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MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

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SUBJECT: Broadening Public Participation and Community Engagement in the
Regulatory Process

Federal regulations address a range of important issues and affect many different communities—from families with children to workers to small businesses and entrepreneurs. It is crucial for Federal agencies to craft regulatory proposals with input from affected members of the public. Public involvement in the development of regulations can lead to more effective and equitable regulations; greater trust in government and democratic accountability; and increased public understanding of the regulatory process.

Consistent with these principles, Executive Order 14094, *Modernizing Regulatory Review* (April 6, 2023), encourages Federal agencies, to the extent practicable and consistent with applicable law, to inform their regulatory actions through meaningful and equitable opportunities for public input by a range of interested or affected parties, including underserved communities.

Effective and meaningful public engagement has long been one of the foundational principles of Federal regulatory development.¹ Such engagement improves the information available to Federal agencies when making evidence-based regulatory decisions. Broadening such public participation and community engagement in the regulatory process is also consistent with this Administration's priorities on public engagement.²

¹ Public participation is a part of the regulatory framework established by the Administrative Procedure Act, which requires agencies engaged in notice-and-comment rulemaking to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation,” 5 U.S.C. § 553(c), and the Federal regulatory review framework established under Executive Order 12866, *Regulatory Planning and Review* (Sept. 30, 1993), section 6(a), which directs agencies to “provide the public with meaningful participation in the regulatory process.”

² Executive Order 14091, *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (Feb. 16, 2023), section 5, calls on Federal agencies to conduct proactive engagement with members of underserved communities to inform design of regulatory agendas and plans. Executive Order 14096, *Revitalizing Our Nation's Commitment to Environmental Justice for All* (Apr. 21, 2023), calls on Federal agencies to remove barriers to the meaningful involvement of the public in decision-making that affects or

This Memorandum provides guidance from the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) to agencies on how, during the regulatory process, to “promote equitable and meaningful participation by a range of interested or affected parties,” including members of underserved communities, as specified in Executive Order 14094, to the extent practicable and consistent with applicable law.³ This Memorandum also establishes guidance for agencies to implement Executive Order 14094’s call for proactive engagement to “inform the development of regulatory agendas and plans,” with a focus on encouraging early engagement in agency priority-setting.⁴

This Memorandum expands on the guidance issued in the Memorandum on Implementation of the Modernizing Regulatory Review Executive Order issued on April 6, 2023.⁵ It also complements guidance issued in OMB Memorandum M-22-10, *Improving Access to Public Benefits Programs Through the Paperwork Reduction Act*, by further specifying how participation and engagement can identify burdens that members of the public face in accessing public benefits and services, and identify changes that could reduce those burdens.⁶ This Memorandum is also aligned with Executive Order 14036, *Promoting Competition in the American Economy* (July 9, 2021), which calls on agencies to consider regulations’ potential effects on competition. Doing so may require proactive agency engagement with new potential market actors, smaller firms, and workers.

In developing this Memorandum, OIRA drew on extensive engagement with both regulatory agencies and the public. OIRA conducted four listening sessions and held two public comment periods from October 2022 through March 2023. The purpose of these listening sessions and comment periods was to understand how members of the public

has the potential to affect human health and the environment, including for communities with environmental justice concerns. In the Fifth U.S. Open Government National Action Plan, published in December 2022, OMB committed to developing new tools for broadening participation in the regulatory process; the plan is available at <https://open.usa.gov/national-action-plan/5/>.

³ Executive Order 14094, section 2(a). As defined in Executive Orders 13985, 14020, and 14091, the term “underserved communities” refers to those populations as well as geographic communities that have been systematically denied the opportunity to participate fully in aspects of economic, social, and civil life, and may include Black, Latino, Indigenous and Native American, Asian American, Native Hawaiian, and Pacific Islander persons and other persons of color; members of religious minorities; women and girls; LGBTQI+ persons; persons with disabilities; persons who live in rural areas; persons who live in United States Territories; persons otherwise adversely affected by persistent poverty or inequality; and individuals who belong to multiple such communities. While not mentioned explicitly in these Executive Orders, underserved communities also include individuals with limited proficiency in English, whether they use spoken language, sign language, or other methods to communicate.

⁴ Executive Order 14094, section 2(c).

⁵ OIRA Memorandum, *Implementation of Modernizing Regulatory Review Executive Order* (Apr. 6, 2023), available at <https://www.whitehouse.gov/wp-content/uploads/2023/04/ModernizingEOImplementation.pdf>.

⁶ OMB Memorandum M-22-10, *Improving Access to Public Benefits Programs Through the Paperwork Reduction Act* (Apr. 13, 2022), available at <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-10.pdf>.

currently engage in the regulatory process, identify barriers or obstacles encountered by different segments of the public, receive suggestions for how agencies can better reach members of the public and incorporate public perspectives into the regulatory process, and solicit feedback on draft recommendations.⁷ OIRA will organize a follow-up listening session in approximately twelve months from the issuance of this guidance to hear from members of the public about implementation of this guidance and opportunities for improvement. OIRA will also engage with agencies in that same time period to understand how implementation of this guidance can be improved.

This Memorandum begins by providing definitions of public participation and community engagement, and discussing how public participation and community engagement can benefit the regulatory process (section I). After this, the Memorandum discusses obstacles to greater participation and engagement that members of the public shared with OIRA in listening sessions and public comments as well as obstacles faced by agencies (sections II and III) and why intentional early planning is important for engagement (section IV). The Memorandum then reviews actions agencies should take, where practicable and appropriate, to support greater participation and engagement in the regulatory process, including by underserved communities (sections V and VI). These include:

- (1) Leveraging the release of the biannual *Unified Agenda of Federal Regulatory Actions* (“*Agenda*”) to discuss agencies’ past, ongoing, and upcoming participation and engagement with the public, including underserved communities.
- (2) Ensuring that agency policies on communication during the rulemaking process promote accessible, equitable, and meaningful participation and engagement, especially early on in setting regulatory priorities and in the early stages of rule development before a proposed regulation is issued for comment.

