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Public Interest Comment¹ on the Office of Management and Budget’s Request for Information on Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government

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Introduction

The Office of Management and Budget (OMB) should be commended for its initiative to seek public comments on the issues presented in the Equity RFI. This comment offers two specific suggestions in response to issues that OMB sought comment on: Area 2 (Barrier and Burden Reduction) and Area 5 (Stakeholder and Community Engagement).³

Area 2 focuses on “[a]pproaches and methods for assessing and remedying barriers, burden, and inequities in public service delivery and access.” Updating OMB’s guidance or regulations implementing the Paperwork Reduction Act (PRA) is a concrete step that OMB could take to

¹ This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center’s policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

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³ Office of Management & Budget, Request for Information, Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government, 86 Fed. Reg. 24029 (May 5, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-05-05/pdf/2021-09109.pdf>.

improve agency and public consideration of the way government paperwork burdens serve as barriers to the public.

Area 5 calls for “[a]pproaches and methods for accessible and meaningful agency engagement with underserved communities.” Considering different forms of public engagement across the entire regulatory development timeline, and not just during the Administrative Procedure Act public comment period, could deliver equity and engagement improvements in both the process itself and resulting regulatory outcomes.

Background

On his first day in office, President Biden signed Executive Order 13,985, entitled “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.”⁴ This order called for cross-government attention to equity as a policy goal and set deadlines for various actions to be taken by the agencies and various White House offices, including the Domestic Policy Council and the Office of Management and Budget.⁵

This was one of several executive actions taken on January 20, 2021 to orient federal policymaking towards ensuring more equitable outcomes. Another, related action was the presidential memorandum on Modernizing Regulatory Review.⁶ Among other points, that memorandum directed the Office of Information and Regulatory Affairs (OIRA) to formulate recommendations that promote equity and other factors during review of draft agency regulations. While these two actions do not expressly refer to each other, the linkage is clear enough to warrant joint consideration.

On May 5, 2021, OMB published a request for information (RFI) entitled “Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through

⁴ Exec. Order No. 13,985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan. 20, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01753.pdf>.

⁵ The order also contained some definitions. Equity was defined as “the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment.” The order also defined “underserved communities” as “populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life,” and including the following examples: “Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.”

⁶ Presidential Memorandum, Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 20, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-26/pdf/2021-01866.pdf>.

Government.”⁷ This RFI called for information across five subject matter areas. This comment provides input on two of them, as noted below.

Area 2: Barrier and Burden Reduction

Approaches and methods for assessing and remedying barriers, burden, and inequities in public service delivery and access.

The Paperwork Reduction Act is an incredibly powerful, and mostly underappreciated, tool to identify and reduce administrative burdens imposed by the federal government on the public. The Act applies to “collections of information” by the federal government, a term of art that includes both physical or electronic paperwork that is sent by the public to the government, as well as recordkeeping and disclosures of information from one member of the public to another.

When agencies propose to collect information, they must justify their choices and obtain OMB approval. As part of that justification, the agency provides an estimate of the number of hours that the collection will take. OMB’s regulations implementing the PRA are explicit about what the agencies should include in these estimates:

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency, including:

- (i) Reviewing instructions;
- (ii) Developing, acquiring, installing, and utilizing technology and systems for the purpose of collecting, validating, and verifying information;
- (iii) Developing, acquiring, installing, and utilizing technology and systems for the purpose of processing and maintaining information;
- (iv) Developing, acquiring, installing, and utilizing technology and systems for the purpose of disclosing and providing information;
- (v) Adjusting the existing ways to comply with any previously applicable instructions and requirements;
- (vi) Training personnel to be able to respond to a collection of information;

⁷ Office of Management and Budget, Request for Information, Methods and Leading Practices for Advancing Equity and Support for Underserved Communities Through Government, 86 Fed. Reg. 24,029 (May 5, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-05-05/pdf/2021-09109.pdf>.

- (vii) Searching data sources;
- (viii) Completing and reviewing the collection of information; and
- (ix) Transmitting, or otherwise disclosing the information.⁸

These regulations, which offer a comprehensive method to measure task-level compliance burdens, do not include factors that Pamela Herd and Don Moynihan describe as *psychological costs* in their path-breaking book [Administrative Burden](#). This could include stigma, frustration, or other stressors associated with the collection that, among other things, discourage the public from signing up for benefits to which they are entitled. Along these lines, the RFI seeks recommendations on how “agencies [could] incorporate considerations of the psychological costs of qualifying or applying for Federal benefits programs into their assessments of equitable service delivery.”

