

March 10, 2023

VIA ELECTRONIC MAIL

Mr. Richard Revesz
Administrator
Office of Information and Regulatory Affairs,
Office of Management and Budget
725 17th St. NW
Washington, DC 20503

RE: Comments on Broadening Public Engagement in the Federal Regulatory Process

Dear Administrator Revesz:

On behalf of the National Association of Home Builders of the United States (NAHB), I am pleased to submit these comments in response to the Office of Information and Regulatory Affairs' (OIRA) request for feedback on broadening public engagement in the federal regulatory process. NAHB welcomes the opportunity to provide feedback to the agency and urges OIRA to adopt many of the recommendations listed on the White House website,¹ some of which are discussed below. We also offer a number of additional recommendations for your consideration.

NAHB is a Washington, D.C.-based trade association that represents more than 140,000 members who are involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. NAHB's builder members construct about 80 percent of the new housing units built each year, making housing a large engine of economic growth in the country.

Residential construction, however, is also one of the most heavily regulated industries in the country. For example, residential construction is one of the few industries in which a government-issued permit is typically required for each unit of production. The rules do not stop there, as a constricting web of regulatory requirements affects every aspect of the land development and home building process, adding substantially to the cost of construction and preventing many families from becoming homeowners. The breadth of these regulations is largely invisible to the home buyer, the public, and even the regulators themselves, yet nevertheless has a profound impact on housing affordability and homeownership.

These regulations stem from legislation including the Clean Water Act, the National Environmental Policy Act, the Endangered Species Act, the Energy Policy Act, the Occupational Safety and Health Act, the Fair Housing Act, and the Safe Drinking Water Act. Regulations imposed by state and local governments are even more numerous, covering zoning, earth moving, sediment and erosion control,

¹ <https://www.whitehouse.gov/omb/information-regulatory-affairs/broadening-public-engagement-in-the-federal-regulatory-process/> (Accessed March 6, 2023).

land dedication, gas service, impact fees, tree preservation, long-term facility maintenance, public service impacts, transportation, setback requirements and burning restrictions. Because many regulatory agencies are not familiar with the home building process, including all aspects from financing to land acquisition, grading to infrastructure installation, foundation to framing, and roofing to landscaping, many regulations have been improperly developed and ill-applied, offering little assurance that the regulations are achieving their intended results, yet burdening our members, nonetheless. Therefore, continuous improvement to the administration's public engagement processes is vital.

I. Background

In December 2022, the Biden-Harris Administration issued the Fifth U.S. Open Government National Action Plan², which “reflects the United States’ longstanding commitment to open government at home and abroad, and includes over 30 commitments from across the Federal Government to: ensure, consistent with law, that the public has access to Federal Government data, research, and information; empower citizens to participate in the work of Federal Government; transform the way Federal agencies interact with the public; fight corruption and support the integrity of Federal Government programs; and ensure that the Federal Government upholds the rule of law fairly for all people.” One component of the Action Plan is to improve public engagement related to agency regulatory actions. To accomplish this goal, President Biden called on the Office of Management and Budget to lead an effort to modernize the regulatory review process, including by exploring opportunities to broaden public engagement. Today's request for feedback is one step in that process.

II. OIRA'S Request

NAHB supports many of the recommendations aimed at helping the public better understand the regulatory process and improving the agencies' proactive engagement of the regulated community early and throughout the rulemaking processes. As noted in the public listening session held by OIRA on March 7, 2023 (hereafter referred to as the “listening session”) by representatives from the U.S. Department of Labor (DOL), Food and Drug Administration, and Environmental Protection Agency (EPA), the difficulty for regulated entities to navigate resources such as the biannual regulatory agenda and the limitations many agencies place on their information gathering efforts hinder a key step in the rulemaking process – to engage the widest swath of impacted entities. EPA Director of the Office of Environmental Justice, Matthew Tejada, even noted the importance of civil servants getting out into the community to understand the impacts on individuals and communities. We couldn't agree more.

a. Outreach Efforts must be Broadened

While most agencies emphasize and tout the importance of, and need for, public participation in the rulemaking process, the public often gets short shrift when it comes to evaluating alternatives, estimating impacts or directing outcomes. Recognizing these challenges, efforts have been made throughout the

² <https://open.usa.gov/national-action-plan/5/> (Accessed March 9, 2023).

years to revise and improve the public process.³ Clearly, by virtue of today's effort and considering NAHB's experiences, we are not there yet.

