



April 6, 2021

To: ACUS-Committee on Regulation, Committee Chair Connor Raso, Staff Counsel Leigh Anne Schriever, and Consultants Christopher Carrigan and Stuart Shapiro

Re: Early Input on Regulatory Alternatives

The Institute for Policy Integrity (“Policy Integrity”) at New York University School of Law¹ respectfully submits these comments on the project on Early Input on Regulatory Alternatives. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

Comments on Proposed Recommendations

Revisions to the Current Proposals

Recommendation 1: The Committee should add as another factor for agencies to consider in determining whether to seek early input on alternatives: “Whether affected groups may be otherwise traditionally underrepresented in the agency’s administrative process.” Though Recommendation 2 appropriately notes that the full participation of such groups should be weighed in considering which methods of early outreach to undertake, the full participation of such groups should also be factored in to the initial determination of whether to undertake early outreach.

The Committee should also add as another factor: “Whether the agency already is considering, or could consider, flexible regulatory approaches as alternatives.” The need to consider flexible approaches—including economic incentives, user fees, marketable permits, warnings, default rules, disclosure requirements, and, more generally, performance-based standards—is one of the specific ways in which Executive Orders instruct agencies to consider alternatives.² Agencies may benefit from early input on considering novel, more flexible regulatory approaches, which may be outside their traditional regulatory expertise but nevertheless deserve careful consideration.

The Committee should also add as another factor: “Whether experts in other agencies may have valuable input on alternatives.” As Recommendation 4 rightly notes, experts at other agencies may have valuable input, and collecting that input should be a factor in agencies’ initial determinations on whether to undertake early outreach. Moreover, engaging with other agencies early in the rulemaking process can save agencies time in the long run. Not only might other agencies have useful experience with certain regulatory approaches or analyses that would save the rulemaking agency from having to reinvent the wheel, but early engagement might save time later during the often lengthy inter-agency review process.

Recommendation 2: The Committee should add as an additional method for soliciting early input: “Flagging both potential alternatives and affected groups of stakeholders, especially any groups traditionally underrepresented in the rulemaking process, in the agencies’ Regulatory Agendas and Regulatory Plans.” Executive Order 12,866 in fact calls for agencies to summarize the alternatives being considered and preliminary estimates of costs and benefits for all planned significant regulatory actions

¹ This document does not purport to present New York University School of Law’s view, if any.

² Exec. Order No. 12,866 §§ 1(b)(4), (8); Exec. Order No. 13,563 §§ 1(b)(4)-(5), 4.

submitted in agencies' annual Regulatory Plans.³ This requirement is often neglected today, but it is another method that agencies should consider.

Recommendation 5: The Committee should rephrase the reference to alternatives that are “ultimately rejected in the NPRM.” An NPRM should not slam the door on any reasonable alternative. Instead, in their NRPMs, agencies should explain the reasons why the agency is proposing to pass on certain alternatives in favor of the proposed rule, but the agency ultimately should remain open to the possibility that additional public comments received on the NPRM could change their mind. Thus, this recommendation’s first sentence should be revised to read: “Agencies should provide in the NPRM a full discussion of the alternatives that the agency has already considered, including alternatives that the agency is not proposing to adopt, together with the reasons why the agency is not proposing to adopt those alternatives.”

Recommendation 6: This recommendation appropriately advises agencies to consider reasonable alternatives that are believed to be precluded by statute. If such alternatives would otherwise have been the preferred option, it would be useful for OIRA to collect such alternatives and include them in its annual reports to Congress. The Committee should add to this recommendation instructions for OIRA to compile such a list of legally precluded but otherwise preferable alternatives, so that Congress can consider appropriate statutory amendments.

A related issue occurs when an agency fails to consider an alternative specifically contemplated by statute. As detailed in the Institute for Policy Integrity’s report on *Enhancing the Social Benefits of Regulatory Review*,⁴ agencies sometimes fail to disclose the costs and benefits of any alternatives when their “preferred” course of action is to maintain the status quo. This situation often comes up when agencies are required by statute to periodically review the stringency of their standards, as with EPA’s national ambient air quality standards or the Department of Energy’s energy conservation standards for appliances. At times, both agencies have announced a determination not to increase the stringency of the standards for various reasons but without disclosing the potential costs and benefits of alternatives to that course of action. But, as *Circular A-4* says, “When a statute establishes a specific regulatory requirement and the agency is considering a more stringent standard, you should examine the benefits and costs of reasonable alternatives that reflect the range of the agency’s statutory discretion, including the specific statutory requirement.” To that end, ACUS should recommend, and OMB’s *Circular A-4* should further clarify, that even when an agency may prefer not increasing the stringency of an existing standard, it should still examine alternatives and disclose the costs and benefits.

Recommendation 7: The proposed interagency working group may be especially beneficial in developing and sharing best practices for outreach to underrepresented groups. The recommendation should be adopted, with additional language added to highlight that such a working group should focus on developing practices for outreach to underrepresented groups.

Proposals for Additional Recommendations

Guidance on Number of Alternatives: In the consultants’ draft report, they recommended that OMB update *Circular A-4* “to be more specific about the number of non-trivial alternatives an agency should

³ Exec. Order No. 12,866 § 4(c)(B).

⁴ Jason A. Schwartz, *Enhancing the Social Benefits of Regulatory Review: Rethinking OIRA for the Next Administration* 20-21 (Policy Integrity Report, Oct. 2020), https://policyintegrity.org/files/publications/Enhancing_the_Social_Benefits_of_Regulatory_Review.pdf.

discuss in the NPRM.”⁵ This recommendation should be added to the Committee’s set of recommendations.

