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Hon. Richard Revesz  
Administrator  
Office of Information and Regulatory Affairs  
U.S. Office of Management and Budget  
Washington, D.C.

Re: Proposed Revisions to Circular A-4, Regulatory Analysis, and Circular A-94, Federal Spending (Docket Nos. OMB-2022-0014 & OMB-2023-0011)

Dear Administrator Revesz:

In partnership, PolicyLink and the Urban Institute write to offer public comment on the Office of Management and Budget (OMB) and the Office of Information and Regulatory Affairs' (OIRA) recent proposed revisions to Circulars A-4 and A-94. In 2021, PolicyLink and the Urban Institute launched the Equity Scoring Initiative, which seeks to build tools to measure the potential impact of federal legislation and policy on equitable outcomes and help advance policies that improve racial, gender, and other dimensions of equity, such as ability, sexual orientation and gender identity, and immigration status. While the federal government has a responsibility to represent all people, equity calls on government practice and policy to target interventions where they are needed most. Equitable governing considers the impact of structural racism and intersecting structural bias in policy making and seeks to actively address and remedy those existing biases and resultant inequities, which compound for people of color and low-income communities in particular. We consider the guidance set forth in the Circulars to be a prime opportunity to further racially equitable governing and applaud the efforts of the Biden-Harris Administration to build upon and strengthen previous guidance. The proposed revisions are much needed and make great progress in ensuring that all federal regulations—and the investments they impact- move towards becoming more equitable in their impact to all people who live in the United States.

As stated in this newest guidance, regulations are intended to correct for market failure, address bias, improve government operations and service delivery, promote distribution fairness and advance equity, and protect civil rights and civil liberties while advancing democratic values. These intentions acknowledge that there are no neutral investments—that every investment made has counterpoints of benefit and disadvantage. The potential for advancing equity via federal policies and programs is significant and can uplift the more than 100 million people in the United States who experience financial insecurity and who are systematically denied opportunity—a vast majority of whom are identified as protected classes under current civil rights law. As the author and enforcer of large-scale policy change, and as one of the largest procurers in the American economy, the federal government is strongly positioned to ensure that the impact of federal investments is not only fiscally beneficial to some, but to all.

In order to do so, the federal government must embrace both its legal authority and fiscal responsibility to advance people-centered, race- and class- conscious approaches to impact analysis alongside current cost-benefit analyses. Given the historic and current systemic inequities experienced by low-income people and people of color, in conducting regulatory analysis the government must ask: Who benefits from federal regulations and how? Who is harmed? Who carries the burden or costs, and what alternatives balance benefit and harm, toward the fairness and justice promised in the Constitution? Ultimately, these are not just questions of distributional fairness, but also of the legal responsibility and affirmative duty of government to avoid, prohibit, and remedy the effects of racial discrimination.

In the spirit of these intents, and in alignment with the whole-of-government call to action set forth by the Biden-Harris Administration and codified by Executive Orders 13985, 14008, and 14091, we encourage

and urge OIRA and federal agencies to consider additional revisions and/or accompanying guidance and tools that might propel not only regulatory analyses, but also the resultant actions of federal agencies, to center the well-being of people (and particularly low-income people and people of color who have experienced persistent discrimination), acknowledge systemic inequities, and proactively utilize federal funds to repair those inequities so that all people can thrive.

We commend OIRA for embracing this call-to-action and the affirmative duty of the federal government to build regulations that promote fairness and advance equity. The following reflections and recommendations to the proposed updates to Circulars A-4 and A-94, supported by extensive legal research, are intended to offer suggestions on how current and proposed regulatory processes can embrace the call to equity.

