

March 10, 2023

Administrator Revesz
Office of Information and Regulatory Affairs
1600 Pennsylvania Ave, NW
Washington, DC 20500

Submitted through: publicparticipation@omb.eop.gov

Comments to the Office of Information and Regulatory Affairs on “Broadening Public Engagement in the Federal Regulatory Process”

Dear Administrator Revesz,

The Coalition for Sensible Safeguards (CSS), an alliance of over 150 labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, welcomes the opportunity to provide feedback on the recent notice from the White House Office of Information and Regulatory Affairs (OIRA) regarding “Broadening Public Engagement in the Federal Regulatory Process.”¹

We commend OIRA for recognizing the valuable role that the regulatory system plays in our society. As the notice observes, “Federal regulations make a difference in people’s lives every day—from improving access to safe, effective, and affordable hearing aids to ensuring people are safe at work.” As the administration works to promote greater public engagement, it is crucial that it continue articulating a positive vision of the regulatory system in this fashion.

Similarly, we commend OIRA for including in the notice an explanation of why public participation in the regulatory system is important. At the same time, championing the various benefits of public participation will further encourage members of the public to take fuller advantage of the regulatory system’s participatory opportunities.

Feedback on Recommendations Included in the Notice

We are generally supportive of the recommendations included in the notice (with one exception detailed below), and we agree that they would effectively broaden public engagement in the regulatory process.

Barriers to Public Engagement That are Not Addressed by the Recommendation in the Notice

As the notice recognizes, many of the biggest barriers that members of the public face generally arise from two overarching factors: (1) ordinary members of the public are not like professional advocates or lobbyists and cannot be reasonably expected to act as if they were, and (2) the

¹ Off. Info. & Reg. Affairs, Off. Mgmt & Budget, Exec. Off. President, *Broadening Public Engagement in the Federal Regulatory Process*, <https://www.whitehouse.gov/omb/information-regulatory-affairs/broadening-public-engagement-in-the-federal-regulatory-process/> (last visited Mar. 6, 2023).

intrinsically complex and technical nature of most regulations. Specific examples of how these barriers can manifest themselves is scheduling hearings during standard work hours, which are inconvenient for many people, and especially members of marginalized communities; hosting hearings at sites that are inaccessible to mass transit, or failing to offer a “remote” option for participation in hearings; neglecting outreach to communities, particularly rural ones, which lack reliable high speed internet; and failing to provide translation services for people who don’t speak English as a first language. Accordingly, the recommendations included in the notice are designed to address these types of barriers to public engagement and would effectively do so.

We urge OIRA to consider that effective public participation is exceedingly resource intensive and that cost is an obstacle to public engagement. Public participation opportunities are a good thing, obviously. But taking advantage of them can be costly. In the worst case, the public can become spread too thin to meaningfully participate in all of them, which can lead to industry dominance of those opportunities. As OIRA works on its recommendations, we urge it to be mindful of this challenge and the unintended consequences it can produce. In other words, OIRA’s recommendations should pay careful attention to the *quality* of participatory as much as the *quantity*.

In addition, agencies should consider ways to avoid unnecessary repetition of participation. For instance, on matters where there is already a long-standing public record of input from marginalized communities, agencies should consider ways to begin with what has already been shared instead of putting the onus on under-resourced groups to have to continually repeat their input to be heard.

Other Recommendations that OIRA Should Consider for Promoting Greater Public Engagement in the Regulatory Process

As OIRA works towards completing its final set of recommendations, we urge it to embrace the following principles:

- *Identify the unique strengths that the public has to offer and design recommendations so that they leverage those strengths.* For those looking to promote public participation in the regulatory process, the general strategy has been, in effect, to turn the public into something resembling professional advocates or lobbyists. We think a more useful approach is to consider how agencies can integrate the public *as they are* into the rulemaking process as best as possible.

One general approach is to design participatory processes to effectively capture the unique expertise the public holds – namely, that which comes from their situated knowledge and lived experience. As political philosopher John Dewey aptly pointed out, “The man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied.”² It is thus essential that federal agencies take the necessary steps to obtain this kind of feedback so that it could be incorporated into their decision-making.

² JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY 224 (Edited by Melvin L. Rogers, 2016).

