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Richard L. Revesz
Administrator, Office of Information and Regulatory Affairs
The White House Office of Management and Budget

Re: Request for Comments on Proposed OMB Circular No. A-4, "Regulatory Analysis" (Docket ID No. OMB-2022-0014)

Dear Administrator Revesz:

Thank you for issuing this critical proposed update to Circular A-4 and "Draft Guidance Implementing Section 2(e) of the Executive Order of April 6, 2023 (Modernizing Regulatory Review)" regarding EO 12866 meetings. We are providing comments on the proposed update to Circular A-4 below. Public Citizen is pleased that the Biden administration is taking important steps to modernize the regulatory process. A strong and modern regulatory system will protect consumers, workers, public health, and the environment; empower members of marginalized communities; and enable swift action to address the climate crisis.

Public Citizen is a national public interest organization with more than 500,000 members and supporters. For over 50 years, we have successfully and zealously advocated for stronger health, safety, worker, consumer protection, and environmental safeguards, as well as for a robust and effective regulatory system that works in the public interest, not for corporate special interests. For more on our work, please visit our website at citizen.org.

Public Citizen chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 150 consumer, labor, scientific, research, faith, community, environmental, good government, public health, and public interest groups representing millions of Americans. We are joined in the belief that our country's system of regulatory safeguards should secure our quality of life, pave the way for a sound economy, and benefit us all. This comment is submitted only on behalf of Public Citizen.

Ensuring that the regulatory process is responsive to the public is critical to our work. The U.S. Office of Information and Regulatory Affairs (OIRA) regulatory review process has often served as a barrier to, rather than as a catalyst for, regulations that are designed to protect the public. As the President's Memorandum on Modernizing Regulatory Review (Memorandum) points out, the regulatory review process has historically disregarded important values like human dignity, equity, and the interests of future generations; failed to account for a wide range of regulatory benefits and is insufficiently attentive to

distributional concerns, thus inappropriately burdening disadvantaged or marginalized communities; discouraged stronger protections instead of proactively promoting them; imposed costly delays; and been marked by a lack of basic transparency that is necessary for upholding the democratic values this administration champions.

The Biden administration should be applauded for following through on its commitment to modernizing regulatory review with proposals to improve and strengthen the rulemaking process, including regulatory analysis. The administration's proposals are the most important and impactful set of reforms to the regulatory process in decades. These reforms will make the process more efficient, inclusive, accountable, and effective at protecting the public.

While Public Citizen is strongly supportive of the changes to the regulatory process outlined in the proposed update to Circular A-4 and draft guidance on EO 12866 meetings, we believe there is more to be done. We support many aspects of this proposed update to Circular A-4 and draft guidance on EO 12866 meetings, and we also urge the implementation of additional changes that build on this framework as soon as possible.

Circular A-4

Cost-benefit analysis

While regulatory cost-benefit and economic analysis have played an increasingly significant role in federal rulemaking since the adoption of EO 12866 and Circular A-4, the increasing reliance on regulatory cost-benefit analysis has led to numerous criticisms that it routinely results in agencies blocking, weakening, or delaying regulations which in turn results in regulations that are less effective at protecting the public. Public Citizen supports the long overdue reforms proposed by the Biden administration to Circular A-4 that improve regulatory cost-benefit analysis.

Currently, the use of regulatory cost-benefit analysis to support federal agency rulemaking under EO 12866 is deeply flawed in several respects. First, agencies are required to analyze regulatory costs and benefits using discount rates that were established in Circular A-4 and are now long outdated and overdue for revision. In practice, this means that agencies have been significantly understating the very real benefits that new regulatory protections provide to the public due to the fact that those benefits accrue in the future rather than immediately. In other words, the use of a discount rate when computing the costs and benefits of federal regulations leads agencies to place less weight on long-term regulatory benefits to the public while placing more weight on the short-term regulatory compliance costs to corporations. The higher the discount rate, the more regulatory cost-benefit analysis puts a thumb on the scale against strong regulations that protect the public and in favor of weak regulations that are corporate-friendly.

Public Citizen supports the proposed update to Circular A-4 directing agencies to use a 1.7% discount rate rather than the current and outdated 3% discount rate. The 1.7% rate is based on the most current and sound economic evidence and adjusts the discount rate based on the same calculation that was used to arrive at the 3% discount rate when Circular A-4 was originally adopted in 2003. Thus, this is a much-needed reform that improves regulatory cost-benefit analysis by ensuring that agencies are accurately counting the benefits of regulations to the public, rather than allowing regulatory costs to count more than benefits as is currently the case under Circular A-4. Public Citizen also

supports changes to simplify regulatory cost-benefit analysis by removing the requirement that agencies analyze costs and benefits using an alternative 7% discount rate that further skews the analysis against benefits to the public in favor of costs to corporations. As the proposed reforms make clear, the 7% discount rate is based on the problematic "opportunity cost of capital" concept that does not accurately reflect, and routinely overstates, the costs to industry of complying with new regulations. Public Citizen supports agencies using only the 1.7% discount rate when conducting regulatory cost-benefit analysis.

