact, during the interviews, respondents' answers to our questions about consideration

[55] As Don Arbuckle has suggested regarding some procedural requirements that agencies must fulfill in developing rules, "Old impact statement requirements meet a lonely and doleful demise—their once proud aspirations dulled and forgotten; their exaggerated promise relegated to the impact analysis dust bin; their sad fall from glory giving rise to a mild and vaguely embarrassing schadenfreude in us all. They stumble into their dotage in the *Federal Register* on the concluding pages of rules as humiliated, featureless, grey boilerplate." Donald R. Arbuckle, "Regulation's Impact on Jobs," The Regulatory Review, Nov. 26, 2012, https://www.theregreview.org/2012/11/26/26-arbuckle-jobs/.

of alternatives invariably tied back to stakeholder engagement, suggesting the extent to which the two are intertwined. To these current and former agency personnel, considering alternatives is almost synonymous with engaging interested parties. One agency representative made this particularly clear in describing periodic discussions that the agency had with stakeholders, suggesting, "They have monthly meetings with both industry and consumer groups. At these meetings, there are people coming up with ideas for new rulemakings, and the agency is constantly getting feedback on what is needed, what is working."

The monthly calls described by this representative are only one possible venue for agencies to receive feedback on possible regulatory alternatives. For example, OSHA is formally required to ask for such input under SBREFA. Presenting an early pre-proposal document to small business owners both forces the agency to grapple with different alternatives as is required in the statute and exposes the agency to ideas from this constituency.[56] Some agencies described using formal mechanisms like ANPRMs or RFIs. Further, negotiated rulemaking was another pathway mentioned to gather information on alternatives although agency representatives did note the significant costs associated with organizing this mechanism for feedback. Others suggested advisory groups as an additional source for inspiration regarding alternative regulatory methods. Stakeholder meetings were also a popular form of engagement. One interviewee indicated, "For rules that I think we anticipate would have a broad impact, then we might do more formal stakeholder meetings ahead of time because we want to get interested parties with opposite views to play off of each other."

On occasion, these approaches were required by particular statutes, but in other instances, the agencies used these approaches to engage the public of their own volition. In fact, although

[56] Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601-612.

some agencies did discuss internal documents guiding rulemaking that encouraged rule writers to consider alternative regulatory approaches, whether they instituted that guidance remained their choice. As a result, the preferences of the particular office initiating the rulemaking more determined the mode by which it engaged with stakeholders relative to any set of policies set by the agency more broadly.

In the end, there appear to be nearly as many ways of engaging stakeholders in the rulemaking process as there are agencies. On the one hand, this variety allows particular agencies to fit their mode of engagement to the particular issue at hand and to the relationship they have with their stakeholders. On the other hand, the plethora of techniques employed to gather feedback makes it difficult to know which methods of engagement are most effective in different circumstances. A prescriptive and standardized approach to early engagement is unlikely to be successful across the federal government. But, a sharing of best practices could allow cross-fertilization of agency ideas on engagement. This leads to our second recommendation.

Recommendation 2: OIRA should consider convening an interagency working group to gather data on approaches agencies use to generate and solicit feedback on alternatives and the effectiveness of these approaches in order to produce a menu of options for agencies on best practices for early engagement with stakeholders and guidance on how different options may be appropriate in different circumstances.

As described, the preponderance of suggestions for regulatory alternatives originate in external parties. However, when we asked current and former agency personnel, none of whom were economists, about their internal processes for generating alternative regulatory options, they consistently indicated that agency economists played an important role. One interviewee

attributed this to the need to meet SBREFA requirements, suggesting "we think of alternatives early on and our economists have a lot of say about this because of the SBREFA process." But, it was not just agencies subject to SBREFA that mentioned the importance of economists. Another agency representative noted, "The economists play a key role in the process of developing regulatory alternatives."