Most citizens are not aware of the existence of the *Federal Register*, much less review it on a daily basis. While the Semiannual Regulatory Agenda is a useful tool, it only provides a snapshot of agency activity. Likewise, increased internet access and sophisticated search engines may provide wider access, but that requires vigilance and access is oftentimes sought after a regulation has been finalized. Many are signed up for list serves, newsletters, regulatory updates and other news feeds, but those are only as good as the people who are updating the information and are often seen as clogging inboxes. To date, agencies have been responsible for their own outreach and ensuring that the public has fair and meaningful opportunities to participate in the regulatory process. The public can only participate when it knows what is happening and is provided the data and information upon which decisions might be made. Because the agencies have yet to demonstrate an ability to consistently engage the public and affected stakeholders before decisions are made, OIRA is urged to step in and, at a minimum, develop baseline strategies that must be followed, including broader based approaches that include a number of steps and outreach mechanisms to reach a broader spectrum of the public. Likewise, NAHB believes that regular communication with trade groups, interest groups, governmental entities and others can provide a vast network through which the agencies can reach interested and affected stakeholders.

b. Input Opportunities must be Meaningful

While we appreciate the agencies' information gathering efforts, the opportunity to capture the most diverse audience is oftentimes limited by the short amount of time departments and agencies dedicate to listening sessions or discussion panels with regulated entities. In many cases these types of panels and sessions don't even happen, because depending on the agency and stage of the rulemaking process, they are at the sole discretion of the agencies. For example, under the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, only the Occupational Safety and Health Administration (OSHA), Consumer Financial Protection Bureau and EPA must conduct Small Business Advocacy Review panels prior to proposing rules that would have a significant economic impact on a substantial number of small entities.⁴ However, no other agencies, such as DOL's Wage and Hour Division (WHD), which arguably have as much of an impact on small businesses as significant rulemakings coming from the agencies mentioned above, can and do forego this important step. As a result, the opportunities to engage employers and workers on regulatory actions that have a considerable impact are inconsistent and handled on a case-by-case basis.

Of note, WHD conducted two listening sessions in 2022 related to its policies determining independent contractor status under the Fair Labor Standards Act. While NAHB and its members gladly participated in the session tailored for employers, the agency would have been better served if it had expanded this series to focus on the specific industries that would be significantly affected by changes to the current policies, such as journalism, finance and construction. Instead, the sessions that were held were dominated by self-employed and independent journalists. While their input was vital to help inform the agency of their concerns as regulated entities, certain industries were not well represented. Moreover, there was not enough time for those participants who signed up to provide meaningful feedback. Three minutes per participant during one available session does a disservice to the very purpose for holding

³ See, for example, Executive Order 12866 (October 4, 1993), Executive Order 13563 (January 21, 2011), Office of Information and Regulatory Affairs, *Memorandum For The Heads Of Executive Departments And Agencies, And Of Independent Regulatory Agencies RE: E.O. 13563*, February 2, 2011.

⁴ <https://advocacy.sba.gov/resources/reference-library/sbrefa/> (Accessed March 7, 2023).

listening sessions in the first place. At the very least, the agency should have taken the same approach it did when it held listening sessions related to its policies regarding the “white-collar” overtime exemptions, with separate employer and employee sessions dedicated to multiple regions across the country.⁵ To remedy this, OIRA should play an advisory role in assessing whether a rulemaking with significant economic impact should undergo broader opportunities for feedback and the extent of these feedback sessions (*i.e.*, regional, industry-specific, *etc.*) and recommending the best course of action for these agencies. Equally important, those outreach decisions should be made prior to the development of the rules.

c. OIRA/Agencies must set Aside Sufficient Time to Engage

Another barrier that prevents the regulated community from meaningfully addressing concerns involves the limited time allotted during OIRA meetings when affected stakeholders request a meeting pursuant to Executive Order 12866 on Regulatory Planning and Review⁶ (“12866 meetings”) to discuss pending regulations, whether at the advanced notice of proposed rulemaking, proposed rulemaking, or final rulemaking stages. NAHB has participated in numerous 12866 meetings with OIRA and agency staff over the years and a persistent concern remains unaddressed.

For instance, NAHB and its members may request a meeting to discuss a proposed regulation, but the meeting is strictly limited to 30 minutes. In practical terms, once all introductions are finished and all participants are identified for the record, the parties requesting the meeting in effect have less than 30 minutes to discuss their thoughts and provide feedback. NAHB routinely engages with OIRA through 12866 meetings either on our own or as part of larger industry coalitions if we share common goals and interests. Yet the limited time regularly poses an issue. If a proposed rule is going to have a significant impact, it makes little sense for representatives to only be able to tell half (or less) of the story. And, as above, because most regulators are not familiar with the whole of the home building process, much of that scant 30 minutes is oftentimes used to place issues in context and/or educate the attendees as to why doing something poses a problem or hardship. A short meeting in which little is accomplished is not an appropriate or efficient use of the public’s nor OIRA’s resources. NAHB, therefore, recommends OIRA offer 12866 meetings requested by larger groups and those regarding more controversial or complex topics additional time (at least one hour) to make better use of the resources dedicated to these meetings and to ensure the public is adequately heard.

