June 6, 2023

Submitted via Regulations.gov

Richard Revesz
Administrator
White House Office of Information and Regulatory Affairs
1600 Pennsylvania Ave NW
Washington, DC 20500

Dear Administrator Revesz,

Thank you for the opportunity to comment on the “Draft Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review)” regarding Executive Order 12866 meetings at the White House Office of Information and Regulatory Affairs (OIRA).

I am a Senior Policy Analyst with the Center for Progressive Reform (the Center), a nonprofit research and advocacy organization that conducts independent scholarly research and policy analysis, and advocates for effective, collective solutions to our most pressing societal challenges. Guided by a national network of scholars and professional staff with expertise in governance and regulation, the Center convenes policymakers and advocates to shape legislative and agency policy at the state and federal levels and advance the broad interests of today’s social movements for the environment, democracy, and racial justice and equity.

At the outset, I agree that the Executive Order 12866 meeting process needs to be significantly overhauled to address “the risk or the appearance of disparate and undue influence on regulatory development.” Indeed, the Center helped put this issue on the policy agenda with our 2011 empirical analysis of Executive Order 12866
meetings, Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment.¹

As part of that report, the Center made several recommendations for reforms to the Executive Order 12866 meetings process, and we are pleased to see the Draft Guidance take some of those recommendations up. There, we called on OIRA to “assume an active role in balancing the participation, whether through consolidating meetings with likeminded participants (seeing them all at once), reaching out to the relevant public interest groups to encourage their input, or both.”² And Section 2(e)’s provisions generally seek to accomplish that.

In my comments, I will suggest a few ways that Section 2(e)’s incremental reform approach can be strengthened. Then I will turn to calling on OIRA to take an even bolder reform approach, which would involve abolishing the practice of Executive Order 12866 altogether.

Strengthening the Incremental Reforms of Section 2(e): Supporting the Quality of Participation by Under-Represented Members of the Public

Executive Order 12866 meetings have long exhibited a huge gap in participation between interests in favor of stronger regulations and those opposed. When compounded with the fact that OIRA review has in the past typically yielded weaker rules and unreasonable delays³, this gap in participation created the appearance, if not the reality, that OIRA was where corporate interests could reliably go to obtain regulatory relief.

Recent attention to a more specific concern – getting historically under-represented members of the public, including those from structurally marginalized communities better engaged in the rulemaking process – has raised another gap in participation rates. Nearly without exception, all the participants in Executive Order 12866 meetings are sophisticated, “repeat players” in the rulemaking process – regardless of their actual stance on particular regulations.⁴ Given well founded doubts about how well such sophisticated organizations represent the interests of individuals, this aspect of the exclusivity of Executive Order 12866 meetings reinforces democratic concerns about the regulatory review process.

² Id. at 13.
⁴ STEINZOR ET AL. supra note 1, at 14-21.
The incremental reforms in Section 2(e) correctly recognize this problem and offer an incremental solution to them – that is, they propose to maintain the practice of meetings but seek to achieve greater balance in participation. Importantly, these reforms focus on both sides of the equation when it comes to participation gaps. On the one hand, it outlines steps that OIRA should take to affirmatively increase engagement by “potential participants… who have not historically requested such meetings, including those from underserved communities.”

On the other hand, it seeks to crack down on abuses by sophisticated participants, particularly those representing regulated industries. Such abuses include duplicative meeting requests from a single requester and repetitive meeting requests from several entities that share the same basic views on a given regulation. Importantly, Section 2(e) would reinforce these measures targeted at abusive practices by requiring greater transparency around Executive Order 12866 meetings.

As far as incremental reforms go, I support them. However, they fall short in one important regard: They treat the participation gap as a purely quantitative issue. Even with the effective implementation of these reforms, an equally important qualitative gap is likely to persist. This gap reflects the fact that sophisticated actors – particularly, those representing regulated industries – will continue to participate more effectively in these meetings due to their relatively superior resources, technical expertise, and other intangible advantages (such as relationships with existing government officials). As a result, these actors are likely to have far greater sway over how the centralized review process is conducted, regardless of the quantity of meetings that OIRA hosts with different stakeholders.

