

FEATURE

Equity, transparency, efficiency

Considerations for responding to President Biden's
Modernizing Regulatory Review memorandum

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In the *Modernizing Regulatory Review* memorandum of January 20, 2021, the Biden administration offered regulators an opportunity to chart a new regulatory path. Planning for agility and long-term impact will enable regulators to rise to this challenge.

Introduction

Every administration has created its own regulatory reform agenda. In recent history, these agendas have centered on financial cost-benefit analysis as the most important aspect of regulatory review. **In *Modernizing Regulatory Review*, President Biden calls for regulatory leaders to bring equity to the center of regulatory reform.** Cost-benefit language

In *Modernizing Regulatory Review*, President Biden calls for regulatory leaders to bring equity to the center of regulatory reform.

makes only one appearance in this memo: in the context of fairly weighing costs for “disadvantaged, vulnerable, or marginalized communities” instead of the more generally defined “society” of past orders. In this memo, the Biden administration places equity, transparency, and efficiency front and center.¹

In *Modernizing Regulatory Review*, President Biden departed from previous regulatory reform orders in outlining directions over directives:

- Center people over pocketbooks
- Reduce burden, but deregulate as a last resort
- Partner proactively
- Regulate in the open

- Be effective *and* fast to avoid delaying positive impacts

In doing so, the Biden administration simultaneously recognizes the need for a new regulatory framework and opens the door to allow regulators to shape it.

To rise to the challenge and realize the goals of the memorandum, the OMB and regulatory leaders at the OIRA and across all federal agencies must develop and deliver a strategy that is centered on:

- The development of **analytically sound approaches** to assess the regulations of today and tomorrow,
- The **identification and prioritization** of existing regulations where **equity impacts** are the greatest, and
- The curation of the **authorities, skills, capabilities, and influence** to undertake the task.

This will require combining the OMB’s, OIRA’s, and federal agencies’ deep expertise in regulatory review with partnerships with leading academics and researchers and harnessing the potential of new technologies.

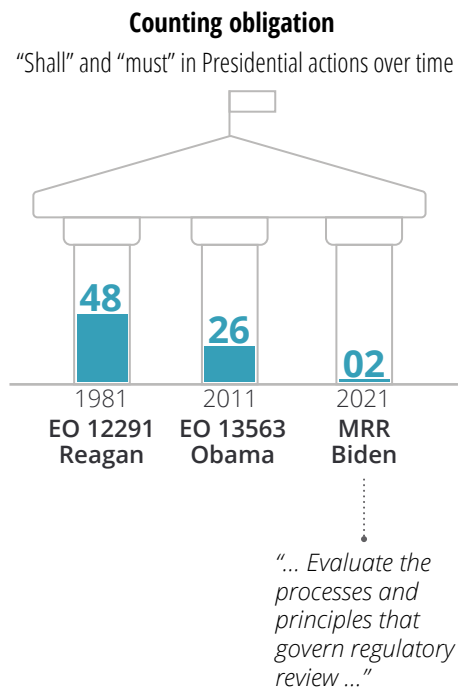
Put principles into practice

In the past, Presidential actions on regulatory reform strategy have outlined how agencies should and should not make regulations.

Whereas the old challenge was complying with every “shall,” *Modernizing Regulatory Review* challenges regulatory leaders to imagine a new future for the American regulatory process (figure 1). In doing so, they should consider guiding principles that can serve as a foundation on which

Modernizing Regulatory Review asks regulatory leaders to create a new measuring stick for regulatory review—one that values people as much as it values process.

FIGURE 1
Presidential actions on regulatory reform strategy over time



Source: Deloitte analysis.

to build. In practice, the outcomes of these principles will look different for every agency collaborating with the OIRA in regulatory review.

First guiding principle: Equity

“... take into account the distributional consequences of regulations ...”