Additionally, it is important to keep in mind that these meetings are conducted in a vacuum since the regulated community possesses no knowledge of actual proposed or final regulatory texts. Often, it feels as though this public participation phase in a rulemaking has no merit since one never knows if their concerns have any impact on OIRA, or frankly are even heard. Involving stakeholders in the regulatory process should not be perceived by the public as a routine action, particularly when the stakes of a rulemaking can be high and severe economic consequences can result from new regulations. Therefore, NAHB urges OIRA to require that agencies respond to the comments raised during the listening sessions in the preambles of final rules, as is typical for written comments.

⁵ U.S. Small Business Administration Office of Advocacy, *DOL Announces Additional Listening Sessions On Overtime Regulations*, April 13, 2022, <https://advocacy.sba.gov/2022/04/13/dol-announces-additional-listening-sessions-on-overtime-regulations/> (Accessed March 7, 2023).

⁶ <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf> (Accessed March 8, 2023).

d. Agencies must Recognize the Role of Trade Associations Vary

Trade associations and other organizations can play a key role in the regulatory process. NAHB was dismayed, however, when one participant claimed during the March 7 listening session that trade associations typically follow the interest of their “larger” members. Along with this deeply subjective view, this participant’s generalizations do not consider the nuances of the various industries represented by these associations. The residential construction industry (*i.e.*, home building) in the United States is predominantly comprised of small businesses. In fact, residential construction remains an industry of independent entrepreneurs, with close to 80% of homebuilders and specialty trade contractor firms being self-employed independent contractors. Among firms with paid employees, 63% of homebuilders and two-thirds of specialty trade contractors generate less than \$1 million in total business receipts.⁷ Indeed, NAHB’s own membership reflects the general makeup of the industry as well. According to a 2020 NAHB member census, more than 91% of builders reported a dollar volume of less than \$15 million (which is well below the \$39.5 million threshold for the Small Business Administration’s size standard classification for all residential construction⁸), with the median annual revenue of \$2.6 million. In 2020, NAHB’s builder members had an average of 15.6 employees on payroll, with a median of five paid employees.⁹ Moreover, the majority of NAHB’s members build less than 15 houses per year. As a result, NAHB greatly seeks advice and depends on guidance from its small business members. Equally important, NAHB advocates on their behalf.

That being said, there is still concern that OIRA and other agencies view a big trade association in the same way the participant discussed and, as a result, tend to discount the regulatory impacts that are continually piled on to these small businesses. NAHB research shows the regulatory cost imposed on land developers and single-family home builders begins accumulating at the zoning approval phase and lasts through the lifetime of a project, resulting in roughly 24 percent of the final price of a home being attributed to regulations from all levels of government.¹⁰ Likewise, the costs for land developers of single-family home lots attribute nearly 42 percent of costs to regulations, while regulations account for more than 40 percent of multifamily development costs.¹¹

⁷ Natalia Siniavskaia, Ph.D., *Home Building Census*, National Association of Home Builders, July 1, 2021, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-home-building-census-july-2021.pdf> (Accessed March 7, 2023).

⁸ U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, Aug. 19, 2019, [https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards Effective%20Aug%202019%2C%202019 Rev.pdf](https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards%20Effective%20Aug%202019%2C%202019%20Rev.pdf) (Accessed March 7, 2023).

⁹ Paul Emrath, Ph.D., *Who Are NAHB’s Builder Members?*, National Association of Home Builders, April 5, 2021, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-who-are-nahb-builder-members-april-2021.pdf> (Accessed March 7, 2023).

¹⁰ Paul Emrath, Ph. D., *Government Regulation in the Price of a New Home: 2021*, National Association of Home Builders, May 5, 2021, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-government-regulation-in-the-price-of-a-new-home-may-2021.pdf> (Accessed March 8, 2023).

¹¹ Paul Emrath, Ph.D., and Caitlin Sugrue Walter, Ph.D., *Regulation: 40.6 Percent of the Cost of Multifamily Development*, National Association of Home Builders and National Multifamily Housing Council, June 9, 2022, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special->

The agencies must understand that these nuances vary from industry-to-industry and association-to-association, and despite the supposed stigma surrounding trade associations, NAHB serves as the voice for these small businesses who participate in every facet of residential construction, and the concerns addressed during our meetings with the administration reflect the concerns of the general member companies, regardless of size. It is these reasons why small businesses have decided to join NAHB; not only do we provide the professional expertise to advocate on these issues on their behalf, but the association also provides the guidance and resources that strip away the complexities of these regulations as they are issued. At the same time, NAHB strongly supports direct engagement between the agency and these small entities, and we believe trade associations serve the purpose of connecting OIRA with these entities for participation opportunities and, at the very least, providing that feedback on behalf of these businesses and individuals.

e. The Administration must Return to Guidance that Promotes Regulatory Transparency

Another barrier to the public's meaningful participation during the federal regulatory process is the lack of transparency, access, and public outreach, which are hallmarks of the Administrative Procedure Act and the federal regulatory process. Federal agencies issue hundreds of regulatory guidance documents each year covering a vast swath of regulations. Examples include compliance manuals, certification standards, interpretative compliance memoranda, statements of applicability, question and answer documents interpreting regulations, letters of interpretation, and best practice manuals. While these regulatory guidance documents can be useful in interpreting laws, highlighting how a federal mandate might be enforced, and are frequently described as not having a binding legal effect, as a practical matter, they often do because they have all the constraining power of the law.