The Memorandum then discusses leading practices for participation and engagement that agencies can consider using (section VII). Finally, it concludes by discussing existing exemptions and flexibilities available to agencies under the Paperwork Reduction Act of 1995 (PRA)⁸ to facilitate public participation and community engagement in the regulatory process (section VIII).

⁷ OIRA held two listening sessions in fall 2022 focused on government-wide strategies for building stronger public engagement as well as a listening session focused specifically on public engagement in the regulatory process as part of the Open Government National Action Plan drafting process. In addition, OIRA invited public comments on additional written ideas throughout the fall. In February 2023, OIRA published draft recommendations based on the previous public engagement, and held a follow-up listening session in March 2023 as well as opening a second public comment period for public feedback on those recommendations. Between 300 and 400 participants joined each listening session, and OIRA received approximately 90 written comments through email and comment submissions. This document builds on, and responds to, comments received through this process. For more details, see <https://www.whitehouse.gov/omb/information-regulatory-affairs/broadening-public-engagement-in-the-federal-regulatory-process/>.

⁸ 44 U.S.C. §§ 3501–3520.

A note on implementation of this guidance: OIRA is providing this guidance to help agencies broaden public participation and community engagement across the regulatory process. Appropriate implementation, including the timing and nature of participation and engagement, will differ for each agency and regulatory program. Although many agencies are already taking steps to implement many of the practices offered in this guidance, for some agencies these practices will be new. OIRA recognizes that it will take time to both adapt and scale these practices across diverse agencies and regulatory programs and that the timing and nature of implementation will depend on a range of considerations. While OIRA is introducing these changes beginning with the *2023 Fall Agenda*, OIRA anticipates that agencies may need to apply this guidance at a smaller scale initially, and broaden its application, as practicable and appropriate, to more regulatory activities over time.

I. The importance of “public participation” and “community engagement” for the regulatory process

Public participation in government is any process that involves members of the public in government decision-making. It seeks and facilitates the involvement of those affected by, or interested in, a government decision, including individuals; state, local, Tribal, and territorial governments; non-profit organizations; educational institutions; businesses; and other entities.

Community engagement is a more specific concept within public participation that involves agency actions to build trust-based, long-term, and two-way relationships with communities, including underserved communities that have been historically left out of government decision-making.

This Memorandum refers to “participation and engagement” as shorthand for these processes. By communities, this Memorandum refers to a group of individuals living in geographic proximity to one another, or a geographically dispersed set of individuals (such as agricultural workers), where either type of group experiences common conditions.⁹

Broadening public participation and community engagement in the regulatory process can help agencies produce more responsive, effective, durable, and equitable regulations. This is particularly true when agencies engage communities through trust-based, long-term, and two-way relationships.¹⁰ Participation and engagement can help agencies to better understand problems that regulations could address and identify

⁹ On this definition, see OMB Memorandum M-23-09, *Addendum to the Interim Implementation Guidance for the Justice40 Initiative*, M-21-28, *on using the Climate and Economic Justice Screening Tool (CEJST)* (Jan. 27, 2023), available at https://www.whitehouse.gov/wp-content/uploads/2023/01/M-23-09_Signed_CEQ_CPO.pdf.

¹⁰ For an overview, see Michael Sant’Ambrogio & Glen Staszewski, Admin. Conf. of U.S., *Public Engagement with Agency Rulemaking*, (Nov. 19, 2018), available at <https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf>.

regulatory proposals that are responsive to public needs. Engagement with communities, for instance, can help agencies to identify administrative burdens that members of the public face when attempting to access public benefits and services and relevant changes to agency regulations to reduce those burdens.¹¹ Similarly, engagement can help agencies to better formulate and choose among regulatory alternatives, by helping agencies take into account the diverse economic, social, and civic contexts that regulations operate in, as well as practical impacts associated with the implementation of a particular regulation.

Greater participation and engagement can also strengthen agencies' understanding of regulations' potential benefits and costs, both quantitative and qualitative. Participation and engagement can inform decisions about how to describe benefits and costs, or which sub-groups might be most relevant to examine in distributional analyses, consistent with OMB Circular A-4.¹² Public input can also help agencies characterize regulatory impacts that are challenging to monetize or quantify. Accounts of individuals' experiences, for instance, can help agencies describe how regulations affect people's lives as well as critical values like human dignity, equity, and fairness, values that are affirmed in the Presidential Memorandum on Modernizing Regulatory Review and Executive Order 13563, *Improving Regulation and Regulatory Review* (January 18, 2011).

Apart from specific regulations, greater participation and engagement in rulemaking can help increase the extent to which people perceive the regulatory process and government as a whole as legitimate and responsive, by assuring members of diverse communities, including underserved communities, that their views matter and are considered by Federal agencies.¹³ As agencies move toward deeper forms of engagement, the two-way channels of communication that emerge can also foster more trust in government across communities as they see the government reaching out to affected communities, and addressing their needs and problems.¹⁴ Over the longer run, greater engagement can form positive feedback loops, building community capacity to engage with agencies and making that engagement more effective. As a result, greater participation and engagement in the regulatory process can strengthen democratic accountability and ensure government is responsive to all people.

II. Obstacles to greater public participation and community engagement in the regulatory process

¹¹ This kind of engagement supports agency implementation of OMB Memorandum M-22-10, *Improving Access to Public Benefits Programs Through the Paperwork Reduction Act*.