Several sections of the *Modernizing Regulatory Review* call out equity concerns in regulation more directly than past Presidential actions. With equity front and center in the future of regulation, OMB, OIRA, and federal agency leaders should seek to develop:

- Robust approaches to **assess the impact of regulations on different communities**
- Mechanisms to **identify those existing regulations** that are **not appropriately benefiting** or inappropriately placing disproportionate burdens on disadvantaged, vulnerable, or marginalized communities
- Capabilities that can help **design and improve regulations** so that they achieve their intended goals in a manner that is equitable and just

Developing robust approaches to assessing the equity impacts of regulations will require the engagement of the academic and research communities as well as experts in specific policy areas. Codifying the approach in the form of a framework for assessment could help government apply its approach in a consistent and fair way that is less vulnerable to capture by specific interest groups that benefit from inequitable regulations. Other countries, such as the United Kingdom, have been conducting equality impact assessments for several years and engaging them can help the US build on their lessons learned.²

The large volume of existing regulations can make it hard to establish where to start the process of addressing inequity in the current stock of regulations. Stakeholder engagement with experts and impacted communities themselves could help government identify those regulations that have the most discriminatory impacts on disadvantaged,

vulnerable, or marginalized communities. In addition, technologies that harness artificial intelligence (AI) can also help subject matter experts quickly identify regulations that are inconsistent with the government's current policy (see sidebar, "Regulatory review for equity using AI").

REGULATORY REVIEW FOR EQUITY USING AI

Inclusive language review

Reviewing regulations for outdated or non-inclusive language can be a start to equity conversations, not an end.

21 CFR 21.44

"An individual who appears in person for access to records about **himself** shall be required to provide at least one document to identify himself ... or **alien** or voter registration card to verify **his** identity ..."³

— *A regulation by the Food and Drug Administration, last modified in 1977*

41 CFR 60-50.1

"The employment problems of **blacks, Spanish-surnamed Americans, orientals, and American Indians** are treated under part 60-2 of this chapter and under other regulations and procedures implementing the requirements of Executive Order 11246, as amended."⁴

— *A regulation by the Department of Labor, last modified in 1978*

Equitable language review

By identifying outwardly inequitable regulations and those which discriminate by proxy, agencies can begin addressing inequities.

32 CFR 705.36

"Privileges equal to those given male correspondents will be accorded female correspondents **whenever practicable**."⁵

— *A regulation by the Department of the Navy, last modified in 1979*

40 CFR 7.120

"Individuals can open a discrimination complaint related to environmental protection under this regulation.⁶ However, participants in a recent Chicago complaint say that public comment services are **not accessible to the individuals with limited English proficiency** who make up most of the impacted community."⁷

— *A regulation by the Environmental Protection Agency, last modified in 2010*

For the illustrations of potentially inequitable regulations, we used Deloitte's RegExplorer™ tool to illustrate how AI can help governments identify regulations that may be inconsistent with the government's current policy and may require further review. These regulations largely fall into two categories: **inclusive language** and **equitable distribution of impact**. An inclusive language review does not necessarily address the impact of a regulation, but rather looks at how the terminology it uses aligns with the government's official position. See examples of in-force regulations from the US Code of Federal Regulations (US CFR) that may need inclusive language review.

The noninclusive language examples do not necessarily have a disparate impact on individuals by racial or ethnic group, gender, or immigration status. The second category of the regulatory review, equitable distribution of impact, addresses regulations that may be directly discriminatory toward a particular group, or may use characteristics such as an individual's zip code or employment status to discriminate by proxy. **An equitable distribution of impact review may be more difficult to execute than an inclusive language review, but both represent advancement.** In order to develop truly equitable regulations, OIRA, OMB, and agency leaders must develop robust frameworks to identify and evaluate the impact of these proxies. See in-force examples of US CFR regulations that may require equitable distribution of impact review below.

As the examples on the last page demonstrate, the existing US CFR includes inherent bias and potential discrimination, which is understandable from the perspective that many of these regulations have not been edited, reviewed, or updated for, in some cases, decades. This only points to the need

for comprehensive regulatory review as part of the administration's regulatory modernization efforts. While manually searching through the US CFR site is a high-effort activity, using **AI-augmented tools can help speed up the search process**, which enables OMB, OIRA, and agency leaders to **spend more time evaluating whether the regulation should be changed to reflect current equity considerations**.

As important as it is to be able to assess the equity of current and future regulations, to increase the impact of its work in creating a more just and fair society, the government also needs to improve the way that it designs regulations and ultimately the policies and programs they lead to. **Directly engaging impacted communities** through consultations and human-centered design approaches such as journey mapping can help it craft regulations, policies, and programs with fewer unintended consequences.

