June 5, 2023

Administrator Richard L. Revesz
Office of Management and Budget
Office of Information and Regulatory Affairs
725 17th St., NW
Washington, DC 20503

Via electronic submission: www.regulations.gov

Re: Docket ID OMB-2022-0011, Request for Comments on Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review)

Dear Administrator Revesz:

The Project On Government Oversight (POGO) submits the following comment in response to “Draft Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review)” published in the Federal Register on April 7, 2023. ¹

Founded in 1981, POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

POGO is pleased to see the Biden administration take steps to improve access, diversity, and transparency with regard to the federal regulatory process via its April 6 Executive Order 14094, Modernizing Regulatory Review. ² Federal rulemaking impacts many aspects of our lives and work. The regulatory process includes opportunities for ordinary people to help shape rules through a formal comment process, and for significant rules, meetings with the Office of Information and Regulatory Affairs (OIRA).³ These meetings are known as E.O. 12866 meetings. But while the draft guidance implementing the Modernizing Regulatory Review states that “E.O. 12866 meetings serve as listening sessions for OIRA officials,” it also notes that the majority of rules reviewed by OIRA generate no meeting requests. When rules do generate requests, typically fewer than five meetings are requested.⁴ The meetings that do occur tend to have been requested by well-resourced individuals, organizations, businesses, and industry associations. This is indicative of a process that is complicated at best, and impenetrable at worst.

³ Executive Order No. 12866, 58 FR 51735 (October 4, 1993).
⁴ Request for Comments on Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review) [see note 1].
In his April 6 Executive Order on Modernizing Regulatory Review, President Joe Biden noted that “opportunities for public participation shall be designed to promote equitable and meaningful participation by a range of interested or affected parties, including underserved communities.” Inclusive and diverse participation is a critical equity issue. It’s also common sense. When people can share their lived experiences and expertise on the rules that will in turn impact their lives, the federal government’s regulations will be better informed.

The draft guidance seeks feedback on E.O. 12866 meetings: How to include new perspectives, particularly from underserved communities; how to arrange and prioritize these meetings; and how to increase the transparency and accountability of the process. In the past, POGO has recommended solutions to increase participation, transparency, and accountability in the rulemaking process. In today’s comment, we restate some prior recommendations as well as respond specifically to the draft guidance.

**Facilitating Diverse and Inclusive Participation in E.O. 12866 Meetings**

POGO supports the solutions offered in the draft guidance, and would add to them as follows:

- **Publish federal rulemaking resources in different languages.** Historically underserved communities often face significant language barriers that prevent more meaningful regulatory participation. OIRA should offer translations into the most common foreign languages on its website as well as in any official supplementary materials related to federal rulemaking. This would help ensure that a wider and more diverse range of individuals can make use of OIRA’s processes for soliciting feedback on federal rules.

- **Streamline the federal register.** The federal register can be intimidating and difficult to navigate. While the legal language and structure of federal regulations are necessary to ensure the regulations are sufficiently binding on the regulated community, the federal government needs to also present the information in a way that is accessible to the general public, especially affected communities. This should include a plain language explanation of the proposed regulation and links to other sources the regulation cites. The government should also ensure that the federal register and relevant websites related to rulemaking are user-friendly for disabled individuals.

- **Use technology to engage a wider and more diverse audience.** OIRA should better and more creatively use popular technology, including social media platforms, to reach underserved communities. It should be noted that while technology can improve outreach, it is not a total or singular solution as it comes with its own equity challenges. The digital divide remains a real barrier for certain communities, often including rural and low-income areas.

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5 Executive Order No. 14094 [see note 2].
• **Establish an OIRA Equity Accountability Council.** OIRA should establish a permanent Equity Accountability Council consisting of representatives from the federal level, state and local levels, civil society, community organizations, third party intermediaries, academics, and other experts to advise on the federal rulemaking process. This would allow interested and relevant groups to coordinate on regulatory reform.

• **Build relationships with on-the-ground intermediaries.** The federal government should also look to build and maintain meaningful relationships with third party intermediaries, such as nonprofits, community organizers, and faith-based organizations. These community leaders are often the most effective conduits to reaching traditionally underserved groups.

• **Set a minimum window to request E.O. 12866 meetings.** The current process does not make clear how long OIRA will accept meeting requests; usually, a denied meeting request is the only way to surmise that OIRA has finished its review. This opacity can be a barrier for participation, particularly to those less familiar with the regulatory process. POGO recommends that OIRA create and publicize a minimum window of time during which they will accept E.O. 12866 meeting requests. If a rule is getting many requests, OIRA should extend the window (within reason) and publicize the change.

• **Publish a list of organizations from whom OIRA has received feedback or with whom it has met.** OIRA should publish online a list of organizations that attend engagement sessions or provide feedback. This would encourage organizations to collaborate and to build relationships in the regulatory space.