The observations of the interviewees are also supported by our independent review of rulemaking documents. As we describe in connection with Theme 3 below, agencies' NPRMs, final rules, and supporting RIAs generally do not have a robust discussion of regulatory alternatives. Still, to the extent they do describe other approaches considered, the description is most often found in RIAs. Given that agency economists are primarily responsible for developing RIAs, and they are important players in developing alternatives, it stands to reason that these other approaches would be described there. In fact, we scored each of the rulemaking documents we analyzed with a zero if there was no discussion of alternatives, a 0.5 if there was a superficial discussion, and a one if there was a substantive discussion. For the NPRMs, the cumulative score was 9.5 "points" while, for the RIAs, the score totaled 14.5 points.

Nevertheless, the involvement of economists comes with a caveat. Several agency representatives acknowledged that economists were involved because of requirements under Executive Order 12,866 to discuss alternatives in the RIA. This often, but not always, meant that they were brought in to generate alternatives to policy preferences that were already fairly fixed within the agency. Moreover, it accords with our observation that the types of alternatives described by our interviewees, who were important players in the development of the associated rules, differed qualitatively from the types of alternatives we saw discussed in the public rulemaking documents. Although the interviewees often mentioned entirely different modes of

regulating, as described in connection to Theme 3, our document analysis suggested that the alternatives differed more with respect to stringency or compliance dates. Moreover, this finding accords with the argument in the academic literature that sometimes the RIA is used as a justification for a decision rather than informing the decision.[57] When alternatives are developed in this manner, it does not serve the purpose of encouraging public input on meaningful choices among regulatory policies.

ACUS Recommendation 2019-5, "Agency Economists," included a recommendation that, "To promote meaningful consideration of economic analysis early in the decision-making process, agencies should consider developing guidance clarifying that economists will be involved in regulatory development before significant decisions about the regulation are made."[58] Our work supports this recommendation specifically, as it would help foster a more systematic process for the internal generation of regulatory alternatives early in the rulemaking process. This leads to our third recommendation.

> **Recommendation 3: In accordance with ACUS Recommendation 2019-5, agency economists should be involved early in the rulemaking process and encouraged to develop regulatory alternatives as part of this involvement.**

In addition to encouraging a more robust discussion of alternatives within the agency, involving economists earlier when rule development is ongoing would also create the conditions whereby the associated economic analysis of alternatives could center on those approaches actually under meaningful consideration by the agency.

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[57] Wagner, "CAIR RIA," 56-81.
[58] Administrative Conference of the U.S., Recommendation 2019-5, *Agency Economists*, 84 Fed. Reg. 71,349 (Dec. 27, 2019), 7.

Theme 3: Agencies generally consider alternative approaches early in the process of developing the regulation, well before the NPRM is issued.

As the discussion of Theme 2 suggests, agencies not only focus primarily on external stakeholders for ideas on regulatory alternatives, but they also gather this information early in the rule development process, as one might expect they would. As one interviewee suggested, "It turns out, it is a pretty regular process where we would reach out and get input from stakeholders before we do an NPRM." Receiving this input early not only guarantees that the agency receives the feedback before they are too far down a path with a particular rule, but it also serves to establish trust and solidify their relationships with their stakeholders. For example, one agency representative indicated, "We want to develop good relations with our stakeholders so…it makes it even more important to reach out before."

However, the other side of this early engagement is that by the time the agency has reached the stage of issuing an NPRM, it has largely vetted the reasonable alternatives. Thus, the comments received at this stage are unlikely to break new ground in introducing approaches that the agency had not previously considered in its prior outreach, a point that was made by multiple interviewees. That is not to say that rule writers do not take the comments received seriously, and agency personnel provided numerous examples where input at the NPRM stage did have effects on the final rule. Moreover, as one respondent suggested, even to the extent the agency does not incorporate a comment received in response to the NPRM in the final rule, they "are very careful to explain why. We don't ignore stakeholders." Regardless, current and former agency personnel seemed to suggest that it was rare that a public comment would provide a fundamentally different regulatory pathway that had not been previously considered through early outreach by the agency. Moreover, this finding concurs with the robust literature studying the effects of

public comments, which broadly suggests that comments may not necessarily result in revisions to the associated final rules.[59] And, when they do inspire revisions, the updates made tend not to change the associated rule at any fundamental level.[60]

The fact that agencies process input on rules they are considering well before the NPRM is written and published may help explain why the robust exchanges agencies have with stakeholders are not typically documented in rule documents. Our examination of the preambles to agency NPRMs and final rules as well as the associated RIAs showed very uneven disclosure of any consideration of alternatives. As described in our discussion of Theme 2, fewer than 40 percent of the preambles to proposed rules included in our sample of 25 regulations had any substantive discussion of alternative policies. Further, as described, agencies were more likely to position any discussion of alternatives in their RIAs relative to their NPRMs or final rules.