Harnessing other science- and research-based approaches such as data analysis, positive deviance, and behavioral science can also help improve the efficacy and equity of resulting policies and programs.

Second guiding principle: Transparency

"... recommendations should be informed by public engagement with relevant stakeholders ..."

Transparency is mentioned twice in the memo—once explicitly, when discussing transparency in the interagency review process, and once indirectly in the above quote, which implies benefits in opening regulatory discussion to a more public audience.

To improve transparency in the regulatory process, OMB, OIRA, and federal agency leaders should consider:

- What kinds of **experts or stakeholders does my agency routinely call on** when drafting or evaluating a regulation? Are there ways to broaden this pool?
- Is my agency **publicly citing the reports**, research, and facts used in its regulatory creation?
- For individuals who are impacted by my agency's regulations, **do they know that they are impacted?** How can we **better ensure that individuals and groups are aware** when their regulatory compliance requirements change?

A traditional notice and comment period to gather feedback from the population can take up to a year. This period commonly involves the preparation of a document and publication in the Federal Register (a daily publication for rules, proposed rules, and notices of the Federal Government) for, say, a 90-day comment period followed by a careful analysis of comments. This process can be **invaluable in securing insightful perspectives from experts** and interested parties to improve the drafting of a proposed rule. However, it is **not always the best way to understand the views of citizens and in particular disadvantaged, vulnerable, or**

marginalized communities. As we explored in our *Regulator of tomorrow* report, studies have shown that people express a view even on things they don't know anything about.⁸ For example, in 1986, political scientist Dr. George Bishop and his team asked a sample of Americans for their views on a fictional "Public Affairs Act of 1975" and other fictitious or unknown legislation. They found that 20–40% of Americans offered opinions on laws they had never heard of.⁹

Comment periods can also fall prey to highly mobilized campaigns or interest groups dominating the consultation process to further self-interests, promote personal agendas, or gain notoriety.

This was the case in a television segment by comedian John Oliver in 2014 (see the sidebar, "Last Week Tonight with the FCC," below). On the one hand, Oliver's segment brought national attention to a choice that the FCC needed to make but had been seen as a dry issue that many citizens might typically pass over. On the other, it failed to provide the FCC with a true appreciation of the balanced views of an informed citizenry. Fortunately, there are other ways that regulators can collect and interpret comments to gain an appreciation of citizens' views, which can be deployed alongside the notice and comment process.

LAST WEEK TONIGHT WITH THE FCC

Comedian John Oliver put the public comment system to the test in 2014

In spring 2014, the Federal Communications Commission (FCC) solicited comments on **proposed changes to rules impacting net neutrality** and received a steady trickle of valuable and expert views from industry organizations, consumer bodies, and academics over its first month. This all changed in early June when John Oliver, a TV comedian, aired a 13-minute sketch on the issue on his late-night news comedy show and encouraged internet commenters to "Seize your moments, my lovely trolls, turn on caps lock and fly, my pretties, fly."¹⁰ **The resulting barrage of comments overwhelmed FCC systems.**¹¹

The Center for Deliberative Democracy (CDD) at Stanford University has developed a five-step approach to facilitate the deliberative democratic process, called Deliberative Polling®, which seeks to overcome both shortcomings.¹² The process “combines deliberation in small group discussions (so participants are informed) with scientific random sampling (to reflect a population and reduce the influence of vested interests) to provide public consultation for public policy and for

electoral issues.” **Deliberative Polling® examines the opinion changes through “before-and-after” questionnaires and small group deliberation in order to gauge how people adjust their perspectives after becoming more informed about policy options.** The CDD has tested Deliberative Polling® as a face-to-face and online policymaking experiment in the United States, European Union, and China.

DELIBERATIVE POLLING® IN ZHEJIANG

China puts polling into practice for infrastructure

For example, Deliberative Polling® enabled residents of Zeguo Township, Wenling City, in the Chinese province of Zhejiang to **impact the budgetary decisions of their local government.** In March 2005, residents were asked to consider 30 options for infrastructure projects to fund in the coming year. The results from the Deliberative Poll were widely accepted by the Zeguo residents, and **the process was replicated in subsequent years to decide similar issues.** Meanwhile, a nearby town's leadership did not consult the residents before deciding to give land to chemical plants, and the villagers blocked roads in protest of the policy decision.¹³

Another option is to **combine direct citizen engagement with open convenings of subject matter experts from academics to disadvantaged, vulnerable, and marginalized communities themselves.**

Interactive dialogue between citizens, rule-makers, and experts could provide a more complete view of the potential benefits and impacts of proposed rules.

