



BETTER MARKETS

June 6, 2023

Administrator Richard L. Revesz
Office of Information and Regulatory Affairs
Office of Management and Budget
Executive Office of the President
1600 Pennsylvania Ave., NW
Washington, DC 20500

Re: Draft Guidance Implementing Section 2(e) of the April 6, 2023 White House Executive Order on Modernizing Regulatory Review (Docket No. OMB-2022-0011).

Dear Administrator Revesz:

Better Markets¹ appreciates the opportunity to comment on the above-captioned draft guidance (“Draft Guidance”) from the Office of Information and Regulatory Affairs (“OIRA”) within the Office of Management and Budget (“OMB”). The Draft Guidance² would implement Section 2(e) of the Executive Order of April 6, 2023, titled Modernizing Regulatory Review (“Modernizing E.O.”).³

The Draft Guidance is a positive step as it will broaden the public input that OIRA receives and considers as it reviews proposed rules from federal regulatory agencies. It will also make the review process more transparent. The Modernizing E.O. calls for a number of reforms to the process through which OIRA meets with interested members of the public on significant regulatory actions under review pursuant to Executive Order 12866 (“E.O. 12866 Meetings”). Those meetings serve as listening sessions for OIRA officials, or channels for gathering input as they evaluate rule proposals from the regulatory agencies. One of the core purposes of the reforms set

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans’ jobs, savings, retirements, and more.

² See Draft Guidance Implementing Section 2(e) of Executive Order of April 6, 2023 (Modernizing Regulatory Review) (Apr. 6, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/04/ModernizingEOSection2eDraftGuidance.pdf>.

³ The request for comments was published in the Federal Register on April 7, 2023. See Office of Mgmt. & Budget, *Request for Comments on Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review)*, 88 Fed. Reg. 20,916 (Apr. 7, 2023), <https://www.federalregister.gov/documents/2023/04/07/2023-07360/request-for-comments-on-guidance-implementing-section-2e-of-the-executive-order-of-april-6-2023>.

forth in the Draft Guidance is to make the process more inclusive: “to facilitate meeting requests from individuals and groups that have not historically requested such meetings, including those from underserved communities.” The Draft Guidance is also intended to improve the overall efficiency and effectiveness of the regulatory review process and to increase transparency around the E.O. 12866 meetings, “while treating all members of the public—no matter their resources or viewpoints—consistently and fairly.”

Better Markets strongly supports all the reforms. Although any member of the public may currently request an E.O. 12866 Meeting with OIRA to discuss an agency rule that is under review, the perception and the reality is that the process has long been dominated by industry interests seeking to impede, dilute, or defeat regulatory reforms in the financial arena and elsewhere. Additionally, while OIRA invites representatives from the agencies taking regulatory action to participate in E.O. 12866 Meetings, the agencies do not always do so. In short, the public interest has been woefully underrepresented in this important phase of the rulemaking process.

The Draft Guidance will help correct these shortcomings, offering numerous benefits: The additional input from more diverse stakeholders, especially those who are underserved and underrepresented in government, will improve the quality of the final rules under review, mitigate the influence of anti-regulation voices, promote the public interest, and increase the public’s confidence in the rulemaking process. The provisions aimed at enhancing the efficiency and transparency of the process will similarly benefit the public and instill greater confidence in this aspect of federal government operations. We support these reforms and suggest some ways in which they can be strengthened.

BACKGROUND

On April 6, 2023, the White House issued an Executive Order on Modernizing Regulatory Review (“Modernizing E.O.”), part of a lengthy list of Executive Branch memoranda and executive orders that govern the process for reviewing agency rules issued at the federal level.⁴ For example, the Modernizing E.O. “supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review),⁵ and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review).”⁶ The Modernizing E.O. also further implements the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory

⁴ Exec. Order 14094, *Modernizing Regulatory Review*, 88 Fed. Reg. 21,879 (Apr. 06, 2023), <https://www.federalregister.gov/documents/2023/04/11/2023-07760/modernizing-regulatory-review>.

⁵ Exec. Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Sep. 30, 1993), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>. Executive Order 12866, as amended, establishes and governs the process under which OIRA reviews agencies' significant regulatory actions.

⁶ Exec. Order 13563, *Improving Regulation and Regulatory Review*, 3 CFR 13,563 (Jan. 18, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

Review).⁷ Pursuant to the terms of the Modernizing E.O., any provisions of those previous Executive Orders that were not amended by the Modernizing E.O. are to remain in effect. But the Modernizing E.O. proposes specific changes that represent a welcome departure from the anti-regulatory views reflected under some prior Administrations.

