

## **Draft Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review)**

April 6, 2023

This draft guidance, in the form of questions and answers, addresses the requirements of Section 2(e) of the Executive Order (E.O.) of April 6, 2023, titled “Modernizing Regulatory Review” (hereinafter, Modernizing E.O.). That section of the Modernizing E.O. concerns the process for persons not employed by the executive branch to request meetings with Office of Information and Regulatory Affairs (OIRA) officials regarding the substance of regulatory actions under OIRA review—a process established under Section 6(b)(4) of Executive Order 12866 (Regulatory Planning and Review).<sup>1</sup> This draft guidance refers to such meetings as “E.O. 12866 meetings.”

The Modernizing E.O. directs the OIRA Administrator to implement reforms designed to reduce the risk or the appearance of disparate and undue influence on regulatory development. Accordingly, this draft guidance explains OIRA’s preliminary proposal for implementing Modernizing E.O. Section 2(e), which states that the Administrator of OIRA shall, to the extent practicable and consistent with law:

- (i) Provide information to facilitate the initiation of meeting requests regarding regulatory actions under OIRA review from potential participants not employed by the executive branch of the Federal Government who have not historically requested such meetings, including those from underserved communities; and
- (ii) Implement reforms to improve the procedures and policies with respect to OIRA’s consideration of meeting requests initiated by persons not employed by the executive branch of the Federal Government regarding the substance of regulatory actions under OIRA review to further the efficiency and effectiveness of such meetings. These reforms may include:
  - (A) efforts to ensure access for meeting requesters who have not historically requested such meetings;
  - (B) discouraging meeting requests that are duplicative of earlier meetings with OIRA regarding the same regulatory action by the same meeting requesters;
  - (C) consolidation of meetings by requester, subject matter, or any other consistently applied factors deemed appropriate to improve efficiency and effectiveness; 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 meetings

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<sup>1</sup> See Executive Order 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

and the subject matter discussed during such meetings, as required by section 6(b)(4)(C)(iii) of Executive Order 12866, so as to better facilitate transparency and analysis.

OIRA welcomes comments on all aspects of this draft guidance, as well as suggestions to achieve the goals of the Modernizing E.O. with respect to E.O. 12866 meetings. OIRA also anticipates further opportunities for public participation designed to promote equitable and meaningful participation by a range of interested or affected parties, including underserved communities, as part of implementation of the Modernizing E.O. Comments on this draft guidance should be provided via Regulations.gov (at the docket OMB-2022-0011) within the 60-day comment period. OIRA will revise these questions and answers and E.O. 12866 meeting practices as necessary in response to comments and broader public engagement; should such revisions require changes to the related collection of information, the Office of Management and Budget (OMB) anticipates implementation of revised guidance only after those changes to the related collection of information are made.

## **A. Background**

### **1. What is an E.O. 12866 meeting?**

E.O. 12866 establishes and governs the process under which OIRA reviews agencies' significant regulatory actions. E.O. 12866 meetings occur at the initiative of outside parties who request a meeting with OIRA about a regulatory action that is under OIRA review to present their views. OIRA invites to these meetings representatives from the agency or agencies that would issue the regulatory action, though participation may be limited by scheduling or other considerations.

E.O. 12866 meetings serve as listening sessions for OIRA officials. Members of the public can share their views with OIRA on a regulatory action under review, as well as any scientific, technical, social, or economic information, or information drawn from individual experience that may be helpful to OIRA officials while reviewing a regulatory action. During such meetings, OIRA officials may ask clarifying questions but will not share deliberative or pre-decisional information about the regulatory action under review.

E.O. 12866 meetings with OIRA are not a substitute for submitting comments to the action agencies under their applicable regulatory procedures.<sup>2</sup> OIRA typically reviews regulatory actions, such as rules, undertaken by other agencies. Accordingly, OIRA is not the action agency

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<sup>2</sup> See Executive Order 12866 § 10, 58 Fed. Reg. at 51,744 (“This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.”). The E.O. 12866 process also does not substitute for the requirement to do Tribal consultation where it is required pursuant to E.O. 13175. See Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* § 9(a), 65 Fed. Reg. 67,249 (Nov. 9, 2000).

and views shared only through the E.O. 12866 review process would not be considered properly submitted during the notice and comment period.