¹² OMB Circular A-4, *Regulatory Analysis* (Sept. 17, 2003), available at https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/regulatory_matters_pdf/a-4.pdf.

¹³ See, for example, E. Allan Lind & Christiane Arndt, *Perceived Fairness and Regulatory Policy: A Behavioural Science Perspective on Government-Citizen Interactions*, Org. for Econ. Dev. Regulatory Pol'y Working Paper No. 6 (Dec. 17, 2016), available at https://www.oecd-ilibrary.org/governance/perceived-fairness-and-regulatory-policy_1629d397-en.

¹⁴ See for instance "Building Trust to Reinforce Democracy." July 2022. Organization for Economic Development: https://www.oecd-ilibrary.org/governance/building-trust-to-reinforce-democracy_b407f99c-en.

Notice and comment rulemaking generally affords any interested individual or organization the opportunity to provide written input on agencies' proposed regulations. Agencies, in turn, are generally required to review these comments as they consider how best to finalize their regulatory proposals and analyses, and to respond to significant issues raised by commenters in any final rule. Agencies generally collect comments on their rules online through www.regulations.gov, theoretically making it straightforward for any individual with access to the Internet to file a comment on regulatory proposals.

Despite the availability of online commenting, individuals who contact agencies may not be representative of the population as a whole.¹⁵ Research on the regulatory process suggests that agencies are more likely to hear from larger, established, and well-resourced organizations with deep knowledge of the regulatory process before and during a comment period, and much less likely to hear from individual members of the public, especially members of underserved communities, workers, and smaller market entities, including small businesses, entrepreneurs, and new firms.¹⁶

Encouraging greater participation by and engagement of these communities—including providing opportunities for engagement prior to, but not in place of, submission of written comments on rulemaking proposals—can provide important benefits to agencies and the public as a whole. But producing this beneficial participation and engagement requires identifying and addressing obstacles that members of the public and agencies currently face.

At least four sets of barriers may impede greater regulatory participation, especially for underserved communities. First, individuals may lack awareness or knowledge of the regulatory process and opportunities for input. As OIRA heard in public comments and listening sessions, the Federal regulatory process tends to receive much less attention in civics or government courses than the legislative process in Congress, news coverage of regulatory steps often does not describe the full process of rulemaking or timely opportunities for public participation, and there are few dedicated

¹⁵ According to the 2020 American National Election Study, just five percent of American adults reported that they had contacted a Federal agency in the past 12 months, which likely overstates regulatory participation since these contacts could include non-regulatory matters. In addition, individuals with a professional degree are five times more likely to have reported contacting agencies as compared to individuals with less than a high school degree. Survey item V202036: "And what about a non-elected official in a federal government agency? Have you contacted such a person in the past twelve months?" Survey weight V200010a applied. See, https://electionstudies.org/wp-content/uploads/2021/07/anes_timeseries_2020_userguidecodebook_20210719.pdf.

¹⁶ For reviews of relevant literature, see: Michael Sant'Ambrogio and Glen Staszewski. 2018. "Public Engagement with Agency Rulemaking." Administrative Conference of the United States Final Report: <https://www.acus.gov/sites/default/files/documents/Public%20Engagement%20in%20Rulemaking%20Final%20Report.pdf>; and Susan Webb Yackee. 2019. "The Politics of Rulemaking in the United States." *Annual Review of Political Science* 22: 37-55. For other examples, see: Daniel P. Carpenter et al. 2022. "Inequality in Administrative Democracy: Methods and Evidence from Financial Rulemaking." Unpublished working paper: <https://judgelord.github.io/finreg/participatory-inequality.pdf>; and Wendy Wagner, Katherine Barnes, and Lisa Peters. 2011. "Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards." *Administrative Law Review* 63(1): 99-158.

nationwide institutions or organizations that provide training on participation in the regulatory process.

Second, even if individuals are aware of the regulatory process, they might not be aware of specific regulations or issues that agencies are considering if agencies publicize opportunities only in the *Federal Register*. Identifying the right agency for a specific regulatory proposal or issue may not be straightforward. Furthermore, it may be challenging for members of the public to understand which regulations agencies are currently considering, what stage of regulatory development a proposal is in, and how the proposal may affect them.

Third, even if individuals identify an agency or regulation with which they would like to engage, they might not be aware of the most effective way of participating or may lack the resources or incentives to participate through traditional regulatory processes. OIRA learned from public comments and during listening sessions that members of the public lacked clarity on, for instance, how to write effective comments on proposed regulations; what experiences, data, or information would be most helpful to agencies during agency meetings, listening sessions, or requests for comments; deadlines to submit comments; or whom they could contact within agencies.

Last, even if individuals are clear on the forms of input that would be most helpful for a specific agency or regulation, they may face other obstacles to participation. OIRA heard from members of the public that these may include the following:

- Barriers related to the time it takes for participation; for instance, participation opportunities may conflict with work or family care, which may pose particular challenges for individuals from underserved communities.¹⁷
- Language and communications access, if materials are not available in a language that is used by a significant portion of a community interested in, or affected by, a regulation; if materials are not written in plain language; if materials do not include accompanying plain language summaries, guides, or explanations; if materials are not provided in an accessible format; or if live or recorded communications do not have effective sign language interpretation or captioning.¹⁸
- Physical access—for instance, related to transportation, distance, or venue accessibility—to the extent that agency engagement is in-person.

¹⁷ According to the 2016 General Social Survey, 51% of all workers and 60% of hourly workers reported that they “rarely” or “never” had input into their work schedules: Susan Lambert et al. 2019. “Precarious Work Schedules as a Source of Economic Insecurity and Institutional Distrust.” *The Russell Sage Foundation Journal of the Social Sciences* 5(4).