The Draft Guidance reflects this shift, as it seeks to enhance rather than inhibit regulation, in part through measures designed to increase public participation in the review process conducted by OIRA and to decrease the dominance of the regulated industry. For example, the Modernizing E.O. instructs that “[o]pportunities for public participation shall be designed to promote equitable and meaningful participation by a range of interested or affected parties, including underserved communities.”⁸ Section 2(e) of the Modernizing E.O. states that, “[p]ublic trust in the regulatory process depends on protecting regulatory development from the risk or appearance of disparate and undue influence, including in the OIRA review process.”⁹

OIRA’s basic role in the regulatory process is explained in the foundational E.O. 12866:

6(b) OIRA Responsibilities. The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency’s regulatory actions are consistent with applicable law, the President’s priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency.¹⁰

OIRA’s “guidance and oversight” must be informed by the views of all stakeholders affected by rules and regulations, especially the beneficiaries of regulation, not just those in the industry who seek to minimize their compliance costs. Thus, among other laudable goals, the Modernizing E.O. stresses the importance of broadening public participation by actively seeking out different perspectives to include in the regulatory process including from those communities most likely to benefit from, or be impacted by, the regulation. The Modernizing E.O. calls for this to be accomplished by facilitating participation by groups that have not historically requested E.O. 12866 Meetings, improve the efficiency of the regulatory process, and increase transparency, while treating all members of the public—no matter their resources or viewpoints—consistently and fairly.

⁷ Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review) (Jan. 20, 2021), <https://www.whitehouse.gov/omb/information-regulatory-affairs/modernizing-regulatory-review/>.

⁸ Exec. Order 14094, *Modernizing Regulatory Review*, *supra* note 4 at § 2. Section 10(b) of Exec. Order 14091, *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 88 Fed. Reg. 10,825, 10,832 (Feb. 22, 2023), defines the term “underserved communities” as “those populations as well as geographic communities that have been systematically denied the opportunity to participate fully in aspects of economic, social, and civic life, as defined in Executive Orders 13985 and 14020.” *See also* Memorandum from Richard L. Revesz to Regulatory Policy Officers at Executive Departments and Agencies Regarding Implementation of Modernizing Regulatory Review Executive Order (Apr. 6, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/04/ModernizingEOImplementation.pdf>.

⁹ Exec. Order 14094, *Modernizing Regulatory Review*, *supra* note 4 at § 2(e).

¹⁰ Exec. Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Sep. 30, 1993), <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>.

OVERVIEW OF DRAFT GUIDANCE

The Modernizing E.O. directs OIRA to implement reforms designed to reduce the risk or the appearance of disparate and undue influence on regulatory development. The Draft Guidance would engender public trust in the regulatory process by attempting to meaningfully increase participation by a range of interested or affected parties, including underserved communities, in the E.O. 12866 Meeting process.

Specifically, the Draft Guidance outlines proposals to:

1. Provide information to facilitate the initiation of meeting requests from potential participants who have not historically requested such meetings, including those from underserved communities as called for by the Modernizing E.O. by:
 - (A) designing new OIRA tools to help members of the public request E.O. 12866 Meetings and effectively participate in E.O. 12866 Meetings, including a process to request reasonable accommodations;
 - (B) offering periodic and accessible public training on effective participation in E.O. 12866 Meetings, in collaboration with agencies and civil society organizations so as to reach communities that might not have historically participated in the E.O. 12866 meeting process before”;
 - (C) improving notice of Meeting opportunities, such as by recommending that agencies share information about the opportunity to request E.O. 12866 Meetings with public commenters on regulatory actions that are reviewed by OIRA;
 - (D) consulting with the public to better understand current barriers to communicating information about and participating in E.O. 12866 Meetings and identifying potential strategies for overcoming those barriers, including barriers related to Internet availability; non-English language access (consistent with Executive Order 13166 (Improving Access to Services for Persons with Limited English Proficiency))¹¹; access by persons with disabilities, such as web accessibility (consistent with OIRA’s responsibilities under federal disability rights laws); knowledge or awareness of the regulatory process and OIRA’s role in E.O. 12866 review; and lack of trust in government;
 - (E) reviewing and improving data collection and disclosure related to participation in E.O. 12866 Meetings and consulting with agencies and the public to identify gaps in participation by interested or affected individuals or entities; and

¹¹ Exec. Order 13116, *Improving Access to Services for Persons with Limited English Proficiency*, 65 Fed. Reg. 50,121 (Aug. 11, 2000), <https://www.govinfo.gov/content/pkg/FR-2000-08-16/pdf/00-20938.pdf>.

- (F) making the E.O. 12866 Meeting request form more prominent in relevant areas of reginfo.gov.
2. Implement reforms to improve the procedures and policies with respect to OIRA’s consideration of E.O. 12866 Meeting requests regarding the substance of regulatory actions under OIRA review to further the efficiency and effectiveness of such meetings, including:
- (A) efforts to ensure access for E.O. 12866 Meeting requesters who have not historically requested such meetings by defining those who “have not historically requested” an E.O. 12866 Meeting as a subset of members of the public, including organizations and individuals, who have not previously participated in the E.O. 12866 Meeting process within the last three years;
 - (B) discouraging E.O. 12866 Meeting requests that are duplicative of earlier meetings with OIRA regarding the same regulatory action by the same E.O. 12866 Meeting requesters by not scheduling multiple E.O. 12866 Meetings for the same meeting requester during a single E.O. 12866 review of the same regulatory action at the same stage of the regulatory process;
 - (C) consolidation of E.O. 12866 Meetings by requester, subject matter, or any other consistently applied factors deemed appropriate to improve efficiency and effectiveness by strongly encouraging groups that would like to present similar views on a regulatory action to submit joint meeting requests wherever possible and prioritizing such requests; and
 - (D) disclosure of data in an open, machine-readable, and accessible format that includes the dates and names of individuals involved in all substantive E.O. 12866 Meetings and the subject matter discussed during such E.O. 12866 Meetings, as required by Section 6(b)(4)(C)(iii) of Executive Order 12866, so as to better facilitate transparency and analysis.