## 2. How do I request an E.O. 12866 meeting?

OIRA has an “open door” policy with respect to meeting requests; staff do not affirmatively reach out to members of the public to schedule E.O. 12866 meetings or to solicit specific views. If members of the public wish to express their views to OIRA on a regulatory action under review, they have the ability to do so through the process outlined below. Any member of the public can request an E.O. 12866 meeting to present views on a regulatory action under OIRA review by going to [www.reginfo.gov](http://www.reginfo.gov). Clicking on the tab “Regulatory Review” and selecting “EO 12866 Meetings” will then take the requester to the page shown below, where there is a box for requesting a meeting.

The screenshot shows the 'EO 12866 Meetings' page on Reginfo.gov. The page header includes the Office of Information and Regulatory Affairs logo and navigation links. The main content area is titled 'EO 12866 Meetings' and contains a 'Schedule' button circled in black, along with a form for submitting meeting requests. The form includes fields for RIN, Stage of Rulemaking, Agency, SubAgency, Date Range (MM/DD/YYYY), Meeting Type, and a Search button.

OIRA encourages requesters to submit E.O. 12866 meeting requests as soon as possible after the start of OIRA review. Although E.O. 12866 generally permits up to 90 days for review, reviews can and often do conclude in fewer than 90 days. Meetings cannot be requested or granted after OIRA has concluded review on a regulatory action. E.O. 12866 meetings may also be cancelled in the event that OIRA concludes review on the regulatory action in advance of the meeting date. OIRA endeavors to grant all E.O. 12866 meeting requests, and early submission of such requests facilitates prompt scheduling. Occasionally, however, OIRA cannot accommodate all requests.

OIRA’s meeting request form collects information from the public and is subject to the Paperwork Reduction Act (PRA) and Privacy Act. This form is assigned OMB Control Number 0348-0065. As discussed further below, OIRA is considering revisions to the E.O. 12866 meeting request form and related disclosures to facilitate transparency and analysis with respect

to E.O. 12866 meetings. Any such revisions would be subject to the 60- and 30-day public comment periods under the PRA, as well as OMB approval.

### **3. Why are these E.O. 12866 meeting reforms being implemented?**

The Modernizing E.O. directs the OIRA Administrator to implement reforms designed to reduce the risk or the appearance of disparate and undue influence on regulatory development. The reforms outlined here serve to facilitate meeting requests from individuals and groups that have not historically requested such meetings, including those from underserved communities, improve the efficiency and effectiveness of the regulatory review process, and increase transparency around the E.O. 12866 meetings process, while treating all members of the public—no matter their resources or viewpoints—consistently and fairly. These reforms also help to implement President Biden’s Presidential Memorandum of January 20, 2021, titled “Modernizing Regulatory Review.” That Memorandum called for OMB to “identify reforms that will promote the efficiency, transparency, and inclusiveness of the interagency review process,”<sup>3</sup> which includes E.O. 12866 meetings.

#### **B. Facilitation of E.O. 12866 Meetings**

##### **1. How will OIRA provide information to facilitate the initiation of meeting requests from potential participants who have not historically requested such meetings, including those from underserved communities?**

OIRA is considering a variety of strategies to facilitate participation by those who have not historically requested E.O. 12866 meetings, including those from underserved communities. These efforts complement OIRA’s forthcoming guidance to agencies for broadening participation and engagement at other stages in the regulatory process, including when agencies are still formulating regulatory priorities and alternatives. The proposed strategies draw from public engagement OIRA has conducted through listening sessions and public comments. Strategies under consideration include:

- building on public feedback to design 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; we welcome public feedback on the types of tools (such as short guides) that would be most helpful for OIRA to produce to facilitate the initiation of meeting requests;
- 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;

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<sup>3</sup> Presidential Memorandum of Jan. 20, 2021, *Modernizing Regulatory Review* § 2(b)(iv), 86 Fed. Reg. 7223, 7224 (Jan. 26, 2021).