Further, since guidance documents are internal documents to the agency before they are shared publicly, their interpretation is not always clear. The public, especially disadvantaged communities, can never review regulatory guidance documents until they are in force and effect. The first step in broadening the public's meaningful engagement during the federal regulatory process is to afford them access to review and engage the agency before they are published and go into effect. This is particularly true for disadvantaged communities because they often lack the resources to hire outside experts, such as lobbyists, attorneys, and consultants. That is why NAHB supported the rationale behind OIRA's memorandum entitled "*Guidance Implementing Executive Order 13891*",¹² which was issued in response to E.O. 13981 entitled "*Promoting the Rule of Law Through Improved Agency Guidance Documents*."¹³

OIRA's helpful regulatory guidance memorandum had five key elements. First, OIRA's guidance establishes definitions for the terms "guidance document" and "significant guidance document." Second, it directed all federal agencies to establish and maintain a centralized database where the public can locate all active regulatory guidance documents. Third, it established general requirements that all federal guidance documents must contain to ensure they are understandable and consistent in their approach. Fourth, the E.O. stated most new "significant guidance documents" must be published in the Federal Register for public comment before becoming effective. And finally, it directed federal agencies to

[studies/2022/special-study-regulation-40-percent-of-the-cost-of-multifamily-development-june-2022.pdf](https://www.regulationwriters.com/downloads/M-20-02-GuidanceEO13891-Memo-103119.pdf)
(Accessed March 8, 2023).

¹² Office Information and Regulatory Affairs. (2019) Guidance Implementing Executive Order 13891, Titled "Promoting the Rule of Law Through Improved Agency Guidance Documents" (Accessed March 10, 2023) from <https://www.regulationwriters.com/downloads/M-20-02-GuidanceEO13891-Memo-103119.pdf>

¹³ 85 Fed. Reg. at 31,104.

establish a process for the public to petition an agency to modify or withdraw any existing regulatory guidance document that was incorrect or outdated.

Unfortunately, President Biden revoked the underlying E.O. 13891 when President Biden issued E.O. 13992, *“Revocation of Certain Executive Orders Concerning Federal Regulation.”*¹⁴ Since then, in accordance with E.O. 13992, federal agencies have rescinded their regulations implementing OIRA’s good guidance memorandum. As part of OIRA’s effort to broaden the public’s engagement during the federal regulatory process, NAHB urges OIRA to consider re-establishing its good guidance memorandum to ensure the public, in particular disadvantaged communities, have access to all relevant federal regulatory guidance documents when participating in the federal rulemaking process.

f. Improving Timelines within the Semiannual Regulatory Agenda is Essential

Finally, focusing on the agencies issuing these rulemakings, NAHB urges OIRA to develop and impose new accountability measures to improve the accuracy of the timelines included within their submissions to the Regulatory Agenda. NAHB and other business organizations heavily rely on the Regulatory Agenda as a guidepost for the administration’s priority actions, giving a general idea of what changes will be made to certain policies, why those changes will take place, and when they will take place. The agencies often do not meet their own estimated timelines. NAHB recommends OIRA allow the agencies to post updated timelines in the Regulatory Agenda (along with a notation of when the update was made) so that the regulated community has a better idea of when a rulemaking is expected to come out. Additionally, despite being labeled as the “Spring” and “Fall” Regulatory agendas, they are issued at inconsistent times, arriving in the middle of the season, at the end of the spring and fall, or even into summer and winter (and sometimes the following year), so NAHB also recommends a stricter adherence to the issuance dates of these agendas to allow for consistency and proper planning among the regulated community.

III. Conclusion

NAHB urges OIRA to consider the suggestions discussed above as it aims to improve the regulatory engagement process. Additionally, NAHB welcomes the opportunity to further engage with the agency in coordinating efforts to strengthen its outreach to regulated entities.

Please contact me at (202) 266-8265 or via email at bmannon@nahb.org if you have any questions or require any additional information.

Sincerely,



Brad Mannion
Director, Labor, Safety & Health
National Association of Home
Builders of the United States

¹⁴ 86 Fed. Reg. at 7,049.