Identifying ways to discuss comments in open forums instead of only within an agency could also improve regulatory review transparency.

Regulations.gov, a website managed by the eRulemaking Program Management Office at the US Environmental Protection Agency (EPA), provides citizens with the ability to comment on draft regulations as if they were commenting on a blog post.¹⁴ Once an agency has processed a submitted comment, users of regulations.gov can see that comment and, once a regulation has been

finalized, see how the agency responded to the comments it received during the rulemaking process.

In recent years, federal agencies including the General Services Administration (GSA) and Administrative Conference of the United States (ACUS) have been holding public forums on the issues and influences of the existing public comments process. Quite rightly, much of the discussion has focused on fake comments and robo-comments skewing the results.¹⁵ **AI technologies can help solve for these issues** by identifying similar comments to be grouped together, and many agencies are beginning to apply these technologies to the public comment process to ensure more accurate analysis and timely response.

However, the *Modernizing Regulatory Review* memo could implicitly call for agencies to take this another step further by analyzing not only the

responses themselves but also *who* responded, and perhaps more importantly, who did not.

For example, on a regulation about immigration, rule-makers should seek input from immigrants to the United States to ensure that their experiences are factored into the regulatory review process. As seen in the second equitable impact review example in the Equity section of this paper, the public comment process may not be accessible to everyone who is impacted by a regulation.

The application of **AI technologies and augmented data sources enable agency leaders and their teams to spend less time searching through comments** and complying with minimum requirements. With the new equity mandates from the Biden administration, rule-makers can spend this time instead on high-value activities such as seeking out community feedback and transparently implementing the intent of the administration's directions.

Third guiding principle: Efficiency

“... it is important that we evaluate the processes and principles that govern regulatory review to ensure swift and effective Federal action ...”

To deliver on all the intended outcomes of the memo, any future regulatory review framework will also need to be efficient in addition to equitable and transparent. As the focus of an “efficient” regulatory system **expands beyond just dollars and cents**, agencies may consider the following:

- **What barriers**, if any, is my agency **placing in front of constituents to providing feedback** or engaging with the regulatory process?
- Are there **noncodified norms in my agency that are slowing down the review process**

without adding significant regulatory value?
What about **codified ones**?

- Is my agency **often re-inventing the wheel on regulations**, or do we build on the regulatory stock of those who have come before us to create new regulation?

Existing commercial feedback platforms could assist in lessening barriers to constituent feedback. AI can also help make sense of high volumes of responses quickly.

According to a 2017 Deloitte Center for Government Insights report analyzing data from the Department of Labor and the Office of Personnel Management, the US federal government spends over 10.5 million labor hours annually assessing regulations. This represents 5,059 full time–equivalent employees at a cost of around US\$466M per annum.¹⁶ But if this investment is deployed to high value cognitive policy and regulatory tasks—equity, fairness, openness—this is time and money well spent.

Unfortunately, all too often the opposite is true. Highly skilled federal workers are spending their time on low-value cognitive regulatory tasks—searching, sifting, filtering, grouping—to find nuggets of value. Leveraging AI tools can change this equation. By **utilizing AI to assist with low-value tasks**, high-value federal worker time and energy will be freed up, enabling agencies to focus on achieving the goals and mandates of the administration and the aim and intent of the *Modernizing Regulatory Review* memo.

A thorough analysis of the regulatory process can also help **identify redundant and duplicative processes** that are slowing down the journey from initial idea to ultimate impact. There may also be opportunities to automate parts of the process, releasing staff time to make the judgement calls and qualitative analysis in a focused and deliberative way. **Journey mapping could also produce insights** to improve both the efficiency and effectiveness of the process.

To avoid reinventing the wheel each time a new regulation is proposed or needs to be reviewed, **creating a “what works” repository as it relates to the regulatory process could help agencies build on and learn from each other’s experience**, leading practices, innovations and networks of academics, community stakeholders, and in-house experts.

