



Regulatory Update

September 2023

No Longer Sidelined: Biden Administration Calls for Broadened Participation and Public Engagement in Federal Regulatory Process

Key Note:

- This summer the Biden administration created federal agency guidance on ways to reduce barriers to meaningful public engagement in the federal regulatory process. The administration recommends that agencies begin the regulatory process with pre-planning and use money, technology and old-fashioned common sense to redress persistent challenges present when interacting with the public. Most critically, the administration is calling upon agencies to explain how public comments received during the regulatory process are considered by the agency.

In July 2023, the Biden administration renewed its commitment to increasing public participation in the regulatory process by issuing a new Office of Management and Budget (OMB) Memorandum (Memo), “[Broadening Public Participation and Community Engagement in the Regulatory Process](#).” The OMB Memo builds on principles outlined in the administration’s prior [Executive Order 14094](#) (April 6, 2023), “Modernizing Regulatory Review,” which encouraged federal agencies to provide equitable opportunities for public input by a range of interested or affected parties, particularly underserved communities. The OMB Memo also complements previous guidance issued in a memorandum titled “[Improving Access to Public Benefits Programs Through the Paperwork Reduction Act](#),” which focuses on removing burdens associated with public benefits and services.

The administration recognizes that both public participation and community engagement are the cornerstones for building public trust, formulating regulations that are responsive to public needs, and providing accountability for government decision-making. The OMB Memo defines public participation as “. . . any process that involves members of the public in government decision-making.” Community engagement is defined as “a more specific concept within public participation that involves agency actions to build trust-based, long-term, and two-way relationships with communities, including underserved communities that have been historically left out of government decision-making.”

Before finalizing this guidance, the Office of Information and Regulatory Affairs (OIRA) in the OMB conducted four listening sessions and two public comment periods from October 2022 through March 2023. The purpose of this outreach was to characterize how the public was currently engaging in the regulatory process, highlight persistent challenges, solicit suggestions on overcoming obstacles and obtain feedback on draft recommendations.

Known Barriers to Engagement in the Regulatory Process

The most traditional way in which agencies receive written feedback from the public on their proposed rulemaking is through notice and comment. In turn, a federal agency is required to review and consider the written comments as it finalizes its rulemaking. This process, however, is not as

straightforward as it may appear, despite the availability of online commenting. Listed below are some persistent obstacles to increasing public engagement within the federal regulatory process:

- General lack of awareness and/or understanding of the federal regulatory process;
- Confusion about how agencies publicize their considerations of rulemaking or regulatory proposals;
- Lack of an understanding of how to provide effective public comments on an agency's proposed regulations;
- Unnecessarily restrictive agency ex parte communication policies;
- Lack of foreign language and communications access;
- Digital divide created by the unequal access to digital technologies;
- Lack of public trust in the federal government;
- Perceptions that agencies will not take comments or lived experiences into consideration;
- Lack of adequate cultural and social competency from agency staff in interacting with communities;
- Federal agencies often lack the time, funding, staffing, or training to properly address challenges associated with public participation.

Not every regulatory proposal will require significant public engagement. As a result, OIRA recommends that federal agencies manage their resources by engaging early in deliberate planning for public participation and engagement. Agencies should also determine what type of information or input would be most relevant for the regulation at issue. As a best practice, a federal agency should also determine from the outset which communities are likely to be impacted most acutely by the regulatory action. Then, it should consider the barriers or challenges those communities may face and the community's historical relationship with the federal government.

Making it Easier to Participate

OIRA recommends that agencies prioritize public engagement before defining regulatory priorities. The administration believes doing so would enable agencies to be influenced by a multitude of perspectives before defining problems and solutions and would generate better policy decisions. The following are a few of OMB's specific

public engagement recommendations to help defeat known communication barriers:

- Utilize technology to provide multiple platforms and formats for agency interaction with the public, the public's review of agency materials, and the public's provision of comments;
- Draft communications in plain English and languages most relevant to the affected communities;
- Consider offering federal financial assistance programs for childcare, personal care attendants, travel, meals or related expenses so that community members can participate in pre-proposal engagement;
- Form partnerships with community-based organizations to learn more about the unique challenges and perspectives associated with a community and consequently rely upon these organizations to deliver news and updates to the community.

This fall, OIRA will update its *Unified Agenda for Federal Regulatory Actions* (Agenda) which catalogs each agency's proposed regulations. The Agenda also includes the Regulatory Plan (Plan) which contains brief narratives of the regulatory priorities and activities planned for the upcoming year. The OMB Memo calls for both the Agenda and Plan to serve as another avenue to increase public participation and engagement. Beginning in the Fall of 2023, agencies should consider sharing how information received from past public engagement is considered by the agency and provide plans for future public engagement over the upcoming year by listing opportunities for affected communities to engage in regulatory activities. OIRA also calls upon agencies to describe in the Agenda plan entries how public engagement informed the individual regulatory proposals, draft Agenda entries, and plan submissions in accordance with the OMB Memo.

Concluding Thoughts

Change undoubtedly will be slow, and OMB's guidance is not intended to be retroactive, but the administration's quest is clear—removing hurdles to enable meaningful engagement with communities typically underrepresented in the federal regulatory process. This guidance is certainly favorable to underserved communities that are now the subject of many of the administration's priorities and

environmental initiatives. The impact on the regulated business community is likely to be more mixed as increased processes will sometimes yield unfavorable decisions on potential projects. Increased transparency, however, may create new avenues for Administrative Procedure Act litigation.

FOR MORE INFORMATION

For more information, please contact:

Tanya C. Nesbitt

404.407.3605

Tanya.Nesbitt@ThompsonHine.com

This advisory bulletin may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgment of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions.

© 2023 THOMPSON HINE LLP. ALL RIGHTS RESERVED.