¹⁸ According to the 2021 American Community Survey, 26 million individuals, or 8% of individuals 5 years or older, speak English less than “very well”, meeting the definition of limited English language proficiency. See here:

<https://data.census.gov/table?q=DP02&t=Language+Spoken+at+Home>. Agencies are required under Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency* (Aug. 11, 2000), to ensure the full participation by individuals with limited English proficiency in the Federal government.

- Internet access, accessibility, and digital literacy, to the extent that participation is online and individuals lack access to reliable high-speed Internet, have disabilities that impede access (and materials or sessions are not accessible to individuals with disabilities), or are unable to use the Internet.¹⁹
- Obstacles related to lack of trust in Federal agencies or government; for instance, past negative or stigmatizing interactions with government, or privacy concerns about how information that is shared with or across the government or published publicly could be used against those who share it.
- Perceptions that agencies will not take comments, personal experiences, collected observations, and technical information from the public seriously.
- Cultural competence and knowledge of Federal agency staff, for example, if staff do not possess the necessary knowledge or training to interact with engaged communities.

III. Obstacles faced by Federal agencies to encouraging greater public participation and community engagement in the regulatory process

Agencies face a separate set of obstacles to facilitating greater participation and engagement, especially with underserved communities. Agencies might not have capacity—such as time, funding, staff, or training—to support additional public participation, especially engagement that requires building trusted relationships over time with communities. Agencies may also be limited in their engagement around specific rulemakings as a result of statutorily mandated or court-ordered deadlines or other requirements.

Agencies might additionally face obstacles to ensuring that any outreach addresses the barriers to participation and engagement listed above: for instance, lack of time or resources, knowledge of relevant community contacts or potentially-affected groups who have not interacted with the agency before, appropriate technology, cultural or language competence, or trust. Not addressing these barriers can limit the extent of participation and engagement.

Last, statutes and regulations may impose requirements on agencies when they pursue specific modes of participation or engagement; for instance, if agencies are seeking consensus recommendations from a group that includes members of the public (which may trigger requirements associated with the Federal Advisory Committee Act²⁰).

¹⁹ On differences across the population in Internet access, see for instance: <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>. As of 2021, an estimated 23% of American adults report not having access to broadband and separately 30% of households say they often or sometimes have problems connecting to the Internet at home. Agencies should consider their obligations under Section 508 of the Rehabilitation Act. For more details on Section 508 compliance, see: www.section508.gov.

²⁰ 5 U.S.C. §§ 1001–1014.

Nevertheless, there are also cases where statutes can provide flexibilities that enable greater participation and engagement. For instance, agencies have expressed concerns that engagement efforts might trigger review by OIRA as required under the PRA, and requested clarity on the application of the PRA to engagement activities. Accordingly, this Memorandum discusses existing exemptions to, and flexibilities in, the PRA that may be relevant for agencies when conducting engagement.

IV. The importance of intentional, early planning around public participation and community engagement for managing limited Federal agency and community time and resources

Both agencies and members of the public face important limits when planning for, and participating in, engagement efforts, including time and other resource constraints. For agencies, meaningful engagement efforts require resources and time: pursuing engagement on one regulatory action requires spending fewer resources and less time on other necessary aspects of that action or other agency actions. For members of the public, participating in regulatory activities may be important, but not a priority in their lives.

Accordingly, OIRA recommends that agencies plan and prioritize their participation and engagement activities, focusing on encouraging participation and engagement that makes effective use of agency and community resources and time. This means recognizing that engagement strategies will be different for each regulation, and that, in some cases, it may be more useful to focus engagement on broad policy areas or regulatory programs rather than each regulation in isolation, for instance, by inviting public engagement around the broad set of issues an agency should be addressing through regulations.

Above all, OIRA recommends that agencies intentionally plan and prioritize their regulatory activities to determine where they should direct resources to maximize the quality of participation and engagement, including with underserved communities. Not every regulatory proposal will warrant significant participation and engagement, and the degree of appropriate participation and engagement will vary. OIRA encourages agencies to consider:

- the types of information or input that an agency is seeking or that could prove useful to regulatory activities;
- the communities, populations, or actors that a regulation or a regulatory program is likely to affect;²¹
- the barriers those communities might face to participation, and how the agency could address those barriers, including by meeting community members where

²¹ Public participation and community engagement described in this Memorandum are in addition to, not substitutes for, government-to-government consultation, including under Executive Order 13175, *Consultation and Coordination With Indian Tribal Governments* (Nov. 6, 2000). Agencies should follow applicable agency policies and Federal requirements for Tribal consultations, including as specified in Presidential Memorandum, *Uniform Standards for Tribal Consultations* (Nov. 30, 2022), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation/>.

- they may already have trusted relationships with community intermediaries or organizations or where they already spend time;
- the historical relationship between a community and the Federal government;
- the nature of the regulatory action or actions, including the discretion an agency has in implementation;
- the different components within an agency involved in engagement and the different relationships or reach that those components may have with the public;
- how regulatory engagement fits into an agency's broader engagement strategy; and
- available agency resources.

In many cases, it will be most effective to prioritize *early* engagement with communities, when agencies are still defining regulatory priorities and establishing an overall regulatory program. Broad public input is often most useful at an early stage, helping agencies in choosing among priorities or developing potential regulatory approaches. Perspectives that draw on the experiences or knowledge of those in affected communities may be most effective at shaping future agency actions at this stage by defining problems to be addressed or identifying potential regulatory alternatives. OIRA encourages agencies to consider how they can prioritize early engagement with affected communities, especially when considering an overall regulatory program, as practicable and consistent with available resources.

