

The Promise (and a Potential Pitfall) of the Biden Administration's Equity in Public Engagement Initiative

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In brief...

OIRA's public engagement recommendations have the opportunity to expand engagement in the federal rulemaking process, but the administration must build on their recommendations to manage public expectations about the efficacy of public engagement.

On the first day of his term, President Biden signed [Executive Order 13985](#), “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” jumpstarting his fulfillment of campaign promises around equity concerns. The order states that “entrenched disparities in our laws and public policies” have systematically disadvantaged [underserved communities](#), defined as populations sharing a particular characteristic or geographic area. It instructs the federal government to establish an “ambitious whole-of-government equity agenda” to promote “consistent and systematic fair, just, and impartial treatment of all individuals.”

As part of the Biden administration's equity agenda, the White House Office of Information and Regulatory Affairs (OIRA) has proposed recommendations to increase [public engagement in the federal regulatory process](#), especially from underserved communities. Rulemaking is an essential component of the policy process. While Congress is tasked with making laws about all aspects of American life, it delegates the authority to write detailed rules implementing legislation to regulators—the agency-based subject matter experts. Public comment on rulemaking gives stakeholders an opportunity to impact how regulators translate legislation into real-world action.

OIRA's recommendations are threefold. The first is to take steps to help the public understand the regulatory process and the role of public engagement in that process. One proposed step is to disseminate information about how to write effective comments (along the lines of a [primer](#) developed by Regulations.gov). The second recommendation is to enhance the accessibility and usability of regulatory materials, through means such as plain language, short summaries, and multiple formats (e.g., infographics and videos). Finally, OIRA recommends engaging stakeholders throughout the rulemaking process, especially early in the development of regulations when key agency decisions have not yet been made and public input can be most meaningful.

Until March 10th, interested members of the public are invited to submit their feedback on OIRA's recommendations and its effort to broaden public engagement in the regulatory process more generally. In line with its recommendations, OIRA welcomes feedback through a variety of channels, including written comments as well as audio and video submissions. OIRA is also holding a [virtual listening session](#) on March 7th to collect feedback from the public.

In our view, OIRA's recommendations each aim to make public engagement more accessible for all, including members of underserved communities. Explaining the steps in the process, the role of public comments in it, and how to write effective comments will help community members understand where they can make a difference, and why they should engage. Making materials available in plain language and in multiple formats lowers the barriers to entry for interested groups and persons. Perhaps most important is OIRA's recommendation of engaging with communities early and often throughout the regulatory process, especially when regulators are still determining the broad parameters of their rules.

There is, however, a potential pitfall that we believe has not yet been adequately emphasized in OIRA's effort. Rulemaking is fundamentally a legal, administrative process that is governed by statute and judicial review. Given that rulemaking takes place under these constraints, feedback from the public is often most useful when it speaks to the economic, scientific, and technical issues agencies have been charged to address. This is not to say that personal stories and other sources of situated knowledge are not important in the regulatory process. In the end, however, rulemaking is not a plebiscite in which the most popular position wins.

The reason this consideration is important is because there is a danger that OIRA's effort will inflate expectations surrounding the efficacy of public participation in a manner inconsistent with the place of public input in a legal, administrative process. New participants, for example, may become disillusioned upon finding that rules are finalized to the contrary of feedback submitted by large numbers of like-minded organizations and individuals. Such disillusionment can in turn lead to diminished trust in the process and disengagement from future regulatory matters, exactly the opposite of what OIRA's recommendations intend.

So, what do we recommend OIRA do going forward in this public engagement process? There is a lot to build on in the recommendations currently out for comment. Take, for example, OIRA's recommendation to disseminate accessible materials that explain the regulatory process. These materials should clearly state what the public can expect as a result of increased engagement in the regulatory process. The materials should prominently state that the most comments on one side of an issue do not necessarily win, but rather agencies [incorporate](#) comments alongside "data, expert opinions, and facts" as they write final rules. In addition, it is important for agencies to clearly state the statutory and judicial constraints they face as they draft their publicly accessible materials and engage stakeholders throughout the regulatory process. As experts in the rulemaking process, OIRA and individual agencies must take responsibility for setting expectations about public engagement and for communicating those expectations to stakeholders who are new to the process.

This is a tough problem to solve—how to broaden engagement without letting down those communities that the Biden administration is specifically aiming to serve. But with OIRA and agency efforts to prioritize both sides of the equation (encouraging participation and emphasizing its constraints), we are confident that the process can live up to its potential.