- improving notice of E.O. 12866 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;
- 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)); 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;
- reviewing and improving data collection and disclosure related to participation in E.O. 12866 meetings, as discussed further below, and consulting with agencies and the public to identify gaps in participation by interested or affected individuals or entities; and
- making the E.O. 12866 meeting request form more prominent in relevant areas of [reginfo.gov](http://reginfo.gov).

OIRA welcomes feedback on these ideas, and appreciates any comments and suggestions for additional methods of facilitating participation, including from individuals or entities from underserved communities.

## **2. Who are members of “underserved communities”?**

As defined by E.O. 14091 (Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government), the term “underserved communities” refers to 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.”<sup>4</sup> As stated in E.O. 13985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government) and E.O. 14020 (Establishment of the White House Gender Policy Council), examples of individuals who may have been systematically denied the opportunity to participate fully in aspects of economic, social, and civic life include members of the following communities: Black, Latino, Indigenous and Native American, Asian American, Native Hawaiian, and Pacific Islander persons and other persons of color; members of religious minorities; women and girls; LGBTQI+ persons; persons with disabilities; persons who live in rural areas; persons who live in United States Territories; persons otherwise adversely affected

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<sup>4</sup> Executive Order No. 14091, *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* § 10(b), 88 Fed. Reg. 10,825, 10,832 (Feb. 22, 2023).

by persistent poverty or inequality; and individuals who belong to multiple such communities.<sup>5</sup> Vulnerabilities are often heightened with geographic location; linguistic isolation; or lack of access to affordable housing, transportation, health care, and energy.

### **C. Efforts to Ensure Access for Relatively New Requesters**

#### **1. What efforts will OIRA take to ensure access to those “who have not historically requested” 12866 meetings?**

For purposes of this draft guidance, OIRA proposes that the term “not historically requested” be used to describe 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. These requesters are less likely to be regular participants. As discussed further below, OIRA is considering collecting information to this effect.

Individuals or organizations that meet this criterion will be considered not to have “historically requested” meetings, even if represented by an organization or counsel that frequently requests meetings for itself or on behalf of other individuals or organizations. However, an individual requester that is requesting a meeting on behalf of another individual or organization that participated in an E.O. 12866 meeting within the last three years will be considered to have “historically requested” 12866 meetings, even if that specific requester has not participated in E.O. 12866 meetings within the last three years.

Again, for the majority of regulatory actions, OIRA is able to accommodate all E.O. 12866 meeting requests and will continue to do so. For the limited number of regulatory actions that strain OIRA resources and ability to accommodate all meeting requests, OIRA may seek to prioritize the scheduling of requests that come from those that have not historically requested meetings.

### **D. Discouraging Duplicative Oral Communications**

#### **1. How will OIRA discourage duplicative oral communications in the E.O. 12866 process?**

OIRA will not schedule 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. OIRA generally discourages E.O. 12866 meeting requesters from repeatedly making such requests.

### **E. Meeting Consolidation**

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<sup>5</sup> See Executive Order No. 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* § 2(a)–(b), 86 Fed. Reg. 7009, 7009 (Jan. 25, 2021); Executive Order No. 14020, *Establishment of the White House Gender Policy Council* § 6(a)–(b), 86 Fed. Reg. 13,797, 13,800–01 (Mar. 11, 2021).

In most circumstances, OIRA is able to accommodate all E.O. 12866 meeting requests for a regulatory action under review. At times, however, it may be difficult for OIRA to accommodate all E.O. 12866 meeting requests for a particular regulatory action under review due to the volume of requests or time period in which the action is under review. To promote efficiency in the review process and to increase OIRA's ability to hear from as many external parties as possible who wish to share their views on a regulatory action, OIRA strongly encourages groups that would like to present similar views on a regulatory action to submit joint meeting requests wherever possible.

E.O. 12866 meeting consolidation can promote efficient regulatory review, facilitate participation in E.O. 12866 meetings by a greater number of meeting requesters than would be possible in the absence of consolidation, encourage advance coordination among parties with similar or interconnected interests, and reduce unduly repetitious feedback.

