

June 6, 2023

**VIA ELECTRONIC SUBMISSION**

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

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**Re: Request for Comments on Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review), Office of Management and Budget (88 Fed. Reg. 20,916 – 20,917, April 7, 2023)**

Dear Administrator Revesz:

The undersigned organizations (“the Business Community”) offer these comments in response to Office of Management and Budget’s (“OMB”) April 7, 2023, “Request for Comments on Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023.”<sup>1</sup> The Business Community recommends to OMB that it withdraw the draft guidance and recommends to President Biden that he restore the original Executive Order 12866.

**Draft Guidance Implementing Section 2(e) of Executive Order 14094**

The Office of Information and Regulatory Affairs’ (OIRA) open-door policy granting meetings to any party interested in a regulation under review has reinforced the rigor and legitimacy of centralized regulatory review. Stakeholders with first-hand knowledge and expertise can often identify trouble spots in regulatory proposals and thus help OIRA and the drafting agencies improve regulatory outcomes and durability. At least as important, OIRA’s open-door policy has helped rebut accusations that OIRA is “by far the least transparent step in the rulemaking process” and has been captured by ideologues.<sup>2</sup> It is precisely because OIRA is open to all comers that it enjoys broad bipartisan support.

The proposed guidance could have damaging ramifications for OIRA’s standing and for regulatory outcomes.

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<sup>1</sup> Request for Comments on Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review), 88 Fed. Reg. 20916 (Apr. 7, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-04-07/pdf/2023-07360.pdf>.

<sup>2</sup> James Goodwin, *The Progressive Case Against OIRA*, Center for Progressive Reform (Jan. 5, 2019), <https://progressivereform.org/publications/progressive-case-against-oira/>.

In the first place, the Business Community is concerned that the draft guidance counsels viewpoint partisanship.<sup>3</sup> All Americans have a right to petition the government. Yet the draft guidance creates two different sets of standards that govern that right. For individuals and organizations that have “not historically requested” such meetings, OIRA will, for the first time, proactively reach out, including to specific “civil society organizations.”<sup>4</sup> The goal of these efforts, according to the underlying Executive Order, is to counteract the influence of private groups that have “historically requested” such meetings.<sup>5</sup> Of particular concern, OIRA anticipates that for the most controversial and analytically intensive rulemakings it will need to limit its meetings and thus will “prioritize the scheduling of requests that come from those that have not historically requested meetings” over those who have historically requested meetings.<sup>6</sup> It is hard to read this warning and not conclude that OIRA expects to allocate opportunities to petition based on the opinions petitioners are likely to offer, soliciting meetings with those likely to support regulatory proposals (perhaps tepidly, and so have thus never been moved to participate) while potentially blocking those who bear the bulk of the costs of regulation and who thus routinely advocate for less costly rules.

Second, an inflexible rule against repeat meetings will negatively affect regulatory outcomes. According to the draft Guidance, “OIRA will not schedule multiple EO 12866 meetings for the same meeting requester during a single EO 12866 review of the same regulatory action at the same stage of the regulatory process.”<sup>7</sup> This is a mistake. Many rules are highly complex, with significantly different impacts on different industries and sectors. In such cases, it is highly unlikely that a single entity, much less a coalition, could adequately discuss the details of the rule in a 30-minute meeting. Regulatory review must be an empirical process. As such, analytical and factual development will often be iterative. The categorical rule against repeat meetings threatens to cut that process off, denying OIRA the help of highly knowledgeable outside groups.

Further, the Business Community observes that, under the current open door policy, many entities participate in the same rulemaking through different coalitions in order to emphasize different impacts of the proposed rule. This division of labor is efficient. The draft Guidance would, however, block these entities from participating in more than one coalition meeting. The consequence of the proposed one-meeting rule might be that OIRA staff holds more meetings, not fewer.

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<sup>3</sup> See generally *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

<sup>4</sup> Office of Management and Budget, *Draft Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review)* 4 (Apr. 6, 2023) (hereinafter “2(e) Guidance”).

<sup>5</sup> Exec. Order No. 14,094, 88 Fed. Reg. 21,879 (Apr. 11, 2023).

<sup>6</sup> 2(e) Guidance at 6.