This focus on early engagement with communities during the regulatory agenda-setting process is consistent with Executive Order 14094, section 2(c), which calls on agencies to “proactively engage interested or affected parties” to “inform the development of regulatory agendas and plans,” as well as Executive Order 14091, section 5, which calls on agencies to “conduct proactive engagement, as appropriate, with members of underserved communities [to inform]” “selection of items for their respective regulatory agendas and plans.” Those directives are discussed further in Section V.

V. Federal agencies should leverage the biannual *Unified Agenda of Federal Regulatory Actions* to publicize past, ongoing, and future public participation and community engagement activities

Executive Order 12866, *Regulatory Planning and Review* (September 30, 1993), directs OIRA to produce a *Unified Agenda of Federal Regulatory Actions* (“*Agenda*”), the design of which is established by the OIRA Administrator.²² The *Agenda* publicly catalogues, by agency, regulations under development. Working together with agencies, OIRA updates the *Agenda* twice a year, in the fall and spring. The fall *Agenda* also includes the *Regulatory Plan* (“*Plan*”), which presents brief narrative Statements of Regulatory Priorities for each agency and previews regulatory activities planned for the coming year.

The *Agenda* provides a regular opportunity for OIRA and agencies to communicate to the public about regulatory priorities and activities, describing the problems or needs to be addressed through regulation, potential regulatory proposals, and

²² Executive Order 12866, section 4(b), specifies that preparation of the *Agenda* will occur “at a time and in a manner specified by the Administrator of OIRA.”

anticipated costs and benefits. Agencies can use this existing regulatory planning process as an opportunity to expand public awareness about agency participation and engagement efforts, including engagement of underserved communities.

Accordingly, this Memorandum directs agencies to make the following changes to the development of their *Agenda* and *Plan* to expand public awareness of the opportunities agencies have provided, and potentially will provide, for public participation and community engagement. These changes will begin with the Fall 2023 *Agenda* and *Plan*²³ and are not intended to be applied retroactively.

OIRA recognizes that application of these changes will take time. Although these changes will begin in the Fall 2023 *Agenda* and *Plan*, OIRA anticipates that agencies (and individual agency components) may initially apply this guidance to a smaller subset of regulations and regulatory priorities, and scale up over time as agencies and their components develop further capacity and experience with implementation.

- When developing agency-wide Statements of Regulatory Priorities for the Fall *Agenda* and *Plan*, agencies should: (1) discuss how, if at all, past or ongoing participation and engagement informed the development of priorities, such as by describing specific past engagement activities (for instance, listening sessions, meetings with community organizations, or requests for information) and describing the information received from the public and how it is being used by the agency; and (2) to the extent practicable, provide information about agency plans for future participation and engagement over the next calendar year, including by signaling upcoming opportunities for interested and affected communities to participate in their regulatory activities, for specific regulations as well as broad priorities and regulatory programs, and describing agency public engagement resources the public can use to identify opportunities for future engagement. OIRA recognizes that there are many different considerations that agencies take into account when setting regulatory priorities (for instance, statutorily mandated or court-ordered rulemakings), and Statements of Regulatory Priorities may describe participation and engagement only for some priorities and not others in light of those considerations. OIRA also recognizes that agencies differ in the degree to which their regulations affect the public, and that the extent of engagement described in Statements of Regulatory Priorities will differ across agencies and within agencies across components. OIRA expects agencies to describe past and planned participation and engagement in Statements of Regulatory Priorities, not conduct new engagement during the brief window between the *Agenda* and *Plan* data call and submission to OIRA.
- When developing *Agenda* entries, agencies, as practicable and appropriate, should draw on past participation and engagement to inform the selection of

²³ OIRA has previously previewed these recommendations in the Spring 2023 Data Call for the *Unified Agenda*; OIRA Memorandum, *Spring 2023 Data Call for the Unified Agenda of Federal Regulatory and Deregulatory Actions* (Feb. 22, 2023), available at <https://www.whitehouse.gov/wp-content/uploads/2023/02/2023-Spring-Agenda-Data-Call.pdf>.

regulatory proposals for the *Agenda*. OIRA expects agencies to draw from past or ongoing participation and engagement in developing *Agenda* entries, not conduct new engagement during the brief window between the *Agenda* data call and submission to OIRA.

- When developing *Agenda* entries, agencies, as practicable and appropriate, could describe in the relevant abstract text how engagement with the public informed individual regulatory proposals. OIRA recognizes that not every regulatory proposal will warrant significant participation and engagement and that the degree of appropriate participation and engagement will vary (as described in this Memorandum). OIRA does not expect that most entries will contain discussion of participation and engagement activities, and inclusion of participation and engagement activities will not be a requirement for *Agenda* entries.
- When developing *Agenda* and *Plan* submissions, OIRA reminds agencies that all material should be written in plain language, consistent with OMB guidance.²⁴ Especially relevant to the *Agenda* and *Plan*, regulatory material should avoid jargon, ambiguity, and redundancy, and not assume familiarity or technical knowledge about agency programs or activities. Similarly, agencies should not assume public knowledge of how one agency's programs or activities interact with—or differ from—another agency's related programs or activities. In particular, *Agenda* and *Plan* submissions should be written to be easily understood by communities that are likely to be affected by agency regulations.²⁵

VI. Federal agencies should, as practicable, review relevant policies on communication and outreach in the regulatory process to ensure that, as permitted by law, such policies facilitate early, transparent, accessible, equitable, and meaningful public participation and community engagement

Oral or written communications between agencies and members of the public related to a notice-and-comment rulemaking process that are not part of a formal written comment are often referred to as *ex parte* communications. The Administrative Conference of the United States (ACUS) has found that *ex parte* communications can benefit members of the public and agencies, including by facilitating more candid