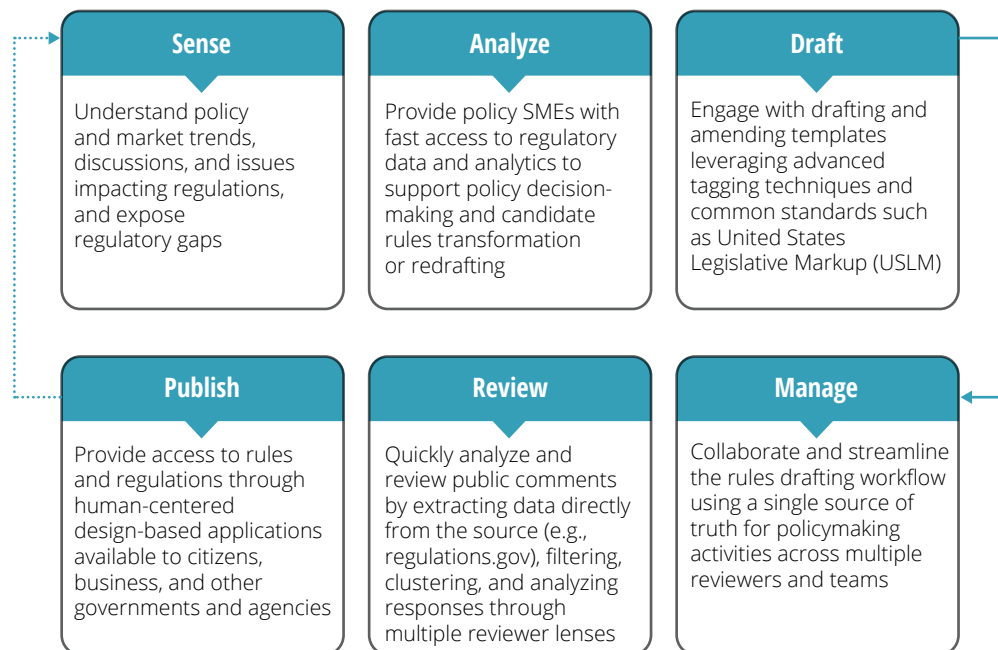
There is a growing notion across agencies that a more **end-to-end approach to modernizing the regulatory review process is required**. This approach is manifested in six primary steps as described in the chart below. Each of the steps in the chart represents a stage in which the regulatory process can work better for the American people than it does today using principles of equity, transparency, and efficiency. Below each stage is an example of how regulatory technology could be

used to shift federal worker time toward these principles and away from low-value activities.

Finally, answering the President’s call for action and realizing the intended aims of the memo will **require robust program and project management in the form of a dedicated Program Management Office (PMO)**. In addition, the team that takes forward this work must include or have access to a wide range of expertise including stakeholder engagement, impact measurement, communications, and other specialized capabilities such as human-centered design and journey mapping. By seizing the opportunity to increase equity, transparency, and efficiency in regulation, the regulatory review process must be examined from end to end (figure 2).

FIGURE 2

End-to-end examination of the regulatory review process



Source: Deloitte analysis.

The path ahead

If the past 40 years of regulatory reforms and executive orders have taught us anything, it is clear the path ahead will not result in a one-time, one-size-fits-all regulatory solution that meets the challenges we're facing and addresses the **complexity of the interrelated challenges** our Nation faces. That is why throughout this paper, we've focused on planning for agility and long-term impact and proposed guiding principles for end-to-end review of the regulatory review process as opposed to a fixed agenda or point in time solution.

Putting equity, transparency, and efficiency at the center should not only improve outcomes for "disadvantaged, vulnerable, or marginalized communities", but also lead to improved outcomes for all, including future generations. Now is the time to innovate.

Complex challenges require thoughtful solutions. For regulators to make the most of the opportunity to shape a new regulatory process,

they must evaluate *how* they regulate as much as *what* they regulate. Re-evaluating how regulations are reviewed requires a new set of tools and strategic partners with experience in different aspects of regulatory reform and institutional effectiveness.

To rise to President Biden's challenge to modernize the regulatory review process, OMB, OIRA, and federal agency leads must create a new approach to regulatory review.

By taking up President Biden's regulatory review challenge with new strategic partners and tools, regulators can ensure that the American regulatory system can adapt as the world changes around it. OMB, OIRA, and federal agency leaders have more of an opportunity than ever before to shape the future of regulation. Let's seize it.

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