A second general approach is to design participatory processes so that they resemble or benefit from activities that the public will ordinarily be carrying out anyway. For instance, creatively designed “community science” programs can take advantage of this approach. Similarly, the public can be enlisted in compliance monitoring programs that take advantage of their existing “on the ground” presence.

- *Consider how to institutionalize the reforms that emerge from this initiative so that they become fully integrated into the standard operating procedures at agencies.* While we support the many recommendations included in the notice, we are concerned that they may not have much on-the-ground impact or long-term durability if they are not successfully integrated into the standard operating procedures at agencies. Thus, we urge OIRA to consider mechanisms for institutionalizing the reforms that emerge from this initiative.

OIRA could direct agencies to create a tailored Regulatory Participation Plan for each rulemaking that is based on a standardized framework that OIRA creates. The goal of the Plan should be to ensure that agencies are getting input from the right members of the public at the right stages of the regulatory development process. Moreover, OIRA could direct agencies to create a Public Participation Statement, which for each rulemaking would document what public participation mechanisms were employed, why they were selected, and what impact public participation had on the rule’s substance. Finally, OIRA could consider establishing something like an Interagency Council on Public Participation, which would provide agencies with a forum to share best practices and lessons learned from their experimentation with different public participation mechanisms.

- *Look for ways to combine this initiative with other regulatory reform initiatives that OIRA is currently undertaking, including Modernizing Regulatory Review³.* Historically, the institutions of OIRA’s centralized regulatory review and cost-benefit analysis have operated in ways that tended to exclude members of the public.⁴ As it works to carry out this initiative, OIRA should give careful attention to ways that the regulatory review process and cost-benefit analysis can each be reformed to actively promote, rather than discourage, public engagement in the regulatory system.

Suggestion for Removal of Recommendation that will not Support Public Participation

CSS overwhelmingly supports this notice and its recommendations. The one notable exception is the recommendation that agencies “proactively disseminate relevant materials, especially through... industry intermediaries (such as trade associations).”

³ Memorandum from President Joseph H. Biden, Jr., to the Heads of Executive Departments and Agencies on Modernizing Regulatory Review (Jan. 20, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review/>.

⁴ RENA STEINZOR ET AL., BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT (Ctr. Progressive Reform White Paper 1111, 2011), available at https://grist.org/wp-content/uploads/2011/11/oira_meetings_1111.pdf.

Several decades of experience with the Small Business Administration's (SBA) Office of Advocacy has made clear that trade associations are not a reliable intermediary for reaching small businesses.⁵ That is because trade associations often work to advance the interests of their large firm members, which are often directly at odds with the unique interests of the small firms within the relevant industry. For instance, trade associations working with the SBA Office of Advocacy often take positions on regulations that benefit large firms, but which are inconsistent with the interests of affected small businesses.

Consequently, this recommendation would be unhelpful, and we urge OIRA to reject it.

Conclusion

We appreciate your attention to this input on the notice and its recommendations for promoting greater public engagement in the regulatory system. We look forward to continuing to work with you on this critical issue.

Sincerely,

Appalachian Trail Conservancy

Center for Progressive Reform

Coalition for Sensible Safeguards

Consumer Federation of America

Earthjustice

Government Information Watch

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

League of Conservation Voters

National Employment Law Project

Natural Resources Defense Council

⁵ See SIDNEY SHAPIRO & JAMES GOODWIN, DISTORTING THE INTERESTS OF SMALL BUSINESS: HOW THE SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY'S POLITICIZATION OF SMALL BUSINESS CONCERNS UNDERMINES PUBLIC HEALTH AND SAFETY (Ctr. Progressive Reform White Paper 1302, 2013), available at https://cpr-assets.s3.amazonaws.com/documents/SBA_Office_of_Advocacy_1302.pdf; Rena Steinzor et al., THE SMALL BUSINESS CHARADE: THE CHEMICAL INDUSTRY'S STEALTH CAMPAIGN AGAINST PUBLIC HEALTH (Ctr. Progressive Reform Issue Alert 1501, 2015), available at https://cpr-assets.s3.amazonaws.com/documents/Small_Biz_Charade_Silica_1501.pdf.

Public Citizen

Sciencecorps

Union of Concerned Scientists

United Steelworkers (USW)

The Wilderness Society