At least one aspect of psychological cost is captured in a qualitative way, outside of the burden hours estimate. In OMB’s [instructions to agencies](#) for the preparation of an information collection request, it includes the following direction:

Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.

Agencies respond to this prompt in narrative discussions in their supporting materials that are put out for public comments and submitted to OMB for approval. To better capture the range of burdens that information collections place on the public, OMB could update its guidance or regulations to account for psychological costs associated with federal information collections. This could be done in a qualitative manner, modeled after the prompt on sensitive questions noted above.

Because OMB’s approvals of information collections are only valid for up to three years, once OMB makes this change, every information collection could be reviewed under this new standard

⁸ 5 C.F.R. § 1320.3(b)(1). OMB regulations also include an exemption for “usual and customary” activities, to be excluded from burden estimates: “The time, effort, and financial resources necessary to comply with a collection of information that would be incurred by persons in the normal course of their activities (e.g., in compiling and maintaining business records) will be excluded from the “burden” if the agency demonstrates that the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary.” 5 C.F.R. § 1320.3(b)(3).

over the course of three years. If prioritized by OMB and the agencies, this could yield transformative results in a very short period of time.

Recommendation 1: OMB should update its guidance or regulations on the definition of “burden” to increase attention on the psychological and other costs that information collections place on individuals.

Area 5: Stakeholder and Community Engagement

Approaches and methods for accessible and meaningful agency engagement with underserved communities.

Here, “OMB seeks specific approaches to stakeholder and community engagement with underserved communities that others have successfully used and that Federal agencies could adapt or apply.”

It is clear that one-time engagements do not necessarily add up to equity in governmental decision-making. In rulemaking, which is my area of expertise, the public has multiple opportunities to inform governmental decisions, but this does not necessarily mean that all of the relevant perspectives are expressed, or that they are expressed at the time most likely to influence decisions.

Rulemaking proposals, which are often the culmination of a lengthy policy development process, can be very technical and hard to understand even for experts who follow them closely. While some individual members of the public do comment on proposed rules, it’s probably impractical to expect that most people will read proposals on Regulations.gov and file comments. Also, some amount of highly technical information will probably always be a part of rulemaking, because it often involves close questions of science, medicine, economics, law, and much more. That does not mean, however, that more equitable public engagement on rulemaking—and achieving more equitable outcomes through rulemaking—is impossible.

Instead, you might consider that there are various points of engagement on a regulatory development timeline. On one end you might have informal agenda-setting conversations between policy makers and members of the public, and on the other end you might have the formal public comment period required by the Administrative Procedure Act. Thinking of the regulatory development process as a [timeline with multiple points and forms of public engagement](#) could help identify gaps in whose perspectives are considered, how or whether they are invited, and when.

It may be, for example, that different forms of front-end engagement on agenda-setting and priorities—beyond the standard public meetings or additional written comment periods, and before the technical details of the rule are drafted and proposed—could offer significant potential for greater equity by informing which rules get written in the first place. If so, taking a close look at how input is invited, from whom, when, and how, at these early stages could reveal promising

avenues to engage those who have previously been excluded. It might also broaden the sense of what “counts” as public engagement on regulatory matters. While the notice and comment procedures of the Administrative Procedure Act are exceptionally powerful and important, it shouldn’t be the case—and already is not the case—that formal comments are all that matters. Inviting more people to participate in that process, in ways that do not require them to have the resources and savviness to file a formal comment, could be a boon for public engagement—and therefore public trust—in our rulemaking system.

Recommendation 2: Notwithstanding the importance of public participation in the formal comment period on the proposed rule, OMB should encourage agencies to consider how the entire regulatory development timeline can be used to engage different groups at different stages and in different forms.

Conclusion

The scope of OMB’s Equity RFI is inspiringly broad. While there is much more to say on the topic of equitable policymaking, this comment has offered two specific, actionable changes that could lead to meaningful change.

Summary of Recommendations

Issue	Recommendation	
Area 2: Barrier and Burden Reduction	1.	OMB should update its guidance or regulations on the definition of “burden” to increase attention on the psychological and other costs that information collections place on individuals.
Area 5: Stakeholder and Community Engagement	2.	Notwithstanding the importance of public participation in the formal comment period on the proposed rule, OMB should encourage agencies to consider how the entire regulatory development process can be used to engage different groups at different stages and in different forms.