IMPROVING EQUITY IN REGULATORY ENGAGEMENT

An Analysis of the Challenges Facing Advocates Representing Marginalized Communities in the Rulemaking Process

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Executive Summary

A regulator's job is to write rules that shape how laws are implemented and how society functions. In a vacuum, regulators do not have nearly enough information to do that job well. Therefore, a significant part of rulemaking involves gathering this information from a variety of sources, including from members of the public who will feel the impact of the rule and whose lived experiences might be different than those of the regulators. Participatory rulemaking is essentially a system designed to bring this information from those members of the public to regulators.

But the regulatory system is not necessarily concerned with getting a broad diversity of perspectives (or, in another sense, a representative sample). It is complicated to navigate and requires a degree of technical expertise to communicate effectively with regulators. For instance, although the opportunity to comment on a notice of proposed rulemaking, is available to anyone, some members of the public are far more likely to comment, and some comments are far more likely to influence the final rule.

Regulated bodies (especially large businesses) make up the vast majority of public comments and have the resources to navigate this complex system. By contrast, members of the general public are largely absent – they are both less likely to comment and less likely to do so effectively. This is compounded for people from marginalized groups, especially communities of color, low-income communities, and rural communities. A network of advocates – community-based organizations, direct services providers, and public interest policy advocacy organizations – often participates on behalf of these groups. While these organizations bring more technical expertise than individuals, they are still outmatched by industry in resources and participate at lower rates.

This is a problem if you believe that any public engagement with government is a societal good in and of itself. But it is an even greater problem if you believe that public engagement with government is an important tool to advance more equitable policymaking.

The existing academic literature on improving regulatory participation is largely concerned with developing recommendations for agencies to better engage absent stakeholders and members of the public. There is also a growing body of work by practitioners designed to arm advocates who represent marginalized communities with best practices for operating within the system as it currently exists. This report seeks to bridge these two aims by identifying where in the system it makes sense for agencies to change and where it makes sense for advocates to receive support.

Through a series of semi-structured interviews with advocates and regulators, challenges emerged in four areas:

1. Advocates do not have access to the **data and research** that regulators need
2. Advocates may be bringing certain **policy asks to regulators too late in the process**
3. Regulators are limited in their ability to **weigh distributive impacts**
4. **Meetings** do not always foster **productive dialogue**

While there are opportunities for both advocates and agencies to address all of these challenges, advocates are more likely to benefit from focusing on issues one and two, while agencies are likely best positioned to act on issues three and four. Recommendations include:

- Invest in **formalizing data gathering and analysis** through advocacy coalitions
- **Resolve mismatches** between policy asks and rulemaking stages
- Reconsider the **role of cost-benefit analysis** in regulatory review
- **Build agency facilitation capacity** for meetings

Recommendations

Regulators and advocates agreed that it would take work from both government and the advocacy community to fully combat the inequities in the regulatory engagement system. For prioritization purposes, this report finds that data and research challenges and policy asks should be addressed from the advocacy side, while agencies (or OIRA) may be better suited to improving regulatory impact analysis and meeting facilitation. These designations are based on insights from interviews and survey results that speak to the potential effectiveness and feasibility of working with advocates on these issues.[40]

The list of recommendations below includes opportunities for interventions at both the advocacy and agency level. These recommendations are preliminary ideas and would benefit from further research into implementation and political feasibility.

Formalize data gathering and analysis through advocacy coalitions

Just as coalitions can be useful for sharing stories from individuals up to a regulator or coordinating opportunities for comments, they hold promise for mitigating the data and research gap facing advocates and regulators. Because legal services attorneys work closely with clients on a regular basis, they are well-positioned to gather data or help inform data collection. Policy advocates, who are more likely to be working on packaging comments or letters, could take on analysis and distribution of results.

Of course, these roles might overlap, and the structure and composition of these coalitions could (and should) vary as appropriate. For instance, coalitions that are aiming to fill in gaps with more informal surveys might operate differently from ones focused on methodologically rigorous research with larger sample sizes.

Client Surveys

Regulators often brought up that membership-based industry organizations will simply survey their members and submit the results to agencies as evidence of a rule's impact. Some also pointed out that legal services attorneys could do the same with their clients in order to help contextualize individual anecdotes and experiences. This seems potentially feasible: when asked if they would survey their clients and share results with regulators, 38% of legal services attorneys surveyed for this report said yes and 52% said maybe.[41] Implementation might vary – legal services organizations could send surveys out to their clients or could add questions to their existing intake processes to track specific types of information (this would be somewhat analogous to industry leveraging internal data). Once the data collection phase was complete, policy advocates could take over to share the most relevant findings with regulators.