²⁴ “While the [Plain Writing] Act exempts regulations from covered documents, rulemaking preambles are not exempted, and long-standing policies currently in effect require regulations to be written in a manner that is ‘simple and easy to understand.’” OMB Memorandum M-11-15, *Final Guidance on Implementing the Plain Writing Act of 2010*, at 5 (Apr. 13, 2011), available at https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2011/m11-15.pdf

²⁵ An analysis of Fall 2021 *Statements of Regulatory Priorities* across the 22 reporting agencies showed that the average Flesch-Kincaid reading level for these documents required 19 years of schooling, which corresponds to three years of graduate-level training. No agency *Statement of Regulatory Priorities* for Fall 2021 was written below a college-level Flesch-Kincaid readability score.

communications and ensuring more opportunities for public input.²⁶ But agencies must ensure that *ex parte* communications do not create risks to the rulemaking process, including legal risk arising under the Administrative Procedure Act (APA) from failing to appropriately disclose such communications. In particular, courts have imposed requirements for public transparency with respect to certain communications.²⁷ Agencies must also treat parties equitably, making reasonable efforts to afford interested parties an equal opportunity to be heard.

Many agencies have adopted written policies with respect to *ex parte* communications to help facilitate participation and engagement within legal bounds and ensure the fairness and transparency of the regulatory process. However, OIRA has heard from members of the public and agencies that in some cases, agency *ex parte* communications policies—or the interpretation of those policies—may unnecessarily interfere with agencies’ outreach and engagement efforts, particularly if these policies are outdated or unnecessarily restrictive. This may present particular obstacles to engagement with communities that do not typically participate in the regulatory process.

OIRA encourages agencies, in consultation with their agency counsel, to review their policies on communication and outreach for notice-and-comment rulemaking to ensure that *ex parte* communications policies are consistent with the law and the following principles²⁸:

- **Agency *ex parte* communications policies should recognize the importance of early engagement and transparency.** Before issuing a proposed rule, agencies may solicit public input and ideas through a range of channels. When engagement occurring before issuance of the proposed rule has a substantive effect on the design of the proposal, for transparency agencies should, in consultation with their counsels, describe in the proposed rule’s preamble or in the public docket who the agency engaged with, when, and what information was provided. After a proposed rule has been issued agencies should focus outreach on encouraging participation through the written comment process.

²⁶ Administrative Conference of the United States Recommendation 2014-4: “‘Ex-Parte’ Communications in Informal Rulemaking.” See here: https://www.acus.gov/sites/default/files/documents/Recommendation%202014-4%20%28Ex%20Parte%29_0.pdf. Similarly, courts have recognized that “the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall.” *Sierra Club v. Costle*, 657 F.2d 298, 400–01 (D.C. Cir. 1981).

²⁷ See, e.g., *Brennan v. Dickson*, 45 F.4th 48, 66 (D.C. Cir. 2022); *Costle*, 657 F.2d at 402–03; *Home Box Off., Inc. v. F.C.C.*, 567 F.2d 9, 53–58 (D.C. Cir. 1977).

²⁸ For one example of an *ex parte* communications policy with these principles, see the Department of Transportation’s policy, which specifically names “affirmative outreach where appropriate” to ensure equitable participation in rulemaking; Department of Transportation Memorandum, *Guidance on Communication with Parties outside of the Federal Executive Branch (Ex Parte Communications)* (Apr. 19, 2022), available at <https://www.transportation.gov/regulations/memorandum-secretarial-officers-and-heads-operating-administrations>.

- **Agency *ex parte* communications policies should support proactive outreach by the agency, especially prior to issuing an individual proposed rule when doing so would result in fairer and more equitable treatment.** Agency *ex parte* communications policies should recognize that fairness means paying close attention to members of the public who might be interested in, or affected by, a regulation but who might not otherwise participate in the regulatory process because of the barriers described above (such as knowledge, accessibility, language access, and trust in government). Proactive outreach by the agency may be necessary to hear from certain interested and affected parties before a particular rulemaking, especially members of underserved communities that have not participated in the regulatory process before.

Where existing policies are not consistent with these principles, OIRA encourages agencies to consider revising them in consultation with their agency counsels. In all cases, OIRA encourages agencies to ensure that agency staff, including staff in regulatory, outreach, communications, and engagement offices, are aware of relevant policies (for instance, through training or other outreach).

In addition to reviewing *ex parte* communications policies, OIRA encourages agencies to consider, as practicable and appropriate, publishing a public regulatory engagement plan on their websites. The regulatory engagement plan could include descriptions of some or all of the following potential agency policies, consistent with Administrative Conference of the United States recommendations²⁹:

- How the agency will identify potentially affected communities when developing regulatory programs.
- How the agency will engage those communities at different stages in the regulatory process, including with respect to both broad priorities and individual regulations, consistent with applicable law and taking into account barriers to engagement those communities might face and the stages at which engagement with those communities will be most useful.
- How the agency will assess the effectiveness of engagement strategies, including specific measures that agencies will use and how the agency will modify engagement strategies as they learn about their effectiveness (including as part of agency Learning Agendas and Annual Evaluation Plans,

²⁹ Administrative Conference of the United States Recommendation 2018-7: “Public Engagement in Rulemaking.” See here: <https://www.acus.gov/sites/default/files/documents/Recommendation%202018-7%20%28Public%20Engagement%20in%20Rulemaking%29.pdf>. See also National Environmental Justice Advisory Council. 2013. “Model Guidelines for Public Participation.” See here: <https://www.epa.gov/sites/default/files/2015-02/documents/recommendations-model-guide-pp-2013.pdf>.

as specified by the Evidence-Based Policymaking Act of 2018³⁰ and OMB Memorandum M-21-27³¹).