## Affirmative Duty of Government

**Durable remedies to structural racism within the regulatory governing structures must be more than tools or workarounds. They must be legally enforceable within the constitutional framework of equal protection and legal jurisprudence.**

Embedded within the familiar and high-profile body of equal protection law is a permissible window within which government can, and is sometimes required to, take *certain actions to avoid, prohibit, or remedy the effects of racial discrimination*. Under the Equal Protection Clause of the U.S. Constitution, government entities have an affirmative duty to avoid “passive participation” in racial discrimination.<sup>1</sup> In addition, Title VI of the Civil Rights Act and its regulations require that “public funds...not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.”<sup>2</sup> As such, Title VI regulations prohibit government actions that disparately impact protected classes.<sup>3</sup> The U.S. Department of Justice directs federal agencies to eliminate policies that have such impacts “unless they are shown to be necessary to the program’s operation and there is no less discriminatory alternative.”<sup>4</sup> Thus, government actors are *permitted* to

- evaluate the potential racial equity impacts of actions under consideration, and make decisions to avoid actions that would have disparate impacts on the basis of race;
- take steps to avoid perpetuating patterns of past discrimination by others – or to affirmatively remedy those patterns; and
- gather data about impacts of existing programs and past decisions, and adjust decisions to avoid continued disparate impacts.

More recently, President Biden has issued multiple Executive Orders requiring federal agencies to consider and prevent the potential discriminatory and quality-of-life impacts of their proposed regulations. Executive Order 14008 requires federal agencies to “address disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impact[.]”<sup>5</sup> Similarly, Executive Order 14091 requires federal agencies to advance equity by identifying opportunities to modify or adopt new regulations and

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<sup>1</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491 (1989); *Norwood v. Harrison*, 413 U.S. 455, 492 (1973).

<sup>2</sup> See U.S. Department of Justice (DOJ), Title VI Legal Manual, last updated Apr. 22, 2021, at page VII.2.

<sup>3</sup> See, e.g., 49 C.F.R. § 21.5 (prohibiting the denial, differentiation, or restriction of program benefits and opportunities “on the grounds of race, color, or national origin,” either “directly or through contractual or other arrangements” and actions that “have the effect of subjecting persons to discrimination”).

<sup>4</sup> DOJ Title VI Legal Manual, page VII.5.

<sup>5</sup> Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, Jan. 27, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

guidance, and to “affirmatively advance civil rights.”<sup>6</sup> These Executive Orders underscore the responsibility of federal agencies to not only consider the fiscal impact of federal investments and regulations, but also the potential quality-of-life impacts they may have on people and the places where they live.

Building on the affirmative duty of government and the call to equity in Executive Orders 14008 and 14091, our recommendations below offer standards by which federal agencies can perform equitable analyses of their proposed regulations and adjust them to avoid discriminatory effects:

### *Operationalizing Regulatory Measurement for Equity*

- A clearly articulated definition and measurement of equity should be operationalized in the regulatory review process, and Cost Benefit Analyses (CBAs) should be amended to consider not only direct impacts to proximate groups but also the costs of exclusion.
- Equity analysis includes cumulative burden over time and accounts for harm caused by past regulations. Utilize a reckoning, repair and transformation framework for regulatory analysis.

### *Development of the Analytic Baseline*

- For programs delivering Federal benefits, benefit and burden analysis should consider all stages of implementation of a program—from outreach, to eligibility determination to applications, to benefit delivery. Regulatory reviews should proactively assess whether or not the design of programs and benefits delivery have accounted for potential procedural inequities, which will inevitably confound the potential distributional benefit of those programs.
- Disaggregated data is necessary to understand inequities and disparities present at baseline and that could be impacted in the course of implementing a regulation. Equal protection may be race-neutral but cannot be race blind.
- Distributional analysis should include a comprehensive understanding of the program and potential interaction effects.

### *Identifying a Range of Alternatives*

- Alternatives should address the root cause or occasion where inequity enters the process.

### *Estimating Benefits, Costs and Transfers and the Role of Distributional Analysis*

- The value of financial benefits and equitable outcomes should be appropriately weighted to prevent disproportionate burden and harm.
- Equity and cost analyses should be integrated to increase accuracy.