In either event, regulators noted that advocates should be sure to be transparent about their methods and samples. Trainings and capacity-building on survey technologies and data collection or basic analytical methodologies would be useful to avoid overburdening attorneys and other legal services staff, who may be cramming these tasks into their already heavy workloads.

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[40] In surveys, 7 regulators and a new sample of 17 legal services attorneys were asked to rank the challenges on specific criteria. Regulators were asked which would be most impactful and important to address through trainings with advocates. Legal services attorneys were asked which they would find most interesting and helpful as a training topic. High ratings by regulators translated into the likely effectiveness of focusing on this issue, while high ratings by advocates translated into the likely feasibility of working on the issue with attorneys who are less likely to do regulatory advocacy on a regular basis.

[41] Author's data from a sample of 17 legal services attorneys surveyed March 2021.

Additionally, building competencies in participatory practices to avoid perpetuating biased or overly extractive research would be important. Some best practices include giving community-based organizations the opportunity to take a leadership role in the research process, recognizing and finding ways to support costs of the research to communities, and co-owning the results.[42]

Speed is a primary advantage to this approach. Not only does a client survey allow legal services attorneys to get results quickly and incorporate them into an existing timeline if necessary (e.g. a 60-day comment period), regulators may also benefit from fresher data. One advocate reported that old data is an ongoing challenge in rulemaking. Gathering this data may also help advocates more explicitly frame client stories in terms of costs and benefits to society.

However, gathering data may require too great of a time investment from attorneys or community members, even if third party support is available. Furthermore, attorneys might be hesitant to jeopardize trust built with their clients by asking them to share more information about themselves and their experiences. Finally, regulators noted that agencies, who know their rules can be challenged for insufficient evidence, can be risk averse, creating barriers to relying on something like an informal client survey for rulemaking.

Research partnerships

One regulatory expert, speaking in her personal capacity and not in her professional role, was firm that the only way to really level the playing field is to form partnerships between legal services organizations and academic researchers to develop studies that will pass regulatory standards for methodological rigor. [43] Legal services attorneys may still want to do initial information gathering and brainstorming with their clients and client communities, but then they should be able to hand the work to a technically-skilled researcher or academic who can design, distribute, and analyze the research. Once complete, policy advocates could still share findings with regulators, but these partnerships would add an additional layer to any existing coalitions.

The most significant advantage to these partnerships is credibility. While some regulators may see a client survey as walking a fine line between data and anecdote, a study conducted by a university center is more likely to have a statistically backed, representative sample that regulators can rely on to make decisions. Some university research centers are eager to partner with local organizations to do practical research, but establishing and maintaining these relationships could be time-consuming, especially for a legal services organization. Advocacy organizations may be able to take on some of this work, but maintaining the independence of the research itself is also an important consideration.

Hold workshops to align policy asks with rulemaking stage

Advocates and former regulators both stressed the importance of a deep understanding of the statutes and legal issues that inform a given rulemaking. One advocate summed it up as being helpful to be able to "speak FMLA"[1] (or whatever statute may be guiding the rulemaking). This kind of preparation, combined with thorough research, can make advocates more appealing to work with, asserted this advocate, because they have "done [the regulator's] work for them in part." And

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[42] CHICAGO BEYOND EQUITY SERIES, *WHY AM I ALWAYS BEING RESEARCHED?* (2019) https://chicagobeyond.org/wp-content/uploads/2019/05/ChicagoBeyond_2019Guidebook.pdf.

[43] Interview with Shagufta Ahmed, Senior Policy Analyst, Office of Information and Regulatory Affairs, U.S. Office of Management and Budget. The views expressed by Shagufta Ahmed in this article are those of herself and do not necessarily represent the views of the Executive Office of the President, the Office of the Management and Budget, or the United States Government.

since agency staff are expected to sift through immense amounts of information in the course of a rulemaking, this can impact whether an advocate is effective or not.

Both policy advocates and legal services attorneys are likely to be able to speak the language of a given statute, but from different perspectives. Legal services attorneys may have a more practical expertise derived from working on client cases that fall under the statutory scheme. Policy advocates may develop their knowledge of a legal issue area through conversations with legal services attorneys and thorough legal research. Policy advocates are also more likely to have an understanding of where regulators are along the rulemaking timeline and what information they might be looking for.

Bringing policy advocates and legal services attorneys together to share expertise and even develop a forward-looking strategy could improve the effectiveness of advocacy from both groups. Workshops discussing advocacy earlier in the agenda-setting or pre-rule stages may also benefit from participation from community organizers or clients who are interested in informing the priorities and direction of advocates' policy asks.