Under this scenario, historically underrepresented populations would have, at best, no meaningful impact on proceedings. At worse, they would actively waste their scarce resources and time by participating in a process that offers them little realistic chance for influence, when they could have expended those resources and time by participating in perhaps different engagement processes. For many individuals and small organizations, these kinds of opportunity costs are particularly significant, given their limited resources.

Admittedly, affirmatively supporting the quality of participation by historically underrepresented populations is not easy. But there are steps that OIRA could and should take to do so.

To begin with, OIRA itself should determine what useful participation in Executive Order 12866 meetings looks like. I attended the public hearing OIRA hosted on Section 2(e), and when this question was asked, the OIRA personnel present were
unable to offer a clear response. One potential way to address this issue is to look at any rubrics that OIRA staff use during rule review and use those as a basis for developing criteria for effective public participation. In other words, public participation should be geared toward being responsive to any specific issues or evaluative factors that exist in the rubrics that staff when conducting centralized review. (This, of course, assumes that such rubrics exist in the first place. If they do not, OIRA should consider developing them. This would have the ancillary benefit of standardizing OIRA reviews and streamlining them for rulemaking agencies.)

Once OIRA has established a clear vision for what meaningful participation looks like, it should communicate that vision to the public. For instance, OIRA could summarize it in a short video, PowerPoint presentation, or other training module hosted on its website. It could also host periodic public training sessions. These could be held on a regular basis (e.g., quarterly) and supplemented on an ad hoc basis when OIRA anticipates a rule that might attract an unusually large amount of public attention.

To further strengthen these education efforts, OIRA should include an option on its Executive Order 12866 meetings online sign-up form for meeting requesters to indicate if they have not participated in an Executive Order 12866 meeting in more than one year. If they check this box, this could then trigger an email sent to that individual containing a tutorial of how to participate effectively (e.g., a video, PowerPoint presentation, or training module).

OIRA should also experiment with enabling members of the public to participate in alternative formats, including video or sound recordings or even through various art media. OIRA should recognize the fact that not all members of the public are comfortable expressing themselves in the manner common among sophisticated lobbyists. And it should embrace these alternative forms of communication as equally valid and effective.

OIRA could further strengthen this strategy for public participation by looking inward and adopting significant internal reforms. As a threshold manner, OIRA cannot expect every member of the public to speak and act like a professional lobbyist. OIRA must learn how to “translate in” the information that members of the public provide, however that information is provided. This may require significant training, reinforced through periodic job evaluation (i.e., staff members must be credibly evaluated on how well they perform this aspect of their jobs). OIRA may also need to consider diversifying its staff. This should include expanding the disciplinary diversity of the staff beyond lawyers and


economists to include individuals with backgrounds in sociology, anthropology, or community organizing. It also, of course, should include diversifying staff in terms of their lived experience (e.g., individuals from different socioeconomic backgrounds).

The bottom line is that OIRA should commit to deploying several communication strategies and creative methodologies for engaging the public. Communication should be varied and redundant. And OIRA should experiment on an ongoing basis with different strategies and methods to determine what, if anything, works better.

OIRA can likewise take various steps to strengthen its transparency measures to further discourage abusive practices by sophisticated participants in Executive Order 12866 meetings. First, OIRA should require video or sound recordings of all Executive Order 12866 meetings and make them available to the public on its website. Alternatively, OIRA could generate written transcripts of its Executive Order 12866 meetings.