In addition, Public Citizen supports proposed reforms to Circular A-4 that would address a major flaw in regulatory cost-benefit analysis by requiring agencies to place more emphasis on analyzing the distributional consequences of regulations. It is well known that new regulatory protections often disproportionately benefit certain segments of the population more than others, in particular low-income, vulnerable, minority, or underserved populations. Nonetheless, such disproportionate benefits are not currently reflected or incorporated in regulatory cost-benefit analysis under CircularA-4. In short, regulatory cost-benefit analysis in its current state often ignores or minimizes how new regulatory protections make our society more fair, equitable, inclusive, and just by disproportionately benefiting certain populations. It is critical that OMB adopt the proposed reforms requiring analysis of distributional effects to ensure that regulatory cost-benefit analysis is accurately reflecting the disproportionate benefits that new regulatory protections provide to low-income, vulnerable, minority, or underserved populations.

While the proposed reforms to Circular A-4 that require agencies to place more emphasis on analyzing the distributional consequences of regulations, the proposed reforms do not address how agencies should determine which regulations provide disproportionate benefits to low-income, vulnerable, minority, or underserved populations in the first place. Certainly, agencies have considerable expertise and experience on how their regulations disproportionately benefit certain populations that will inform decisions to undertake the distributional analysis called for in the proposed reforms to Circular A-4. Yet, rather than making those determinations and undertaking such analysis on an ad hoc basis, Public Citizen has supported reforms that would require agencies to designate regulations which provide disproportionate benefits to certain members of the public, and thus require distributional analysis, early in the rulemaking process and in systematic fashion. Such an approach would ensure agencies are capturing the full scope of regulations that make our society more fair, equitable, and inclusive.

Specifically, Public Citizen has supported enhanced use of the bi-annual Unified Regulatory Agenda to identify rules that disproportionately benefit certain populations. We are pleased to see the proposed reforms recognize the importance of proactive outreach by agencies to underserved communities in order to inform agency regulatory priorities as reflected by the Regulatory Agenda. Nonetheless, Public Citizen continues to encourage to go further and direct agencies to use the Regulatory Agenda as a tool to increase transparency around all rules across the government that agencies have identified as disproportionately benefiting low-income, vulnerable, minority or underserved communities and which should potentially be subject to distributional analysis.

Currently, numerous rules that appear on the Regulatory Agenda are categorized or designated in specific ways, including due to impacts on certain stakeholders, communities, or entities. For example, regulatory actions that agencies have determined may impact small businesses are designated as such on the Regulatory Agenda. Yet,

there is no corresponding designation or categorization for regulatory actions that disproportionately benefit certain populations and where distributional analysis would be potentially required under the proposed reforms. We urge OIRA to enhance the proposed reforms by creating a separate and discrete designation in the Regulatory Agenda that indicates whether a regulatory action disproportionately benefits low-income, vulnerable, minority, and underserved populations and thus will require distributional analysis.

Implementing this reform will serve several purposes. First, such a designation on the regulatory Agenda will provide clarity to the public regarding the full scope of regulatory actions agencies are taking that disproportionately benefit certain populations and may require a distributional analysis. In turn, this will enable agencies to more effectively conduct proactive outreach to those populations and underserved communities that will disproportionately benefit from the regulatory action at the earliest stage of the rulemaking process. Second, the public will be better prepared to provide information that supplements the agency's determination regarding a regulatory action's disproportionate benefits to a certain population during the public comment process, thereby enhancing the basis for the agency's determination and analysis of the regulatory action's distributional consequences. Finally, such a reform will allow both OIRA and the public to monitor the progress and completion of these important regulations and hold agencies accountable for missing deadlines listed on the Regulatory Agenda.

Public Citizen also strongly encourages OIRA to articulate a separate and distinct framework for comparing the costs and benefits of regulations where agencies have determined that all or a significant portion of a regulation's benefits are unable to be quantified or monetized. Under EO 12866, agencies are required to select the regulatory alternative that "maximizes net benefits" after a comparison of the various alternatives' costs and benefits. However, it makes little analytical or policy sense to compare costs and benefits of a regulatory action when a significant portion, or all, of the regulatory benefits are of a non-quantifiable nature. Comparing quantified regulatory costs to non-quantified regulatory benefits in order to determine whether a regulatory action "maximizes net benefits" is tantamount to comparing "apples to oranges."