## **Standards for Equitable Regulatory Analysis**

Overall, the proposed changes to the Circulars strengthen and clarify the role of regulatory analysis in advancing equity and promoting distributional fairness (fair allocation of resources, benefits as well as burden). The Circulars clearly identify the role of distributional equity at every step in the regulatory analysis process and the proposed revisions expand the regulatory analysis process from three to five key steps,<sup>7</sup> adding an emphasis on defining the baseline, as well as a requirement to summarize and increase transparency of the distributional effects of regulatory alternatives. The most critical change is that it clearly identifies the need to advance equity as a potential basis for regulation. In doing so, it more clearly

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<sup>6</sup> Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Feb. 16, 2023, Sec. 3(d), 8.

<sup>7</sup> Evaluating the need for the regulatory action; defining the baseline; identifying a range of regulatory alternatives; estimating the benefits, costs, and transfers of each regulatory alternative; and summarizing the regulatory analysis.

recognizes that people ultimately feel the impact of regulations and encourages engagement with affected communities in the development and analysis of regulations.

While the Circulars expand their guidance on distributional and equity analysis in the regulatory review process, agencies will need additional resources to inform and guide their equity assessments and analysis. This is a nascent field where frameworks and data are evolving and where agencies may have varying levels of expertise and background. In addition, neither Circular A-4 nor A-94 specifically define what criteria should be used to measure whether a regulatory proposal or alternative is “advancing equity.” The Equity Scoring Initiative (as mentioned previously as a partnership between PolicyLink and Urban Institute), is an effort to analyze legislative proposals for their potential to achieve equity (much as budget scoring analyzes proposals for their potential fiscal impact) provides insights on how agencies can approach this question. Building on this work, and within the context of distributional analysis and equity, we offer the following equity standards and recommendations to help inform a framework for equitable regulatory analysis, building on the understanding of government’s affirmative duty, and the permissible window within which government can take certain actions to avoid, prohibit or remedy harmful the effects of racial discrimination.

### *Operationalizing Regulatory Measurement*

***Equity Standard: A clearly articulated definition and measurement of equity should be operationalized in the regulatory review process, and Cost Benefit Analyses (CBAs) should be amended to consider not only direct impacts to proximate groups but also the costs of exclusion.*** In the Equity Scoring Initiative, we consider (1) if a policy or regulation improves outcomes, on average, for all racial and ethnic groups (perhaps by shifting the overall distribution of outcomes toward more positive values), (2) if the gaps in well-being (i.e. better or worse off) between groups of people narrow, and/or (3) whether the policy or regulation prevents further harm to any particular group. We believe these measures can be deployed in both retrospective and prospective analysis.<sup>8</sup>

***Equity Standard: Equity analysis examines cumulative burden over time and accounts for harm caused by past regulations. Utilize a reckoning, repair and transformation framework for regulatory analysis.*** We also consider a wider array of potential units of analysis of burden that consider the multiple and accumulating impacts on people. Cost-benefit and value-for-money analyses are designed to predict the potential effects of the value of a policy or investment as a single dollar-based measurement of value. Acknowledging that communities that experience structural racism often experience multiple, coinciding, and often cascading burdens, regulatory review might consider cumulative burden over time rather than burden at a point in time. Considering cumulative burden may more directly account for harm caused by past regulations, and to what extent the potential benefits of proposed regulations lessen those harms.