Strengthen agency engagement practices earlier in the rulemaking timeline

While regulators have a range of both formal and informal tools to promote public engagement during the earlier stages of the rulemaking process available to them, this engagement is not legally required and therefore happens on an ad hoc basis.[44] This may lead agencies to "undersupply public engagement."[45] Sant'Ambrogio and Staszewski propose interventions designed to create accountability and resources for agencies to enhance their public engagement during agenda setting and rule development. One of these proposals focuses on "early and systematic planning," including the adoption of internal policies and frameworks, along with a "pre-commit[ment]" from agencies to follow through on these policies by promulgating a rule that sets them in motion.[46]

Reform the role of cost-benefit analysis in regulatory review

Regulators expressed that they face constraints on their ability to fit advocates' concerns about equity into their cost-benefit analysis. In part, the solution to this lies in equipping the advocacy community with better data. If advocates can share data that shows outcomes by zip code for instance, regulators can in turn use this data to more precisely quantify costs and benefits geographically.

However, there are also calls for agencies to revisit how they use cost-benefit analysis in rulemaking. Tucker and Nayak point out that traditional cost-benefit analysis "is rooted in concepts like individual willingness to pay to avoid harms, rather than a more structural accounting of which groups in society gain or lose from courses of action and inaction."[47] They suggest, among other reforms, centering the value of social transfers – for instance by directing agencies to "calculate how a proposal impacts the eventual distribution of benefits from one group to another."[48]

Agencies could consider adopting models of analysis that include factors other than costs and benefits. Regulatory impact analysis in its current form is not limited to cost-benefit analysis. For

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[44] Sant'Ambrogio & Staszewski, *supra* note 5 at 818.
[45] *Id.* at 830.
[46] *Id.* at 832.
[47] Todd N. Tucker & Rajesh D. Nayak, *OIRA 2.0: How Regulatory Review Can Help Respond to Existential* Threats 9 (2020).
[48] *Id.* at 28.

instance, it can include cost-effectiveness analysis (useful for difficult-to-quantify benefits) or distributional analysis (useful for assessing effects on marginalized groups).[49] Nonetheless, providing a formal structure that more overtly encourages the use of these and other frameworks might be useful. For instance, New Zealand, whose regulatory impact assessments are largely similar to the United States', requires a risk or net impact assessment along with net costs and benefits.[50] This is similar to the Consumer Financial Protection Bureau's statutory requirement to consider benefits, costs, and impacts.[51]

Invest in facilitation capacity for agency meetings

Regulators stressed that agency staff are stretched thin – one characterized the workload as "drinking from a firehose." However, at least one agency has a program that trains staff to act as facilitators in public meetings, helping to organize and run the meetings to make them "more effective, inclusive, and fair."[52,53] Other agencies could adopt this model or hire outside facilitators. Alternatively, OIRA or another government department (e.g. an advocate's office modeled after the Small Business Association's Office of Advocacy)[54] could be charged with developing capacity and expertise in facilitation, and agencies could then work with these staff on an as-needed basis.

Investing in capacity and expertise could help agencies fulfill the Biden administration's executive order on advancing racial justice. Section 8 mandates heads of agencies "evaluate opportunities . . . to increase coordination, communication, and engagement with community-based organizations and civil rights organizations."[55] Better meeting facilitation has the potential to be particularly helpful with supporting effective advocacy from impacted community members themselves. This is promising both for advocates who invite clients to meetings to share their own stories and possibly for encouraging more participation from the general public in the long term.

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[49] JERRY ELLIG, *REGULATORY IMPACT ANALYSIS FOR FINANCIAL REGULATIONS,* REGULATORY INSIGHT 4 (2020).
[50] New Zealand Government, Guidance Note: Best Practice Impact Analysis (June 2017) https://www.treasury.govt.nz/sites/default/files/2018-03/ia-bestprac-guidance-note.pdf.
[51] 12 U.S.C. § 5512(b)(2)(A)
[52] Lance Rakovan, *Improving Public Meetings with New Facilitators and Policy Statement*, U.S. NRC Blog (Dec. 14, 2016) https://public-blog.nrc-gateway.gov/2016/12/14/improving-public-meetings-with-new-facilitators-and-policy-statement/.
[53] Sant'Ambrogio & Staszewski, *supra* note 5 at 824.
[54] Sharon Block, *Advocating for a Worker's Advocate,* ON LABOR, (Jun. 27, 2019), https://onlabor.org/advocating-for-a-workers-advocate/.
[55] Exec. Order No. 13985 86 Fed. Reg. 7009 (2021).