While the proposed reforms to Circular A-4 will certainly improve the use of regulatory cost-benefit analysis, particularly with respect to agency consideration of non-quantifiable or qualitative regulatory benefits, the proposed reforms unfortunately do nothing to address the deeply flawed assumption in EO 12866 that agencies can compare regulatory costs with benefits when all or a significant portion of those benefits are not monetized or quantified, and thus determine the regulatory approach that "maximizes net benefits." When finalizing the proposed reforms, OIRA should direct agencies to make an initial determination with respect to regulations subject to EO 12866 regarding whether all or a significant portion of the regulation's benefits are unable to monetized or quantified, and if so, direct agencies to exempt such regulations from the EO 12866 requirement to "maximize net benefits."[1]

Finally, Public Citizen urges the Biden administration to consider additions to the proposed reforms, or in potential future reforms, that make the OIRA regulatory review process more transparent and efficient. First, as mentioned above, the Biden administration should

[1] OIRA should only allow exceptions to require net benefits to be maximized if the regulation is subject to a statutory requirement that explicitly mandates consideration of net benefits prior to promulgating the regulation.

consider shortening the OIRA review periods for regulations subject to review under EO 12866. Currently, under EO 12866, OIRA review is supposed to conclude within 90 days with a one-time extension of 30 days if requested by the Agency head. In practice, numerous OIRA reviews have lasted far longer than the time periods laid out in EO 12866 resulting in undue delay in issuing regulatory actions that protect the public. While the proposed reforms will help streamline and expedite ORA review by increasing the economic threshold for rules subject to OIRA review under EO 12866, we believe it would be more effective to update the review periods by shortening them to 60 days or shorter.

Redefining "economically significant"

The proposed reforms to redefine the threshold for regulations subject to OIRA regulatory review under section 3(f)(1) of EO 12866 is a welcome and long overdue change that Public Citizen supports. There have been longstanding concerns over the pace of OIRA regulatory review, particularly regarding lengthy reviews that exceed the review periods allowed under EO 12866, leading to delays of new regulatory protections. This is due in part to the fact that OIRA review is triggered if the impact of the regulation exceeds $100 million dollars annually, a threshold that has never been updated or adjusted for inflation since its adoption in 1993. As a result, the volume of regulations that OIRA reviews has increased, which has created an OIRA regulatory review process that is significantly less efficient and effective.

The proposal to raise the threshold for OIRA regulatory review from $100 million dollars to $200 million dollars, and increase the threshold every three years, will streamline OIRA review by reducing the volume of regulations that OIRA reviews and thereby freeing up OIRA staff time and resources to expedite reviews in order to avoid lengthy delays as has occurred in the past.

However, adjusted for inflation, the actual economic threshold would be much greater. In 1993, President Clinton issued EO 12866 which used a $100 million in economic impact standard, which was borrowed from President Reagan's EO 12291 issued in 1981. President Reagan got the $100 million figure from President Carter's EO 12044 issued in 1978. $100 million in 1978 would be closer to $363 million in today's dollars[2], which means if you double that value, $200 million in 1978 would be closer to $726 million adjusted for inflation. Therefore, $200 million is not nearly a large enough threshold for review, which would falsely subject more regulations to OIRA review than necessary, further burdening an already backlogged regulatory review process with greater delay. Such outdated economic metrics must not be used. The price to the public interest is too high to pay, and the threshold must be higher and adjusted for the current rate of inflation.

Market power

[2] Note: This dollar figure is based on a blog post published in 2017 by the Environmental Law Institute titled "Regulation: Is $100 Million What It Used to Be?" The figures provided are meant to provide a rough estimate of what the economic threshold should be today in 2023. The current rate of inflation should be used when calculating the economic threshold adjusted for inflation. *See* James M. McElfish, Jr., Envtl. L. Inst. Blog, *Regulation: Is $100 Million What It Used to Be?* (June 19, 2017), https://www.eli.org/vibrant-environment-blog/regulation-100-million-what-it-used-be.

The draft A-4 discussion of market power is a considerable improvement from the 2003 version, with room for further refinement and an opportunity to reframe without implied anti-regulatory assumptions.

In general, the draft reflects a clearer and more realistic vision of how regulation relates to concentrated market power. The document also crucially mentions concerns about the *non-price* effects of excessive market power and acknowledges the problem of monopsony (buyer) power. The draft should be improved by a reframing that emphasizes the importance of clear bright-line rules, rather than behavioral nudges. In most cases, consumers benefit from direct intervention that acknowledges the power imbalance between firms, institutions, and individuals.

Public Citizen supports the draft circular's expanded discussion of market power as related to regulatory interventions. The 2003 circular's discussion of market power is brief, with much of the focus on government regulations as the source of a firm's power to reduce competition and increase prices.[3] By focusing on regulation's potential to increase market power, the circular misses an opportunity to delve into regulation's potential to *decrease* market power and fulfill statutory objectives.