- How members of the public can reach a designated and centralized agency point of contact in order to learn more about regulatory participation and engagement activities or offer feedback on the agency's engagement policies.
- How the agency will provide language assistance services to individuals with limited English proficiency, when necessary and appropriate, to ensure meaningful access to regulatory participation and engagement activities.
- How the agency will ensure accessibility, effective communication, and reasonable accommodations for individuals with disabilities in regulatory participation and engagement activities (including, for example, providing sign language interpretation).

VII. Federal agencies should consider adopting leading practices for public participation and community engagement in the regulatory process

OIRA heard from the public about a number of leading practices for participation and engagement. OIRA encourages agencies to consider, as practicable and appropriate, using or continuing to use practices from the below list to hear from interested and affected members of the public, especially those who might not otherwise participate in the regulatory process. Given that engagement is context-specific and dependent on agency resources (including across different agency components), agencies may choose to use only a subset of leading practices in given instances:

- Agencies could ensure that regulatory staff coordinate with other relevant agency components that are responsible for engagement to leverage more available channels of communication, resources, and relationships with the public. Other relevant agency components may include offices of public engagement or public affairs, local and regional program offices, offices focused on serving specific populations, and customer experience offices. Where appropriate, agencies should consider collaborating with other agencies that might have relationships with communities affected by a regulation, for instance, holding joint events, building on outreach lists managed by another agency, and relying on an agency's community relationships through local, district, or regional field offices.
- Agencies could include in *Agenda* and *Plan* entries likely-affected communities for regulations, including specific populations and geographic localities. Providing these descriptions could make it easier for segments of the public to identify regulatory proposals that might affect them and it could

³⁰ Pub. L. No. 115-435, 132 Stat. 5529 (Jan. 14, 2019).

³¹ OMB Memorandum M-21-27, *Evidence-Based Policymaking: Learning Agendas and Annual Evaluation Plans* (June 30, 2021), available at <https://www.whitehouse.gov/wp-content/uploads/2021/06/M-21-27.pdf>.

also help facilitate agencies' participation and engagement planning efforts. Agencies could focus their efforts on those entries for which there is strong reason to forecast impacts on particular groups and where the agency would like to facilitate later participation and engagement.

- When conducting early, pre-proposal engagement, agencies could consider steps for facilitating participation and engagement where members of the public may face obstacles to participation. For instance, where consistent with applicable law, agencies might be able to permit Federal financial assistance program participants to pay for child care, personal care attendants, travel, meals, or related expenses for community members participating in agency engagement activities. Agencies should consult their agency counsels to determine relevant authorities.
- Agencies could endeavor to ensure that participation and engagement functions are sufficiently resourced and staffed to meet engagement needs, including supporting appropriate training for staff to communicate and build trusted relationships with communities affected by a regulation.
- Agencies could make regulatory material more accessible, understandable, and useable by members of the public. Strategies include using plain language as required by the Plain Writing Act³² and related guidance.³³ Agencies could also adapt material to mobile-friendly formats (for instance, through alternatives to PDFs), produce material in multiple formats (like infographics, videos, and short summaries), use standardized language, ensure compliance with Section 508 of the Rehabilitation Act, highlight specific questions and issues on which the agency seeks public input (for instance, through simple standardized questions and text boxes for responses), and provide a fact sheet along with a list of regulatory materials that support a proposed rule. Agencies could also permit responses from the public in multiple forms in early, pre-proposal engagement, like audio/video submissions (online or via a telephone or text messaging inbox). Agencies could further consider distributing versions of their *Agenda* and *Plan* to communities that are likely to be affected by regulatory proposals in accessible and easily understandable formats (e.g., speeches, briefing calls, fact sheets, blog posts, videos, or infographics).
- Agencies should consider their implementation of Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency* (August 11, 2000), and related guidance from the U.S. Attorney General, and

³² 5 U.S.C. § 301 note.

³³ See OMB Memorandum M-11-15, *Final Guidance on Implementing the Plain Writing Act of 2010* (Apr. 13, 2011), available at https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2011/m11-15.pdf.

whether such implementation can include translation of regulatory outreach materials into languages that are relevant to affected communities.³⁴

- Agencies could ensure that outreach activities provide sufficient background information so that individuals can productively engage with agencies, consistent with the nature of the agency request. This is especially important for outreach to communities and entities that have not participated in the regulatory process before. Relevant background could include information on the regulatory problem or issue an agency is exploring, the range of options an agency is considering, the type of information an agency is seeking (for instance, personal stories, data, or research), relevance to particular geographic localities, and how members of the public can participate.³⁵ It is important that agencies be transparent with members of the public about how public input may be used and addressed (such as in a written manner that may be published with a final rule), so that members of the public have a realistic expectation about the impact their participation may have. Additionally, agencies should be clear with the public if they intend to publicize submissions or input, and consult their counsel concerning relevant privacy or confidentiality implications.
- Agencies could consider providing clear explanations of how public input has shaped agency regulatory programs and individual regulations. Doing this illustrates the potential impact of participation and helps increase the public's trust that agencies do not ignore the public's investments of time and resources but rather value their comments, personal experience, collected observations, and technical information. This could include, for instance, using a proposed rule's preamble to discuss how the input received through agency engagement shaped the content of the proposal, or sharing examples of how public input shaped regulatory actions through agency websites or other communication channels.
- Specific engagement activities referenced as leading practices by members of the public that agencies might consider, as practicable and consistent with agency resources, include the following:
 - Holding *listening sessions, including online or technology-enabled sessions*, while agencies are still formulating regulatory priorities in order to reach individuals who might not be able to attend an in-person listening session but can attend on video or telephone; scheduling sessions during a variety of times to take into account different schedules, time zones, and work obligations; and making clear that

³⁴ See for instance the U.S. Attorney General Memorandum, *Strengthening the Federal Government's Commitment to Language Access* (Nov. 21, 2022): <https://www.justice.gov/file/1553196/download>.