Still, this approach serves to diminish transparency, as the RIAs are not always published in the Federal Register[61] and over time have become more likely to be longer, denser, and harder for the public to access and comprehend.[62] Moreover, as our document review revealed, too often in these regulatory documents, the only alternatives presented are a) the preferred option being proposed by the agency; b) an option of not regulating; and c) an unreasonably stringent option. In our conversations, agency officials recognized this "Goldilocks" approach (i.e. too hot, too cold, and just right) to documenting alternatives. Even in the documents in which alternatives

[59] Elliott, "Re-Inventing Rulemaking," 1490-1496.
[60] Balla, "Between Commenting and Negotiation," 59-94; Elliott, "Re-Inventing Rulemaking," 1490-1496. Also, see Marissa Martino Golden, "Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?" *Journal of Public Administration Research and Theory* 8, no. 2 (1998): 245-270.
[61] Often, RIAs are only available at regulations.gov, if they are published at all.
[62] Carrigan and Shapiro, "Simple (and Timely) Benefit-Cost Analysis," 203-212.

were listed, the number considered was often small and the choices aside from the one being forwarded by the agency were unrealistic.

The documents available to the public hence tend to convey a different picture with respect to the extent to which agencies engage early with stakeholders and consider alternatives than what was offered by our interviewees. Because these public documents are often what is used in analyses of agencies' fealty to rulemaking requirements and recommended practices, they are often criticized as a result, including in the aforementioned GAO reports and academic research. The preambles and even the RIAs provide an incomplete portrayal of the process that agencies follow as they develop rules.

More important than creating a negative impression of agency consideration of alternatives, the lack of public disclosure of the early stages of rulemaking adds opacity to the rulemaking process and, in doing so, has the potential to diminish faith in the public accountability of rulemaking.[63] In contrast, disclosure of pre-NPRM communications with stakeholders and of alternatives considered by the agency both increases the transparency of rulemaking and offers agencies an incentive to engage in these practices. Certainly, it is conceivable that interested parties will feel less free to share their views if they know those views will be disclosed in a preamble to a proposed rule. Moreover, agencies themselves might be less inclined to reach out to interested parties if they are worried about public perceptions that they are communicating early with some, but others are not included in that outreach. To at least partially counter this, agencies might broadly list those parties with which they have had discussions about the

[63] Reeve T. Bull, "Making the Administrative State Safe for Democracy: A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking," *Administrative Law Review* 65, no. 3 (2013): 611-664.

regulation prior to the NPRM and the range of alternatives that have been suggested without attributing these alternatives to any particular organizations or individuals.

Doing so would serve several purposes. First, it would make clear to those reading the proposed rules that, in fact, the agency has already engaged in information exchanges with the affected public. Second, it would provide the public with a list of those alternatives that have been considered and rejected by the agency as part of this exchange. Both of these pieces of information could serve to foster comments submitted in response to NPRMs that are more focused and useful to the associated agency. Finally, it would present a more complete picture of agency deliberation, which too often appears to begin with the NPRM but, in fact, is nearly concluded with that document's publication. This discussion leads to our fourth recommendation.

Recommendation 4: a) Congress should consider making it clear that if an agency includes in the preamble to their proposed rule the consideration of realistic alternatives and documentation of early public involvement in this process, such action would offer evidence that can be used to suggest that agency is not acting in an "arbitrary" or "capricious" manner in reaching its regulatory decision; b) A specific place in the preamble should be created both for describing communications with stakeholders and for listing regulatory alternatives; and c) OMB should consider updating Circular A-4 to be more specific about the number of non-trivial alternatives an agency should discuss in the NPRM, assuming consideration of alternatives is warranted for that proposed rule.

