Thank you for the opportunity to comment on the initiatives to broaden engagement in the federal regulatory process. The initiatives are exciting and are the first concrete moves forward in meaningfully improving participation in the regulatory process in decades.

My comments and suggestions are threefold. First, the nexus between analysis, specifically cost-benefit analysis, and participation holds significant potential for enhancing participation. Second, drawing on the lessons of small business panels under the Small Business Regulatory Enforcement Flexibility Act (SBREFA) can do a great deal to enhance meaningful public participation. These two fall under the category that you call, “**Proactively engage communities early and throughout the regulatory process to efficiently use government and community time and resources.”** Finally, it is important to manage expectations among the public regarding their participation on individual rulemakings. After explaining my qualifications to comment on these matters, I will turn to each of them in turn.

My Background

I worked at OIRA from 1998 to 2003. Since leaving OIRA, I have been a professor at Rutgers

University studying the regulatory process. I have written several pieces on the notice and comment rulemaking process (see <https://link.springer.com/article/10.1007/s11077-007-9051-x> and <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191327>). I have also written about the nexus between cost-benefit analysis and participation (<https://www.cambridge.org/core/journals/journal-of-benefit-cost-analysis/article/abs/can-analysis-of-policy-decisions-spur-participation/F84B28F1CB724359928D71C907DF8B4A>), and (with Professor Chris Carrigan) ways that analysis can be reformed to be more useful to the general public (<https://onlinelibrary.wiley.com/doi/abs/10.1111/rego.12120>). Finally, in a report for the Administrative Conference of the United States (ACUS), Professor Carrigan and I examined early participation in the regulatory process at five agencies (<https://www.acus.gov/sites/default/files/documents/Carrigan%20Shapiro%202021%20Developing%20Regulatory%20Alternatives%20through%20Early%20Input%20%28Final%20Report%29.pdf>).

Cost-Benefit Analysis and Public Participation

Ever since the Reagan Administration, regulatory agencies have been required to conduct regulatory impact analyses (RIAs) of their economically significant regulations. These RIAs have the potential to work counter to enhancing participation in the regulatory process. They have constantly grown in length over the four decades of their use, and the most lengthy RIAs can reach more than 1000 pages. They also can be so dense as to require extensive training in economics in order to understand them.

This is unfortunate. One of the primary potential benefits of requiring agencies to examine the costs and benefits of their actions is enhanced transparency. Those who will bear the burden of regulations and reap their benefits should be able to understand the consequences of regulatory actions, how alternative courses of action will affect them, and which provisions in a new regulation are most likely to be critical in its success or failure. Done well and done with an eye toward enhancing participation, there is no reason that regulatory analyses cannot perform these functions.

In our article advocating, “Back of the Envelope” analysis, this is precisely what Professor Carrigan and I had in mind. By doing analysis earlier in the regulatory process (before an agency has settled on preferred regulatory alternatives) and by doing a much simpler analysis than most agencies currently present to the public, regulatory impact analysis can better perform one of its most important functions: enhancing transparency of the regulatory process.

**Suggestion #1**: Add initiatives related to the requirements for regulatory impact analysis. Encourage, incentivize, or require agencies to conduct analysis earlier in the regulatory process, present such analyses to the public, and do so in ways that can be widely understood. In particular, agencies should focus on realistic alternative regulatory requirements and demonstrating to the public the tradeoffs between these alternatives.

The Lessons from SBREFA Panels.

SBREFA requires three agencies (OSHA, EPA, and CFPB) to convene panels of small business owners early in the regulatory process to secure their input on regulations that will burden such businesses. I examined one SBREFA panel as part of a larger project on different forms of policy analysis (<https://www.e-elgar.com/shop/usd/analysis-and-public-policy-9781784714758.html>). I found that the small business owners provided valuable insights that OSHA had not considered in developing the regulation in question. This type of interaction models what can happen when proposals and simple analysis are presented to interested parties early in the regulatory process.

But this only happens for one type of constituency, small businesses. As a result, the SBREFA process is regularly accused of being biased against regulation (and also for serving as a conduit for larger businesses to weigh in early on regulatory proposals). It would be great to take the positive lessons from the SBREFA panel process and apply them to enhancing the ability of those who don’t participate in rulemaking to weigh in on regulatory decisions.

While the SBREFA process is in statute, and while many agencies do meet with stakeholders both formally and informally, OMB could require agencies to convene particular groups well before issuing a proposed rule. These could be panels of labor unions for the Department of Labor, of small farmers for USDA, of non-profit organizations that serve the poor for rules on assistance programs, and for those who would be affected by pollution for environmental rules. The suggestions from these panels do not have to be adopted (see below) but having them, as with the SBREFA process, both exposes agencies to new information that might affect their policy choices and gives people the satisfaction of a direct pipeline to decision-makers.

In both the cases of a SBREFA like process for disadvantaged communities, and a simpler earlier benefit-cost analysis, OMB could reward agencies for embracing these techniques. A shorter OMB review period when agencies take these steps would be one reward that I am sure agencies would appreciate.

**Suggestion #2:** Apply the lessons of the SBREFA process to other constituencies by requiring or incentivizing agencies to convene panels of affected parties early (well before a proposed rule is issued) in the regulatory process. Give these panels regulatory alternatives to examine and solicit their feedback.

Being Realistic with the Public

Even the best constructed means of enhancing participation run the risk of unrealistically inflating the expectation of those who participate. When researching my dissertation many years ago I spoke to someone who had participated in a state rulemaking on child care licensing. She said to me, “they hold all these meetings, take all our input, and then do what they want anyway.” Some of that may be the result of agencies ignoring public input. But some of it is also from a misunderstanding of the nature of rulemaking and public participation.

Agencies are constrained by the laws that they are implementing and statutes that constrain the rulemaking process and communication with the public generally. Agencies must be up front with the public when engaging with them about these constraints. Otherwise they risk alienating people who feel they are not being listened to or agreed with.

**Suggestion #3:** OMB guidance coming out of this process should advise agencies to be honest about how participation will be used and incorporated in decision-making and any limitations on doing so.

Conclusion

As stated above, this effort by OMB is very welcome and in many ways long overdue. The notice and comment process dates to 1946 when the world and our understanding of the world was very different than it is now. I am sure you will get many useful suggestions, and if it would in any way be helpful, I am happy to discuss them given my research and experience in this space.

Stuart Shapiro

Interim Dean

Bloustein School of Planning and Public Policy

Rutgers University

stuartsh@rutgers.edu