³⁵ Indigenous Knowledge can be one important type of information solicited and considered by agencies. See Office of Science and Technology Policy and Council on Environmental Quality, *Guidance for Federal Departments and Agencies on Indigenous Knowledge* (Nov. 20, 2022), available at <https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf>.

agencies are interested in hearing about individuals' own experiences in addition to research or data. Agencies could consider how to make such sessions multilingual, if necessary, and accessible.

- o Providing *multiple means of submitting comments and feedback in multiple formats*, for instance, giving options to submit written comments, participate in a live webinar, or record audio comments in advance to submit to agencies, depending on the stage of regulatory development.
- o Using *plain language summaries, infographics, or short videos distributed through social media or traditional media (especially local, regional, or ethnic news)* to raise awareness of regulatory proposals that an agency is considering and, when relevant, translating these infographics or videos into multiple languages and providing them in accessible formats for affected communities.
- o *Collaborating with community-based organizations* to hold virtual or in-person meetings with open back-and-forth discussions to learn more about the problems and issues faced by specific communities, so that agencies can build on trusted relationships that those organizations already have and obtain relevant information about community-specific barriers and contexts. This could include partnering with other Federal agencies that have trusted relationships with community-based organizations that one agency may lack.
- o Writing *short blog posts on agency websites* that summarize in plain language clear questions agencies are requesting comments on within requests for information or rulemaking proposals. These posts could also provide easy-to-navigate online text boxes for members of the public to immediately submit answers to those key questions. For instance, agencies could consider online platforms for collecting comments that permit designing easy-to-use forms for members of the public to respond to immediate questions.³⁶
- o Using *relationships that agency regional, district, or local offices have with their local communities* to organize listening sessions or meetings with open back-and-forth discussions on regulatory issues specific to those communities. Or, agencies could disseminate information through other widely-trusted and available venues, like placing information in U.S. Postal Service offices or public libraries. This could also include partnering with other Federal agencies that have

³⁶ As an example, the Centers for Medicare and Medicaid Services has used the online survey platform Qualtrics to implement recent Requests for Information intended to reach a broader audience than the Federal Register or www.regulations.gov: <https://www.cms.gov/newsroom/press-releases/biden-harris-administration-announces-request-information-access-care-and-coverage-people-enrolled>.

regional, district, or local offices in communities that one agency may lack.

- o *Hosting engagement calls with civil society organizations with national, state, and local affiliates* that can share news about opportunities for regulatory engagement with their members.
- o *Proactively reviewing the accessibility of events or other outreach efforts* to ensure that all communications, materials, and venues are accessible in advance of an engagement, including by inviting feedback from disability organizations.
- o *Continuing to assess and experiment with technology* to enable additional types of diverse and effective public participation, as such technologies emerge over time and could enhance agency engagement activities.

VIII. What exemptions and flexibilities to the PRA are relevant for Federal agencies when engaging the public in the regulatory process?

OIRA heard from agencies and members of the public that the PRA can be perceived as an obstacle to timely engagement in the regulatory process. The PRA requires certain information collection activities to be reviewed by OIRA and be made available for public comment, with the goal of ensuring the value of the information being collected and minimizing the burden imposed on the public.

This section reaffirms for agencies that many of the leading practices for engagement described above are exempt from PRA review.³⁷ In addition, even when regulatory engagement activities involve PRA review, OIRA already has flexibilities in place that can simplify and expedite the PRA review process. OIRA encourages agencies to consult with their OIRA desk officers to understand the full range of relevant exclusions and flexibilities.

Select exclusions from PRA review that may be relevant for agency engagement include the following types of activities³⁸:

- *Holding public meetings that seek feedback* from members of the public, for instance through meetings with open back-and-forth discussions, webinars, or listening sessions.

³⁷ See also OIRA Memorandum, *Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act* (Apr. 7, 2010), available at https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf.

³⁸ Other important laws, regulations, and policies may apply, however, and nothing in this Memorandum alters agency obligations under other existing laws, including the Federal Advisory Committee Act, the Administrative Procedure Act, the Privacy Act, and the Federal Records Act.

- Publishing *blog posts, fact sheets, or social media posts* to summarize regulatory information in multiple formats.
- Publishing and circulating *online invitations to participate in events through email, websites, or social media*, for instance, to participate in meetings with open back-and-forth discussions, webinars, or listening sessions.
- Soliciting *public input on regulatory issues through requests for information, email, or other online venues*, so long as the solicitation is generally open-ended and not intended to be a survey.

In addition to the exclusions listed above, OIRA maintains other flexibilities for agency information collections, including public engagement, through generic clearances. Generic clearances involve OIRA approval of a plan for conducting more than one information collection using very similar methods, typically involving voluntary, low-burden, and uncontroversial methods.³⁹ With a generic clearance an agency needs to submit only the initial plan for the generic collection for the standard 60- and 30-day public comment periods. Subsequent information collections under the generic collection require only OIRA approval (and not additional public comment periods). Agencies might consider requesting a generic clearance for regulatory engagement involving surveys, which would typically involve full PRA review.

The U.S. regulatory system affords members of the public important opportunities to participate in the work of government, shaping the priorities and alternatives pursued by agencies. This Memorandum lays out important steps that agencies could take to broaden participation and engagement in rulemaking, thereby strengthening regulations and deepening the democratic promise of the regulatory system. OIRA stands ready to work closely with agencies to achieve these goals.

Note: this Memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

³⁹ See OIRA Memorandum, *Paperwork Reduction Act – Generic Clearances* (May 28, 2010), available at https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/inforeg/PRA_Gen_ICRs_5-28-2010.pdf.