As we discussed in conjunction with Theme 2, the interviews revealed that agency approaches to soliciting information on alternatives tend to be ad hoc and based on program

office preferences. That said, current and former agency personnel involved in the rule writing process indicated that requirements for agencies to undertake particular procedures as part of a rulemaking are followed very seriously. The SBREFA process, requirements that agencies publish ANPRMs and RFIs, and mandated regulatory negotiation were all mentioned by interview respondents as important means by which they gather information from the public and debate regulatory alternatives. While the agency representatives did highlight the burdens these requirements placed on the agency, they also praised them for encouraging the agency to explore questions it might have otherwise ignored. For example, in describing the effects of SBREFA, one interviewee noted, "Since we are required to do the SBREFA process, that encourages the agency to develop alternatives before the proposal so we have more of an advantage and our mindset is geared toward alternatives more than most places." They also noted that while these requirements could be beneficial, as noted in our discussion of Theme 1, they were not appropriate or necessary in all rulemaking circumstances.

In our database of regulations, the rule that considered the largest number of alternatives was an OSHA regulation on beryllium issued at the end of the Obama Administration.[64] It is not likely a coincidence that this regulation was subject to the requirements of SBREFA. As discussed, the SBREFA process forces agencies to sit down early in the rulemaking process with parties interested in a regulation. Still, it is also focused only on one constituency, small businesses. Techniques such as SBREFA and regulatory negotiation by their very nature achieve the goal of early input on regulatory alternatives but do so only for a limited group of affected parties. The academic literature has suggested alternative means of getting meaningful input

[64] Occupational Safety and Health Administration, Final Rule, *Occupational Exposure to Beryllium*, 82 Fed. Reg. 2,470 (Jan. 9, 2017).

from outside groups that may be more balanced. Techniques such as citizen juries, citizen advisory committees,[65] community involvement including that used in health impact analyses,[66] and the NEPA process[67] all hold promise for getting more representative input on regulatory alternatives in some circumstances.[68] This leads to our fifth recommendation.

Recommendation 5: Agencies should engage in pilot projects using different modes of soliciting public input on their regulations before issuing NPRMs. The results of these pilot projects should be shared broadly across the government (much like with Recommendation 2) and individually should be described in the NPRMs for which they are used.

Theme 4: Although agency personnel believe that consideration of alternatives makes for better final rules, the decision to invest in developing these alternatives does involve tradeoffs.

Although regulatory complexity and novelty are key factors that help determine the extent to which agencies will seek feedback to develop alternative regulatory approaches, interviewees did identify some barriers to considering alternatives as a part of the rulemaking process. In particular, two obstacles were cited by multiple respondents. The first was that agencies sometimes felt that they were limited in the options they could consider by their enabling statutes, as well as political factors. We return to this subject later in this section. However, the other common response was that development and consideration of alternatives adds time to the regulatory process. Agencies already feel pressure to produce regulations more quickly and the

[65] Bull, "Citizen Participation in Agency Decisionmaking," 611-664.
[66] Brian L. Cole and Jonathan E. Fielding, "Health Impact Assessment: A Tool to Help Policy Makers Understand Health Beyond Health Care," *Annual Review of Public Health* 28 (2007): 393-412.
[67] Shapiro, *Analysis and Public Policy*.
[68] Care would need to be taken with some of these techniques to ensure they do not run afoul of the Federal Advisory Committees Act (FACA), Pub. L. No. 92-463, 86 Stat. 770 (1972).

mandated consideration of regulatory alternatives in a public forum would further strain what agency representatives already feel is a lengthy rulemaking process.[69] As one interviewee aptly noted, "We get criticized for [rulemaking] taking so long… That is the tradeoff. We get more input, it takes longer."