**1. How will OIRA approach the Modernizing E.O.'s call to consider "consolidation of meetings by requester, subject matter, or any other consistently applied factors deemed appropriate to improve efficiency and effectiveness"?**

Meeting requesters frequently request consolidated meetings and OIRA will prioritize scheduling meetings for such requesters. Consolidated E.O. 12866 meeting requests can be an effective tool to communicate a collective concern or showcase a coalition of support, while retaining the expertise and ability of individual meeting participants to share their views on potential impacts at an appropriate level of nuance. Individuals or entities interested in requesting a consolidated meeting might review other comments in the public docket for a regulatory action and reach out to similarly minded commenters in advance of requesting an E.O. 12866 meeting. A list of currently scheduled meetings with meeting requester information (organization and name) is also available to the public at <https://www.reginfo.gov/public/do/eom12866Search> to use for consolidation. OIRA is considering and welcomes public comment and input on further opportunities to improve these disclosures to facilitate consolidation.

For the vast majority of regulatory actions, OIRA has been able to accommodate all E.O. 12866 meeting requests and anticipates continuing to do so. OIRA's review of past E.O. 12866 meeting data indicates that the majority of regulatory reviews do not generate any E.O. 12866 meeting requests, and that there are fewer than five meeting requests for the majority of regulatory actions for which E.O. 12866 meetings are requested. Less frequently, OIRA receives more than 50 E.O. 12866 meeting requests for a single regulatory review.

Should the volume of meeting requests increase substantially beyond what is feasible to accommodate under current resource constraints, OIRA may have to consider the consolidation of E.O. 12866 meetings even in the absence of specific requests. If necessary, this would likely apply to a very narrow subset of rules, and be undertaken so as to avoid as much as possible having to turn meeting requests down. OIRA particularly invites public comment and input on sensible and consistently-applied factors it may use to do so. Some preliminary ideas on when to

consolidate by meeting requester or subject-matter, as stated in the Modernizing E.O., are when meeting requesters:

- are organizational affiliates, such as regional offices of the same organization or members of an umbrella organization (for example, meeting requests from the Illinois, Texas, and California offices or subsidiaries of the same public health advocacy organization or insurance provider federation);
- request meetings on two or more related regulatory actions that are under review concurrently;<sup>6</sup>
- provide substantially similar short narrative statements or other materials describing the purpose of their E.O. 12866 meeting requests, as discussed further below.

OIRA is also considering including a new field in the meeting request form, also discussed below, that would allow requesters to indicate if they would like to convey sensitive information, such as personal or business information about how a regulatory action might impact them as an individual or firm, which may indicate that meeting consolidation would not be appropriate. Consolidated E.O. 12866 meetings would generally still be limited in time to 30 minutes. Therefore, advance coordination would be highly encouraged and will lead to more productive meetings.

## **F. Disclosure of E.O. 12866 Meeting Data**

### **1. What information about E.O. 12866 meetings does OIRA currently disclose?**

The primary purpose of the disclosure requirements in Section 6(b)(4) of E.O. 12866 concerning E.O. 12866 meetings has always been to make transparent meetings between the public and OIRA while a rule is under review. Pursuant to E.O. 12866, OIRA discloses the subject, date, and names of meeting participants on the Reginfo.gov website, as well as any materials provided to OIRA at such meetings. Public disclosure about meetings with outside parties is a cornerstone of a fair and transparent regulatory review process.

### **2. How does OIRA currently release information about E.O. 12866 meetings?**

OIRA currently releases information about E.O. 12866 meetings at <https://www.reginfo.gov/public/do/eom12866Search>. The public can search for E.O. 12866 meetings by the unique regulation identifier number (RIN) for an individual regulatory action. Alternatively, the public can search E.O. 12866 meetings by rule stage, agency, sub-agency, date

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<sup>6</sup> For instance, consolidation may be appropriate for two EPA-related regulatory Notices of Proposed Rulemaking related to methane emissions from different sectors of the economy. In some cases, agencies have shared statutory responsibility for rulemakings. It may be possible to identify related regulation identifier numbers (RINs) and joint or common rules in agency Unified Agenda entries. For instance, the Departments of Health and Human Services, Labor, and Treasury conducted joint rulemaking to address surprise medical billing in their regulations under RINs 0938-AU63, 1210-AB99, and 1545-BQ01.



range, and/or meeting type (completed, scheduled, or no show). Results are presented as either a list or in a calendar view.