**Prioritizing and Consolidating E.O. 12866 Meetings**

As noted in the draft guidance, it is rare for OIRA to receive more than five meeting requests for a rule under review. But in anticipation of reaching more stakeholders, the draft guidance includes suggestions for consolidating and prioritizing meetings. We respond to these suggestions:

• **Meet with as many people and organizations as possible.** The draft guidance proposes that OIRA prioritize meetings from those “who have not historically requested” E.O. 12866 meetings. But simply being a new requester is no guarantee that the individual or group has also been historically marginalized in the federal regulatory process. To the extent possible, we urge OIRA to continue its current process of fulfilling each meeting request, even if some meetings are consolidated.

• **Do not ask about sensitive information.** We recommend that OIRA not include a new field in the meeting request form asking the requester to indicate if they would like to convey sensitive information. Businesses and industry associations already play an outsized role in the federal regulatory process; there is a chance that this field could be misused and even abused to ensure that “those in the know” continue to have individual meetings with OIRA and agency staffers while other meetings get consolidated. If OIRA includes an option to designate information as sensitive, we would urge the office to couple it with a requirement that the parties submitting any such information also submit

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7 Request for Comments on Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review) [see note 1].

8 Request for Comments on Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review) [see note 1].
written justification explaining the reason the submitted information qualifies for any type of protected status. The written justification would better enable the office to make determinations about the submitted materials rather than just accepting the assertions of the submitter. The justifications should also be made public so outside parties may review the claims and potentially challenge any sensitive status granted by the office.

**Increasing Transparency of E.O. 12866 Meetings**

Increasing transparency is integral to making the rulemaking process more inclusive and accountable. We agree that all information about E.O. 12866 meetings should be made public in an open, machine-readable, and accessible format. In addition, POGO makes the following recommendations:

- **Collect and disclose additional meeting requester information.** POGO supports collecting additional information on E.O. 12866 meeting requesters, including the fields proposed in the draft guidance, and making that information required.

- **Clarify that all meeting attendee information will be collected and disclosed.** The current requirement language focuses on disclosing information about outside parties attending these meetings. While current practice includes identifying government officials in attendance, the guidance does not specifically require that disclosure. POGO recommends that the language be updated to make clear that the names and agency affiliations of all government officials participating in 12866 meetings must be disclosed to the public.

- **Clarify that all shared meeting materials will be disclosed.** OIRA should update the guidance to make clear that all materials provided by attendees or their associates before, during, and after the meeting will be disclosed. The current language emphasizes presentation materials, which could be interpreted to exempt materials shared but not discussed in the meeting or items shared later in follow-up communications. In addition, OIRA should make public all communications with outside parties concerning regulatory actions, such as telephone discussions, email exchanges, and comments about pending regulatory matters at the end of a meeting on another topic.

**Increasing Transparency of OIRA**

While not specifically referenced in the draft guidance, POGO would be remiss not to include a longstanding recommendation to increase OIRA’s overall transparency in the rulemaking process.

- **Update the interpretation of OIRA disclosure requirements.** POGO has flagged for more than a decade that OIRA’s interpretation of the disclosure requirements under E.O. 12866 for communications with regulating agencies around proposed rulemakings is deeply flawed. We strongly recommend that OIRA disclose information exchanged during both informal and formal reviews of agency regulatory actions. Currently, OIRA interprets review as only meaning formal reviews, which are often brief procedures, sometimes as short as a single day, that occur after a much longer informal review that can take weeks or even months to complete. OIRA also limits the disclosure of communications during a review to those exchanged by senior officials, who rarely participate in reviews of proposed rules. All

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communications between OIRA and an agency around a proposed rule under review should be made public.

Increasing Accountability

The draft guidance does not include any enforcement or accountability provisions to ensure the described information is collected and disclosed for all regulatory actions being reviewed.

- **Assign compliance responsibility.** POGO recommends that the guidance assign compliance responsibility to a specific senior OIRA official, such as the Deputy Administrator. While that official would not be required to review or post all of the covered information, they would be responsible for ensuring that all OIRA personnel understand and comply with the requirements. This official would also be the point of contact should Congress or members of the public wish to raise concerns about implementation of this disclosure policy.

- **Conduct an annual public review.** OIRA should designate an official to conduct an annual public review of their progress toward achieving the goals of the Modernizing Regulatory Review Executive Order with respect to E.O. 12866 meetings, including whether changes to the outreach and prioritization process are having the desired effect of reaching underserved communities. The process should include an opportunity for the public to comment and raise concerns, which the OIRA official would respond to in the final public review. This would create an ongoing implementation record for the office and a roadmap for any problems or concerns that should be addressed.

Conclusion

Thank you for this opportunity to provide a comment regarding the “Draft Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review).” POGO appreciates the administration’s efforts to make the regulatory process more accessible, inclusive, and transparent. We urge OIRA to consider our recommendations to ensure greater public participation and accountability in rulemaking.

Sincerely,

Faith Williams  
Director, Effective and Accountable Government