COMMENTS

Overall, the Draft Guidance would generally accomplish the mandates of the Modernizing E.O. by facilitating participation by groups that have not historically requested E.O. 12866 Meetings, improving the efficiency of the regulatory process, and increasing transparency, while treating all members of the public—no matter their resources or viewpoints—consistently and fairly. However, Better Markets believes the proposals in the Draft Guidance can be improved in two significant ways.

I. In addition to facilitating meeting requests from more diverse stakeholders, OIRA should also affirmatively reach out to communities that have not participated historically in E.O. 12866 meetings.

Better Markets supports OIRA’s proposals in the Draft Guidance to provide increased information to the public to facilitate the initiation of E.O. 12866 Meeting requests from potential

participants who have not historically requested such meetings, including those from underserved communities. In particular, we support the proposal to offer reasonable accommodations to those with disabilities, as well as periodic and accessible public training in collaboration with agencies and civil society organizations so as to reach communities that might not have historically participated in the E.O. 12866 meeting process. Further, we agree that it would be helpful if agencies shared more information with the public about the opportunity to request E.O. 12866 Meetings on regulatory actions that are reviewed by OIRA and there is no reason that agencies cannot do so to improve awareness of E.O. 12866 Meeting opportunities.

Better Markets, however, believes that OIRA can and should go further. Specifically, OIRA should also establish a program to reach out directly to community leaders, in addition to civil society organizations, to provide training on the importance of the regulatory review process, how to submit meeting requests through www.reginfo.gov, and how to prepare for and participate effectively E.O. 12866 meetings. Ideally, training should be offered in languages other than English consistent with E.O. 13166, accessible by persons with disabilities, and scheduled at times that accommodate the community leaders' and civil society organizations' schedules. This type of affirmative outreach in the community is one important way to help ensure that the Draft Guidance achieves its inclusivity goals. Further, OIRA should ensure that communities and community members have the technological ability to comment, including web access, and should also take steps as necessary to ensure communities have the tools to request and attend meetings.

II. OIRA should adopt additional procedures to enhance the efficiency and transparency of E.O. 12866 meetings.

Better Markets supports OIRA's proposals in the Draft Guidance to improve the efficiency and effectiveness of such meetings. For example, we believe that OIRA should disclose E.O. 12866 Meeting requestors' "narrative descriptions." OIRA should also require meeting requesters to provide a brief summary of the views they anticipate presenting, thus increasing transparency in a more substantive and meaningful way for the public, agencies, and OIRA. And OIRA should ensure that a meaningful summary of the substance of the meeting discussion is also made publicly available. There is no reason to withhold this information from public view, as E.O. 12866 Meetings influence the rulemaking process and affect the lives of every American directly or indirectly.

Similarly, OIRA should disclose the individuals or organizations that the primary meeting requester may be representing at a meeting, including the type of organization seeking to engage with OIRA, such as for-profits, non-profits, coalitions, collectives, and public and private educational institutions. Further, Better Markets urges that the lobbying status of any E.O. 12866 meeting requestor or participant be disclosed. These measures will further transparency and accountability in the rulemaking process.

Better Markets agrees that E.O. 12866 Meeting consolidation, if done properly, may tend to increase the efficiency and effectiveness of E.O. 12866 Meetings to the extent that it brings like-minded individuals to the table collectively while conserving OIRA's time, energy, and resources in the rulemaking process. However, any consolidation of E.O. 12866 Meetings should be

voluntary. This will ensure that all interested individuals and organizations have an adequate opportunity to present their views. It will also help ensure that sensitive information, such as personal or business information about how a regulatory action might impact the participant, can be appropriately safeguarded in the meeting process.

To better facilitate consolidation, we further suggest that OIRA create an online forum, perhaps as a part of www.reginfo.gov, where similarly minded commenters can coordinate in virtual “groups.” Finally, we urge OIRA to reconsider the provision in the Draft Guidance that would continue to limit consolidated E.O. 12866 Meeting to 30 minutes. Instead, OIRA should allocate an additional 10 minutes to consolidated E.O. 12866 Meetings for each additional group or individual to ensure that all parties are heard and to encourage consolidation.

CONCLUSION

We hope these comments are helpful as OIRA and OMB finalize the Draft Guidance.

Sincerely,



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