As detailed in the Institute for Policy Integrity’s report on *Enhancing the Social Benefits of Regulatory Review*,⁶ far too often the current language in *Circular A-4* (which references “at least three options”) has been interpreted by agencies as giving them license to consider *only* three alternatives in their NPRMs and RIAs: their preferred option, a single more stringent option, and a single less stringent option. In fact, *Circular A-4* more generally does call for analysts to assess a “reasonable” number of alternatives for each of the rule’s individual “key attributes or provisions,” and praises an example where an agency examined over twenty distinct alternatives. Nevertheless, agencies have often focused on the “at least three” language to justify including only three alternatives in their public rulemaking analyses.

Yet considering more than the three minimum alternatives is particularly important when distinct provisions within a broader regulation have their own distinct benefits and costs, as well as when different alternatives may affect the distribution of benefits and costs among important and vulnerable groups. *Circular A-4* should be clarified to stress that three alternatives is typically the absolute *minimum* number required for analysis, and that regulations with multiple distinct provisions may likely necessitate consideration of more than three alternatives. *Circular A-4* should also highlight the importance of considering alternatives that may change the regulation’s distributional impacts on to vulnerable groups. The Committee should recommend those clarifications.

For a related point on the number of alternatives to analyze and disclose, see also *supra* in the second paragraph on revisions to recommendation 6, which explains why ACUS should recommend that agencies undertaking a statutorily required review of their regulations should analyze and disclose the costs and benefits of more stringent alternatives even when the agency may prefer maintaining the status quo.

Guidance to the Public: Given the findings of the consultants’ report—that while early input from stakeholders can be instrumental in the selection of alternatives, public comments following the NPRM are less likely to influence the fundamental regulatory approach or consideration of alternatives—ACUS should recommend that either individual agencies or OIRA (or perhaps ACUS itself) prepare guidance to stakeholders and the general public on how they can best inform the consideration of alternatives. In particular, such guidance should highlight for the public the value of early input in shaping the alternatives under consideration. Furthermore, the guidance can recommend how the public might maximize their remaining influence on alternatives during the public comment phase: perhaps, for example, by proposing specific redline edits to regulatory text to suggest alternatives such as different compliance dates or different enforcement methods, or by submitting supporting analysis on the costs and benefits of any suggested alternatives seeking to change the degree of stringency or to move from a prescriptive regulatory approach to a more flexible, market-oriented approach.

Comments on the Consultants’ Report and Legal Memo

The consultants’ report collects extremely useful empirical and survey evidence on the consideration of alternatives. These comments suggest a few additions or edits to clarify some important legal issues.

Most importantly, on page 12 of the consultants’ report, the language cited from Executive Order 12,866 relates specifically to the requirement to consider alternatives for economically significant

⁵ Carrigan & Shapiro at 4-5 (their proposed recommendation #4).

⁶ Schwartz, *supra*, at 20.

regulations. The Legal Memo focuses on the same language from Executive Order 12,866. The documents therefore could mistakenly give the impression that Executive Order 12866 requires the consideration of alternatives *only* for economically significant regulations.

In fact, while economically significant regulations may warrant more rigorous and more quantitative consideration of alternatives, Executive Order 12,866 calls for agencies to consider alternatives much more broadly, for all significant regulations, and indeed to some extent for all regulations. Section 1(a) and Sections 1(b)(3) & (8) of the Order call generally for consideration of regulatory alternatives, and especially for consideration of performance standards, market-based alternatives, information-based alternatives, and the alternative not to regulate. Section 4(c) requires agencies to including in their Regulatory Plans a summary of alternatives to all planned significant regulations. (Note that it is not clear the extent to which agencies actually summarize alternatives in their Regulatory Plans or submissions to the Unified Agenda; the consultants may consider investigating this issue further for their final report.) Executive Order 13,563 mirrors much of that language and expands on the language concerning flexible alternatives. The consultants' report should include all such language, so that neither agencies nor the public reading the report mistakenly think that the Executive Orders require the consideration of alternative only for economically significant regulations; in fact, all regulations should consider alternatives to some degree.

On page 20 of the consultants' report, it may be worth mentioning that implementation of NEPA often involves a scoping process, which is akin in some ways to an ANPRM, in that stakeholders can suggest alternatives before the draft EIS is prepared. The Legal Memo hints at the existence of this scoping process, but its importance for early stakeholder input on alternatives should be fleshed out in both the Legal Memo and in the consultants' report. Furthermore, it may be useful to note that, until 2020 changes, the regulations on implementing NEPA required the consideration of reasonable alternatives "not within the jurisdiction of the lead agency."⁷ This is relevant to the proposed Recommendation #6. That language was removed by the Council on Environmental Quality in 2020, but CEQ may soon revert back to the original language in an anticipated repeal of those 2020 revisions.

Finally, on page 15-16, the consultants' report gives an example from a 2019 Department of Transportation rule on rulemakings. That rule on rulemakings has recently been repealed.⁸

Respectfully submitted,

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Attached: [Enhancing the Social Benefits of Regulatory Review: Rethinking OIRA for the Next Administration](#)

⁷ Compare 40 C.F.R. § 1502.14 (2016) with 40 C.F.R. § 1502.14 (2020).

⁸ 86 Fed. Reg. 17,292 (Apr. 2, 2021).