The legal literature in particular has long debated whether the rulemaking process is "ossified." Proponents of the idea have argued that requirements such as hard look judicial review of agency regulations and BCA have slowed the regulatory process down and, in some cases, deterred agencies from engaging in rulemaking at all.[70] Yet others, citing the extensive volumes of rulemaking over the past several decades, have appealed to empirical analysis in an attempt to refute this thesis.[71]

Regardless of the extent to which the rulemaking process is becoming ossified, our analysis suggests that agencies are considering alternatives and soliciting public input early in the rulemaking process, or even before the process begins. As a result, the time constraints cited by our interview subjects are not preventing them from engaging in these activities on an informal basis. Still, it is possible that formalizing the process of gathering early input and considering alternatives will increase the burden on agencies beyond that of the informal practices they currently utilize. If this is the case, a requirement for agencies to disclose their early contacts with outside parties and to list alternatives, as we suggest in Recommendation 4, may further

[69] Interview subjects were also sensitive to the fact that their agencies were criticized for taking too long to finalize rules.

[70] Thomas O. McGarity, "Some Thoughts on Deossifying the Rulemaking Process," *Duke Law Journal* 41, no. 6 (1992): 1385-1462. Also, Richard J. Pierce Jr., "Seven Ways to Deossify Agency Rulemaking," *Administrative Law Review* 47, no. 1 (1995): 59-96.

[71] Jason Webb Yackee and Susan Webb Yackee, "Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990," *George Washington Law Review* 80, no. 5 (2012): 1414-1492.

stretch out a regulatory process that can even now take much of a president's term to complete in some cases.[72]

In our earlier work, we discussed giving agencies incentives to be more transparent in their RIAs and in their consideration of regulatory alternatives.[73] Much of the discussion in that research applies here as well. If the more formal steps of documenting stakeholder input on regulatory alternatives will add time to the rulemaking process, then perhaps time in other areas can be reduced. Agencies that carefully outline multiple feasible regulatory alternatives and chronicle their early input from outside parties should be given rewards for doing so.

Yet determining how to institute these rewards is not easy. Still, two possibilities suggest themselves. Review by OIRA is often cited as a time-consuming portion of the rulemaking process.[74] Agencies that thoroughly document their outside engagement on alternatives and conduct analyses to consider these various approaches in good faith, even those that would be more considered "back of the envelope" analysis, could be rewarded with expedited review at OIRA. Thus, agencies might be able to "apply" for expedited review based on their outside consultations and documented analysis of realistic alternatives to their proposed policy. Moreover, having engaged in the SBREFA process could be one avenue by which an agency might qualify for expedited OIRA review. After all, as one of the primary functions of OIRA review is to encourage transparency coupled with quality analysis,[75] documented efforts by agencies to consult with outsiders and present meaningful alternatives to the public would ensure

[72] Bethany A. Davis Noll and Richard L. Revesz, "Regulation in Transition," *Minnesota Law Review* 104, no. 1 (2019): 1-100.
[73] Carrigan and Shapiro, "Simple (and Timely) Benefit-Cost Analysis," 203-212.
[74] McGarity, "Some Thoughts on Deossifying," 1385-1462; Pierce Jr., "Seven Ways to Deossify," 59-96.
[75] Richard L. Revesz and Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (New York: Oxford University Press, 2008).

that these goals of transparency and sound analysis are being met. This leads to our sixth recommendation.

Recommendation 6: OIRA should consider ways to incentivize agencies to engage stakeholders early in the rulemaking process particularly with regard to envisioning and vetting alternatives. Any incentives would need to provide agencies with the opportunity to save time later in the rulemaking process if they have documented such consideration early in the process.

The second area where the rulemaking process could be streamlined is when it reaches the courts. This is clearly harder to change in a systematic way since judges review regulations against a wide variety of standards contained not only in the APA but also in agencies' organic statutes and the statutes that authorize particular regulations.[76] Short circuiting this review process would likely raise separation of powers issues, and we make no recommendation on that. That said, agencies may be more inclined to faithfully consider alternatives if courts could give them more leeway when they do a well-documented job of consulting with the public in the decision-making phase of rulemaking and in presenting meaningful alternatives clearly in their regulatory documents.[77] Recent trends suggesting that courts are becoming more likely to scrutinize supporting BCAs may make this possibility feasible.[78]

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[76] Jonathan R. Siegel, Administrative Conference of the U.S., *Draft Sourcebook of Federal Judicial Review Statutes* (2021), https://www.acus.gov/publication/draft-sourcebook-federal-judicial-review-statutes.

