

# New Goals, Old Tools: Broadening Public Participation in the Regulatory Process in the Biden Administration

By: Steven J. Balla and Sarah Hay | November 28, 2023

## In brief...

The Biden Administration is more targeted than predecessors in its efforts to improve public participation. But will tools focused on the "supply" side of the equation be enough to increase public engagement?

Across a variety of policies and procedures, the Biden administration has shown a willingness to break from past precedent. The administration's [proposed changes](#) on antitrust guidelines and [finalized revisions](#) to regulatory impact analysis, for example, [substantially diverge](#) from precedents set by previous administrations. New guidance from the White House Office of Information and Regulatory Affairs (OIRA) constitutes a similar break from previous instructions to agencies about public participation in the regulatory process. Comparing OIRA's current actions to the Obama administration, we find that the Biden administration is repurposing "old" tools in pursuit of "new" goals. Specifically, [OIRA is deploying tools](#) that have been in existence for decades—such as [regulations.gov](#), a website where government agencies publish rules and associated documents—as an element in its [whole-of-government strategy](#) to “advance racial equity and support for underserved communities.” Although e-rulemaking [has long been viewed](#) as way to expand participation, the Biden administration's goals explicitly connect such tools with notions of equity that have gained currency in public discourse over the past several years.

The Obama administration is a relevant benchmark for OIRA's current guidance not only because of its shared party identification, but also because it set the institutional stage for ongoing presidential efforts in the area of technology and regulatory policymaking. On his first day in office, President Obama issued a memorandum on [Transparency and Open Government](#), articulating the ambition of “creating an unprecedented level of openness in Government” with a specific focus on transparency, public participation, and collaboration. As a means of realizing this vision, the federal government has for more than a decade periodically issued Open Government National Action Plans (NAPs) detailing the sitting administration's open government goals and the tools it is utilizing to pursue those goals. In 2022, the Biden administration published the [fifth NAP](#), which was preceded by a [NAP](#) issued in 2019 by the Trump administration and three NAPs released in [2011](#), [2013](#), and [2015](#) by the Obama administration.

With the exception of the Trump administration’s document, the NAPs address public participation in the regulatory process as a component of the administrations’ larger open government strategies. The Obama administration articulated the goal to “expand public participation in the development of regulations.” To meet this goal, the administration focused on tools such as regulations.gov, specifically calling for changes making it easier for users to “find, follow, and participate in” the rulemaking process. One such change was the creation of an application programming interface (API) to facilitate accessing information on regulations.gov.

In our view, the Obama administration’s approach was largely grounded in the long-standing notion that e-rulemaking, by its very nature, is well-positioned to expand public participation in the regulatory process (in comparison to the pre-Internet period). Although the first three NAPs noted the importance of conducting outreach to hear from the public (the “demand” side), the main focus was on the government provision of documents and tools to enhance access to these documents (the “supply” side). To paraphrase from the movie *Field of Dreams*, “If we build it, they will come.”

In one respect, the Biden administration’s NAP and associated OIRA guidance break from precedent by articulating goals that—if not totally new—are more targeted than prior efforts in the area of public participation. This NAP emphasizes an effort to “broaden the voices” involved in the regulatory process and OIRA’s guidance highlights “underserved communities,” a designation that includes (among others) persons of color and persons with disabilities. The Biden administration’s goals, in other words, are a reflection of public discourse in the aftermath of the racial reckoning of the summer of 2020.

In another respect, however, the Biden administration’s effort does not break from the supply side orientation of previous attempts to expand public participation in the regulatory process. OIRA’s guidance, for example, instructs agencies to use the Unified Agenda—which has for decades documented, on a biannual basis, regulations currently under development—to highlight opportunities for public participation. Although the guidance demonstrates an appreciation of the obstacles to participation (such as a lack of awareness and time), the overarching approach remains identifying ways in which existing tools can be repurposed in the service of the Biden administration’s equity goals.

As we see it, this “old tools, new goals” approach is likely to take the Biden administration only so far in broadening public participation in the regulatory process. The Biden administration’s emphasis on racial equity and underserved communities is a sharp break from the Obama administration, which focused on expanding participation in a more general sense. Combined with revisions to the benefit-cost analysis agencies conduct under the Office of Management and Budget’s Circular A-4 (revisions that place [newfound emphasis](#) on equity), the Biden administration clearly aspires to leave a legacy with regard to the manner in which the concerns of people of color, people with disabilities, and other underserved communities are addressed in the regulatory process.

Nevertheless, the Biden administration’s reliance on longstanding tools such as regulations.gov and the Unified Agenda will serve, in our estimation, as a limiting factor on the achievement of its ambitious equity goals. Although such tools have facilitated the [submission of large numbers of comments](#) from broad sets of participants in the context of a relatively small number of highly controversial and salient

rules, the vast majority of proposed agency actions do not generate widespread public involvement. This pattern is unlikely to change with the repurposing of existing tools on behalf of racial equity and underserved communities and without more dramatic changes that actively address underlying issues on the demand side of the regulatory process.