### **3. What additional information is OIRA considering collecting and disclosing in the future?**

New technologies and improvements to Regulations.gov have created new opportunities for further information disclosure to, and transparency for the public, regarding the public comment process and regulatory review overall. However, disclosure practices for E.O. 12866 meetings have not always kept pace with these improvements. For example, recent updates to Regulations.gov have made it possible to better identify the individuals, entities, and groups submitting public comments; enhanced search functionalities of the public docket allow the public to better see and access what other members of the public are saying about a regulatory action; and improved specialization features permit members of the public to subscribe to a specific regulatory docket in order to be notified when a regulatory action is under OIRA review.

OIRA is considering the disclosure of additional information about specific E.O. 12866 meetings that may be helpful to OIRA, to agencies, and to the general public:

- **Narrative descriptions accompanying meeting requests.** A brief narrative description, provided by the requester, of the purpose of the meeting request can help OIRA schedule the meeting and invite the appropriate government officials, particularly when regulatory actions may address many subjects and have many separate provisions. OIRA will thus require meeting requesters to identify the specific meeting topic; in addition, to facilitate transparency, OIRA encourages (but does not require) meeting requesters to provide a brief summary of the views they anticipate presenting.
- **Primary meeting requesters.** OIRA will continue to collect information on the primary meeting requester. At the same time, OIRA is additionally considering ways to make identifying individuals or organizations that the primary meeting requester may be representing at the time of request a required field. For example, an external party wishing to schedule an E.O. 12866 meeting may work through a law firm representing them to do so. In other cases, congressional offices may facilitate scheduling for individual constituents. The majority of meeting requesters already provide information both on the primary point of contact and on who the primary point of contact is representing when relevant, and OIRA consistently takes meeting attendance and, when feasible, updates this information for the public record in cases where it is not initially provided. However, it could be useful, in advance of the meeting, to have information on the individuals and organizations that are being represented in advance. This information could also facilitate better real-time transparency on who is meeting with the government on a particular rule.
- **Meeting requester types.** OIRA is also considering asking meeting requesters to select their meeting requester type among broad categories. For example, OIRA may provide a

drop-down menu asking meeting requesters to identify whether they are requesting a meeting on behalf of an individual member of the public; a state, local, territorial, or Tribal government; a business or trade association; a union; or a non-profit, among other relevant categorizations. OIRA welcomes comment on these organization types.

- **Lobbyist status.** Finally, OIRA is considering asking meeting requesters to indicate whether they are registered lobbyists.

Additionally, OIRA is considering the collection of some information from meeting requesters for internal purposes, including whether or not the meeting requester (the interested person or entity, if the requester is represented by counsel or an organization):

- is requesting a meeting on behalf of multiple groups;
- plans to share sensitive information during a meeting (such as highly personal narratives or sensitive business information), so that the meeting would not be a good candidate for consolidation;
- has previously requested or participated in an E.O. 12866 meeting on any regulatory action within the last three years; and
- has previously requested or participated in an E.O. 12866 meeting associated with this specific regulatory action (at the same stage of the regulatory process).

These data could inform OIRA's implementation of the Modernizing E.O. Changes to the information requested and collected from E.O. 12866 meeting requesters on the meeting request form, as discussed above, are subject to the Paperwork Reduction Act and the Privacy Act.

#### **4. How is OIRA considering releasing this information?**

OIRA plans to release information about E.O. 12866 meeting requests in an open, machine-readable and accessible format. OIRA currently releases some information about E.O. 12866 reviews in Extensible Markup Language (XML) reports:

<https://www.reginfo.gov/public/do/XMLReportList>.

Further, OIRA is considering releasing more real-time data to enhance the public's ability to engage with the regulatory process and to provide crucial scrutiny of the government's work. Members of the public could benefit from having such analyses easily at their disposal. Making disclosures of patterns, trends, and outliers in E.O. 12866 meetings in real time could improve the public's ability to understand the regulatory process and who is sharing their views with the government, as these patterns and trends in meetings have changed significantly over time. OIRA welcomes public comment on how to improve disclosures associated with E.O. 12866 meetings.