Second, if anyone wishes to submit a scientific study or report in the course of an Executive Order 12866 meeting, that person should be required to complete a conflict-of-interest disclosure form regarding that study or report. This form should require the individual to disclose what, if any, financial support they provided for the study or report. And it should also require the individual to disclose whether and to what extent they retained editorial control over the study or report. Model language for this kind of reform could be found in the recently introduced Stop Corporate Capture Act of 2021 (H.R. 6107).7

**Bold Reform: Abolish Executive Order 12866 Meetings**

Even if Section 2(e) was successful in producing roughly equal participation rates, and even if OIRA adopts the suggest reforms above, I remain doubtful that OIRA would succeed in reducing the qualitative gap in Executive Order 12866 meetings to an acceptable level, as a matter of democratic principle. Indeed, given broader structural disparities in our society, and the unique circumstances of OIRA’s centralized regulatory review, I am doubtful that there is anything OIRA could do to reduce the qualitative gap in Executive Order 12866 meetings to an acceptable level. As such, the best course of action may be for OIRA to formally abolish the practice of Executive Order 12866 meetings altogether.

One of the biggest barriers to qualitative parity in Executive Order 12866 meetings is the institutional hegemony of cost-benefit analysis in OIRA’s centralized regulatory review function. As indicated above, OIRA itself must determine what useful

participation looks like based on its own internal practices. More likely than not, these internal practices will often be firmly anchored in the practice of cost-benefit analysis. The problem is that, as has been well-noted, cost-benefit analysis is an intrinsically technocratic enterprise.\(^8\) To participate in it at all, let alone well, one must have graduate-level training in economics or the resources to retain someone with such training. The upshot is that cost-benefit analysis is a game that only the rarefied elite can play well, while the vast majority of the public will remain systematically excluded.

The revised Circular A-4 demonstrates this challenge. It is significant that in instructing agencies on how to perform cost-benefit analysis, Circular A-4 identifies very few opportunities for public input. This is true despite the fact that the Biden administration has made enhanced public engagement in the regulatory process a top priority.\(^9\)

More broadly, cost-benefit analysis illustrates how seemingly neutral rulemaking procedures can interact with and reinforce overarching power disparities in our society. If our society were marked by less social and political power disparities, then something like cost-benefit analysis might not raise such democratic concerns. Yet, the fact that engaging in cost-benefit analysis entails significant costs, and the fact that few entities (usually just regulated industries) can absorb those costs, raises worrisome democratic concerns about the influential role that cost-benefit analysis plays in centralized regulatory review.

Given an awareness of background conditions of inequity, OIRA should be especially attentive to whether and how its procedures can interact with those conditions. Indeed, an OIRA that is generally concerned with promoting greater equity in the regulatory system should strive to adopt procedures that are at least relatively insulated against disparities in economic or political power. Better yet, OIRA should strive to adopt procedures that correct for such disparities. Cost-benefit analysis does not fulfill either objective.

In sum, as long as cost-benefit analysis plays such an influential role in centralized regulatory review, it is unlikely that Executive Order 12866 can ever achieve something akin to qualitative equity (unless, of course, our society experiences a radical decrease in economic and political power disparities). The basic conclusion to be drawn then is that OIRA can have relative equity in Executive Order 12866 meetings, or it can have cost-benefit analysis, but it cannot have both. It seems unlikely that OIRA will ever fully

---


dispense with cost-benefit analysis. As such, it should take the comparatively modest step of abolishing Executive Order 12866 meetings instead.

**Conclusion**

If OIRA chooses to take an incremental reform approach to promoting greater equity in Executive Order 12866 meetings, then I agree that the measures taken in Section 2(e) will help and are worth pursuing. In addition, I urge OIRA to consider strengthening these measures by adopting the recommendations provided above.

If, however, OIRA is truly committed to the goal of eliminating “the risk or the appearance of disparate and undue influence” in centralized regulatory review, then it must seriously consider taking a much bolder approach by abolishing Executive Order 12866 meetings altogether, as explained above.

I appreciate your attention to these comments. If you have any questions regarding the foregoing, or if I can be of further assistance in this effort, please do not hesitate to reach out to me.

Sincerely,

James Goodwin
Senior Policy Analyst
Center for Progressive Reform