The 2003 A-4 demonstrates a half-hearted effort in describing market power in the economy. The guidance describes market power as a market failure rather than a natural, predictable outcome of an unregulated market.[4] The underlying assumption is that untouched markets are self-sufficient and the preferred way to allocate resources.[5] The reality is that a firm's market power varies by economic sector, with a tendency towards monopoly but for government intervention,[6] and that regulators should look to understand each case as part of their regulatory analysis.

The draft's market power section improves on the prior version by expanding the discussion of the harms of market power. The 2003 circular points to one discrete outcome from market power: "higher prices." [7] History and experience has shown that monopoly power can result in a host of social ills beyond supracompetitive pricing, particularly economic inequality.[8] The draft A-4 elucidates other - just as important - ways a firm may use market power to; "decrease product quality, restrict the range of products available to consumers, worsen wage or non-wage attributes of employee positions, or disproportionately influence the terms of service available to consumers, workers, or other

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[3] https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/ ("2003 A-4 circular")

[4] *Id.* "The major types of market failure include: externality, market power, and inadequate or asymmetric information."

[5] Even the 2003 circular's organization reflects a larger conceptual problem. The market power subsection is housed under the "Market Failure or Other Social Purpose" section.

[6] https://www.weforum.org/agenda/2016/05/joseph-stiglitz-are-markets-efficient-or-do-they-tend-towards-monopoly-the-verdict-is-in/

[7] 2003 A-4 circular.

[8] Tim Wu, the Curse of Bigness, https://scholarship.law.columbia.edu/books/63/. *See also*, Lina Khan and Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents, "Given the current distribution of business ownership assets in the United States, market power can be a powerful mechanism for transferring wealth from the many among the working and middle classes to the few belonging to the 1% and 0.1% at the top of the income and wealth distribution. In concrete terms, monopoly pricing on goods and services turns the disposable income of the many into capital gains, dividends, and executive compensation for the few." https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2769132

firms."[9] A wider, more realistic, description of monopoly harms should help readers understand the depth of the issue and lead to more intentional regulation.

In the section dealing with benefits and costs related to market power, the draft helpfully mentions labor market effects as a consideration. However, the section - and the entire draft - could be improved by de-emphasizing the effect of licensing or other safety regulation as a barrier to entry for new firms or individuals. While regulation may serve as a barrier to upstarts and empower incumbents, regulation can be structured in a way that supports small actors while requiring larger firms to strictly comply relative to their impact on consumers.[10] There are a bevy of other factors that lead to market power, especially technological advances, network effects and vertical restraints.[11] Those factors are given short shrift. By prioritizing the issue of regulation as a barrier to market entry, the draft implicitly promotes an anti-regulatory viewpoint.

In the same vein, the draft should reflect a propensity for the enforcement of clear bright line rules rather than compliance through economic incentives, informational disclosures or pseudo-scientific psychological "nudges." The responsibility for regulatory compliance ought to fall on the regulated firms, not those that the government seeks to protect. Corporate actors prefer low-responsibility, minor regulatory requirements that put the onus on consumers and workers to protect themselves or make "responsible" decisions. The draft A-4 should reflect that private institutions are accountable for their outputs and business strategies, not consumers.

Conclusion

Public Citizen appreciates these long overdue changes to Circular A-4 and strongly supports these revisions in conjunction with our recommendations to improve this process. Thank you for your time and attention to our comment.

Sincerely,

Public Citizen

Organization contacts:

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[9] Draft A-4 at 17.

[10] The proposed A-4 describes the market barrier issue in more detail on page 24. While it is true that compliance burdens have an effect on competition, we disagree with the reliance on efficiency as grounds to relive larger firms of heavy regulatory burdens. The draft should do away with the idea that market efficiency is a key consideration for regulators. "The balance of benefits and costs can shift depending on the size of the firms being regulated. Small firms may find it more costly to comply with regulation, especially if there are large fixed costs required for regulatory compliance. This can potentially lead small firms to exit, resulting in reduced competition in some markets. **On the other hand, it is not necessarily efficient to place a heavier burden on one segment of a regulated industry solely because it can better afford the higher cost.** This has the potential to load costs on the most productive firms, costs that may be disproportionate to the marginal harms those firms' actions cause."

[11] https://www.oecd.org/daf/competition/market-power-in-the-digital-economy-and-competition-policy.htm

Lisa Gilbert, Vice President
215 Pennsylvania Avenue SE, #3
Washington, DC 20003
lgilbert@citizen.org
202-454-5188

Elizabeth Skerry, Regulatory Policy Associate
215 Pennsylvania Avenue SE, #3
Washington, DC 20003
ESkerry@citizen.org
202-454-5116