<sup>7</sup> *Id.*

## Amendments to Executive Order 12866

The Business Community urges the Administration to reconsider Executive Order 14094, which directly amends Executive Order 12866. Although the administration did not specifically request comment on these changes, the Business Community provides them for the sake of a shared belief in the promotion of good government.

Fundamentally, cost-benefit analysis is a necessity to good government. It makes sure policymakers are informed by objective criteria, and helps protect against unintended consequences and other negative outcomes. Yet when the full scope of regulation is considered, it is striking how limited cost-benefit analysis's reach is. On average, OIRA reviews about 400 rules a year, but the total number of rules finalized in any given year is between 3,000 and 4,500.<sup>8</sup> Before the changes introduced by EO 14094, nine out of every ten rules were not reviewed by OIRA. Due to the changes in EO 14094, fewer rules will be reviewed as the executive order raises the threshold for OIRA review in multiple respects. Reforms should seek to go in the opposite direction, subjecting more and more rules to rigorous centralized review, such as by requiring independent agencies to submit their significant proposed rules to OIRA for review.<sup>9</sup>

First, the Business Community strongly disagrees with the decision to raise the threshold for economic significance from \$100 million to \$200 million per year in annualized impacts. A rule costing \$199 million per year is consequential, particularly (but not only) if it is concentrated on a small group or on small businesses. Moreover, this change creates a troubling inconsistency with the Congressional Review Act. The "major rules" subject to the Congressional Review Act are those rules that have an annual effect on the economy of \$100 million or more.<sup>10</sup> Congress chose this threshold so that it would match the threshold for economic significance under EO 12866. This was not just symmetry for symmetry's sake. Rather, Congress knew that rules subject to OIRA review under EO 12866 would include the comprehensive regulatory impact analyses that would enable Congress to effectively evaluate the rule. The EO 14094 changes would deprive Congress of that thorough record for some subset of rules.

Second, the Business Community strongly disagrees with the decision to remove the requirement to review rules that "raise novel legal or policy issues." It is especially important to identify and choose the best policy option in the first instance. Novelty is an objective standard concerning precedent-setting rules; applying that standard, private parties can assist the administration with understanding the type and extent of impacts of such rules during centralized review. Executive Order 14094 surprisingly replaces this familiar, workable, and non-partisan criterion of novelty with a standard that eliminates the presumption of review and concentrates discretion in the OIRA Administrator, a political

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<sup>8</sup> Congressional Research Service, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register* 7, 12 (Sept. 3, 2019), <https://sgp.fas.org/crs/misc/R43056.pdf>.

<sup>9</sup> *Cf.* Exec. Order No. 13579, 76 Fed. Reg. 41,585 (Jul. 14, 2011) (encouraging independent agencies to employ cost-benefit analysis).

<sup>10</sup> 5 U.S.C. § 804(2)(A).

appointee.<sup>11</sup> Such a change represents a move away from public accountability towards the politicization of interagency regulatory review, and it should be reversed.

## **Conclusion**

The Business Community recommends that the Draft Guidance be withdrawn. OIRA should not institute preferential treatment for any person seeking to exercise its petition rights—and it especially should not institute preferential treatment on the basis of expected viewpoint. Further, OIRA should not promulgate any categorical rules that would bar potentially informative meetings. In addition, the Business Community respectfully submits that the President should reconsider Executive Order 14094 and restore Executive Order 12866.

Sincerely,

American Chemistry Council  
American Coke and Coal Chemicals Institute  
American Exploration & Production Council  
American Forest & Paper Association  
American Fuel & Petrochemical Manufacturers  
American Gas Association  
American Petroleum Institute  
American Public Gas Association  
American Public Power Association  
American Wood Council  
Associated Builders and Contractors  
Associated General Contractors of America  
Corn Refiners Association  
Council of Industrial Boiler Owners  
Independent Petroleum Association of America  
Interstate Natural Gas Association of America  
National Association of Home Builders  
National Automobile Dealers Association  
National Grain & Feed Association  
National Lime Association  
National Mining Association  
National Roofing Contractors Association  
National Rural Electric Cooperative Association  
National Stone Sand and Gravel Association  
National Waste & Recycling Association  
Plumbing-Heating-Cooling Contractors Association  
Portland Cement Association  
The Fertilizer Institute  
U.S. Chamber of Commerce

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<sup>11</sup> Exec. Order No. 14094.