[77] Bull, "Citizen Participation in Agency Decisionmaking," 611-664, suggests a similar model where courts give agencies credit if they convene a "citizens advisory committee."

[78] Caroline Cecot and W. Kip Viscusi, "Judicial Review of Agency Benefit-Cost Analysis," *George Mason Law Review* 22, no. 3 (2014): 575-618. But, see Karkkainen, "Toward a Smarter NEPA," 903-972, for the opposite outcome in some cases under NEPA.

Connected to this, our interview subjects repeatedly made clear that agencies care a great deal about ensuring that their regulatory efforts are sustained against judicial challenges. This motivation has a wide variety of implications for how agencies consider regulatory alternatives. One such implication is that if a commenter suggests a regulatory alternative in response to an NPRM, agencies personnel will try to respond dutifully to the suggestion in the preamble to the final regulation. Unfortunately, as the current and former agency personnel we interviewed revealed, by the time the NPRM has been published and comments are submitted, agencies have already considered and often carefully dismissed many realistic regulatory alternatives earlier in the development process. Hence, while the agencies must respond to the comments, it is rare that the public comments present new alternatives that the agencies will meaningfully consider. If, in association with Recommendation 4, agencies were to discuss in more detail their early consideration of alternatives, it may make it less likely that the comments submitted would suggest approaches the agency has already dismissed.

As noted previously, another implication of fealty to the law is that agencies will sometimes refuse to consider alternatives that they believe are precluded by statute. For example, in discussing opportunities to consider different regulatory approaches outside of simply issuing means-based standards in which the regulator directly specifies how the regulated entities can achieve compliance,[79] one respondent indicated that the "statute cabins your ability to do that." Certainly, in many circumstances, rule writers and agency attorneys are correct in this belief. However, it may also be true that agencies are inclined to be conservative in their interpretation of their statutes, either because of political pressure to favor particular regulatory policies,

[79] See, e.g., Carrigan and Coglianese, "The Politics of Regulation," 107-129.

something our interview subjects acknowledged occurs on occasion, or because they exhibit risk aversion in their approach to defending rules that could be subjected to judicial review.[80]

Whether or not agencies are correct about plausible regulatory alternatives being precluded by statute, this sentiment should not stop them from identifying and conducting basic analysis of these alternatives for the public.[81] If these alternative approaches are precluded by statute, analysis showing that they are superior to the statutorily prescribed approach may influence further policy debates in Congress on the subject. And, if there is ambiguity regarding the legality of a particular regulatory alternative, then placing them in the public domain to solicit comments will provide the agency with additional perspectives on the legal questions. This leads to our seventh recommendation.

Recommendation 7: Agencies should not avoid documenting, analyzing, and soliciting public input on reasonable alternatives in their NPRMs simply because they believe those alternatives are precluded by statute. Agencies should still present these alternatives along with an explanation of their views on the legality of those alternative policy choices.

Conclusion

The data examining the extent to which agencies consider regulatory alternatives that we collected from public rulemaking documents and the interviews we conducted with current and

[80] Mark Seidenfeld, "Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review," *Ohio State Law Journal* 70, no. 2 (2009): 251-322.

[81] For example, the regulations implementing NEPA required the consideration of reasonable alternatives "not within the jurisdiction of the lead agency." The 2020 regulatory revisions to NEPA eliminated this provision, but it may be restored by the Biden Administration. 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 (Jul. 16, 2020).

former agency officials tell somewhat different stories. Thus, if we had relied solely upon our data collection, our conclusions would have focused on the apparent lack of meaningful examination of alternatives and the limited discussion of pre-NPRM stakeholder involvement. Indeed, this is the conclusion reached in much of the academic literature on the subject. Yet our interviews with current and former agency personnel intimately involved in the rulemaking process made clear that agencies engage with interested parties early and often in the rulemaking process. Further, this engagement often results in agencies evaluating regulatory alternatives and considering options that they would not have otherwise contemplated.

Nevertheless, to the extent that these insights apply more broadly outside of our sample of five executive branch departments, this dichotomy raises important questions about the transparency of the regulatory process. The various executive and statutory directives that collectively mandate an agency that is considering promulgating a rule to publish an NPRM, solicit comments, carefully respond to those comments, and in some cases, perform thorough economic analysis of regulatory proposals has, in effect, shifted some of the most desirable practices in sound policy development, namely engaging with the affected public and considering regulatory alternatives, to a part of the regulatory process that is largely out of sight to the public.

It was clear from our interviews that agency officials value the input they receive and endeavor to incorporate it in their decisions, with some exceptions due to political or legal constraints. It was also clear from our examination of the actual NPRMs and RIAs that these worthwhile practices are not visible to the public nor to those studying the rulemaking process. Many of our recommendations—ranging from disseminating best practices and offering incentives to agencies to disclose deliberation of alternatives on the one hand to encouraging

more systematic agency disclosure and consideration of statutorily prohibited approaches on the other hand—are designed to reconcile this inconsistency between what agencies are actually doing and what they discuss in publicly available documents.

Appendix 1: Rules and Associated Supporting Documents Reviewed

Rule	Agency/Department	Date Finalized	NPRM	Proposed RIA	Final Rule	Final RIA
Energy Conservation Program: Energy Conservation Standards for Miscellaneous Refrigeration Products	Department of Energy	10/28/2016	X	X	X	X
Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems)	Occupational Safety and Health Administration	11/18/2016	X	X	X	X
Instituting Smoke-Free Public Housing	Department of Housing and Urban Development	12/5/2016	X	X	X	X
Commercial Driver's License Drug and Alcohol Clearinghouse (MAP-21)	Federal Motor Carrier Safety Administration	12/5/2016	X	X	X	X
Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators	Federal Motor Carrier Safety Administration	12/8/2016	X	X	X	X
Federal Motor Vehicle Safety Standards; Minimum Sound for Hybrid and Electric Vehicles	National Highway Traffic Safety Administration	12/14/2016	X	X	X	
Definition of Form I-94 to Include Electronic Format	Customs and Border Protection	12/19/2016			X	X
Roadless Area Conservation; National Forest System Lands in Colorado	Forest Service	12/19/2016	X		X	X
Energy Conservation Program: Energy Conservation Standards for Central Air Conditioners and Heat Pumps	Department of Energy	1/6/2017	X		X	X
Occupational Exposure to Beryllium	Occupational Safety and Health Administration	1/9/2017	X	X	X	X
Information and Communication Technology (ICT) Standards and Guidelines	Architectural and Transportation Barriers Compliance Board	1/18/2017	X	X	X	X
Energy Conservation Program: Energy Conservation Standards for Dedicated-Purpose Pool Pumps	Department of Energy	1/18/2017			X	X
Energy Conservation Program: Energy Conservation Standards for Ceiling Fans	Department of Energy	1/19/2017	X	X	X	X
Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date; Request for Comments	Food and Drug Administration	5/4/2017			X	X
Energy Conservation Program: Energy Conservation Standards for Walk-In Cooler and Freezer Refrigeration Systems	Department of Energy	7/10/2017	X		X	X

Rule	Agency/Department	Date Finalized	NPRM	Proposed RIA	Final Rule	Final RIA
Implementation of the Provision of the Comprehensive Addiction and Recovery Act of 2016 Relating to the Dispensing of Narcotic Drugs for Opioid Use Disorder	Drug Enforcement Administration	1/23/2018			X	X
National Organic Program (NOP); Organic Livestock and Poultry Practices	Agricultural Marketing Service	3/13/2018	X	X	X	X
Food Labeling: Revision of the Nutrition and Supplement Facts Labels and Serving Sizes of Foods That Can Reasonably Be Consumed at One Eating Occasion	Food and Drug Administration	5/4/2018			X	X
Agricultural Trade Promotion Program	Department of Agriculture	8/30/2018			X	X
Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements	Bureau of Land Management	9/28/2018	X	X	X	X
National Bioengineered Food Disclosure Standard	Agricultural Marketing Service	12/21/2018	X	X	X	X
Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption; Extension of Compliance Dates for Subpart E	Food and Drug Administration	3/18/2019	X	X	X	X
Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations	Environmental Protection Agency	7/8/2019	X	X	X	X
Review of Dust-Lead Hazard Standards and the Definition of Lead-Based Paint	Environmental Protection Agency	7/9/2019	X	X	X	
Definition of "Waters of the United States"—Recodification of Pre-Existing Rules	Environmental Protection Agency	10/22/2019	X	X	X	X

Note: An "X" in the column labeled NPRM, Proposed RIA, Final Rule, or Final RIA for a particular rule indicates that document was reviewed for that rule.

Appendix 2: Interview Protocol

We are going to ask you some questions about your experiences at your agency in developing rules, especially with respect to the extent and ways in which consideration of regulatory alternatives plays a role in that process. For purposes of this interview, a regulatory alternative is simply a different regulatory approach from what is preferred by the agency personnel primarily responsible for developing the rule. It can be a wholly different mode of regulating. For example, imposing a planning requirement would be considered a regulatory alternative if the agency's preferred or default approach is a technology standard. However, it can also mean varying the stringency of the regulation. So, a performance standard in which the preferred stringency level would be reduced is considered a regulatory alternative as well.

We expect that this will take no more than an hour. We will not use your name in any report and will ask your permission before directly quoting you.

1) Does this definition coincide with your perspective on what a regulatory alternative is?
2) Do you have any questions about the definition of a regulatory alternative or about the interview more generally?
3) Can you describe your role in the agency?
4) How does that role connect you to the agency's rulemaking activities?
5) In the rulemaking projects that you have been involved with at your agency, to what extent do the key personnel responsible for developing the rule consider alternative regulatory approaches?
6) Is this true of a few, some, most, or all of the rulemakings in which you have participated?

If the respondent indicates that the agency considers alternatives at least sometimes, ask the following questions:

7) Is the process at the agency for considering alternative approaches formalized or is it more informal?
8) Does that change based on the rule significance? If so, how?
9) Could you describe that formal/informal process including when in regulatory development alternatives are considered?
10) Based on your experience, describe how the alternatives typically differ from the preferred regulatory option.
11) Do the personnel involved in the rulemaking generally solicit the views of those outside the agency on regulatory alternatives? If so, who? Regulated entities? Interest groups? Other agencies? Academic experts? Others? (If relevant, are SBREFA panels involved?)
12) If so, how do these individuals and entities express their views? Phone calls? Meetings? Emails? Formal comments? Other approaches?
13) Do the personnel involved in the rulemaking typically solicit the views of those inside the agency in developing regulatory alternatives? If so, who? Scientific experts? Economists? Senior leaders? Others?
14) What are the barriers to seriously considering regulatory alternatives?
15) In the typical case, to what degree, if at all, do the alternative regulatory approaches suggested in public comments to advance notices and notices of proposed rulemakings have an impact on the final rule?
16) In your experience, have you found that considering alternatives typically improves the final rule? If so, how? If not, why not?

To the extent we encounter participants that indicate that their agency never considers alternatives, ask the following questions:

17) Why don't those involved in the rulemaking typically consider alternatives?

18) Are there ever instances where the agency would consider alternatives to the preferred regulatory approach? If so, when?

19) In the typical case, to what degree, if at all, do the alternative regulatory approaches suggested in public comments to advance notices and notices of proposed rulemakings have an impact on the final rule?

20) To what extent do you think it would help the agency craft better rules if it did consider alternatives regularly in rulemakings?

Ask the following question of both those whose agencies consider alternatives as well as those whose agencies do not:

21) Do you have any final thoughts you would like us to know about with regard to how your agency approaches consideration of alternatives that we have not covered? If so, what are they?