As well, understanding that Title VI Compliance must be more than the absence of complaints, the regulatory analysis must involve some level of proactive examination of disparate impact on protected classes. Approaches include:

- Disparate impact analysis performed through Equity Action Plans, as modeled at the departmental level (as required by EO 13985 and reinforced through EO 14091)
- Use of disaggregated data tools like the Climate and Economic Justice Screening Tool (CEJST)

The Environmental Protection Agency (EPA), for example, has included Cumulative Impact Assessments in their agency-wide Racial Equity Action Plan to develop scientific approaches, data, methods, tools and analyses to support regulatory, permitting, equitable development, compliance monitoring and

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<sup>8</sup> Observation of the ability for a regulation to close gaps in outcomes or prevent further harm for more than 1 year may be required, as the potential benefits may take longer to manifest. Thus, the timeframe for prospective distributional analysis in regulatory review may need to shift.

enforcement activities.<sup>9</sup> This is an explicit strategy being built by EPA to address environmental racism, responding to NEPA requirements and aligning with recommendations from the White House Environmental Justice Advisory Council and National Environmental Justice Advisory Council.

Cost-benefit analyses could also extend to include the cost of not reaching intended participants, who should be in the denominator or baseline population but are often excluded. In addition, the higher marginal benefit of a program would accrue to those people who are excluded, who are often people with greater need and harder to reach, such as those who are unstably housed. Current analysis does not fully account for the higher marginal utility of some programs to some participants, and it does not account for the cost to society of inadvertently excluding the very participants who could experience improved life outcomes if program eligibility or outreach were simpler.

### *Development of the Analytic Baseline*

***Equity Standard: For programs delivering Federal benefits, benefit and burden analysis should consider all stages of implementation of a program—from outreach, to eligibility determination to applications, to benefit delivery. Regulatory reviews should proactively assess whether or not the design of programs and benefits delivery have accounted for potential procedural inequities, which will inevitably confound the potential distributional benefit of those programs.*** Inequity can compound across all of the stages of implementation or can be hidden in some stages where there is no, or inaccurate, data collected. Incomplete data limits outreach, which in turn limits the number of eligible people applying for a program. In this way, incomplete data and resulting outreach places an invisible burden on potential applicants to learn about and navigate a program by themselves. Then, burdensome application processes may deter eligible people from applying. Initial approvals and applicant takeup and follow through will have downstream implications for overall equity in program participation. People who enroll may not complete a program, not for lack of effort but due to missing verification documents or unclear submission timelines. Tracking the dropoff in people across the timeline from program application to completion could identify where unfair practices exist.

***Equity Standard: Disaggregated data is necessary to understand inequities and disparities present at baseline and that could be impacted in the course of implementing a regulation.*** Equal protection may be race-neutral but cannot be race blind. Tracking the disparities at any given point in the process will require data on the gender, race and ethnicity, disability status or other characteristics of initial applicants—even if it cannot be determined whether discrimination is occurring as a result of administrative procedures used to approve or deny claims, evidence of disparities over time likely reflects unfair and inequitable processes. Relatedly, analyses often focus on the impact of regulation on current beneficiaries, but it is important to understand the historic make-up of applicants for programs and who has historically been excluded from the benefits of those programs. For example, long standing cases of discrimination for some types of US Department of Agriculture farming assistance may influence current patterns of assistance.

Under A-94, rules for a baseline for equitable distribution of funds need to consider how the criteria for programmatic need may have unintended consequences. For example, in some areas, the size of waiting lists are considered a metric of need. However, in some cases, such as with Home and Community Based Services (HCBS) under Medicaid, the data does not necessarily reflect the underlying need for HCBS. States which are more aggressive in providing HCBS services will have a shorter waiting list but no less need. Tying funding to waiting lists unfairly penalizes states dedicated to serving the needs of their elderly and disabled residents.

It is important to note that even race-blind policies and practices can produce disparate impacts on people and communities of color. Consider a recent acknowledgement by the Internal Revenue Service (IRS)

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<sup>9</sup> United States Environmental Protection Agency. “Cumulative Impacts Research: Recommendations for EPA’s Office of Research and Development.” September 2022. Available at <https://www.epa.gov/system/files/documents/2023-05/CUMULATIVE%20IMPACTS%20RESEARCH-FINAL%20REPORT-EPA%20600-R-22-014A%20%2812%29.PDF>.

that auditing algorithms disproportionately and negatively impact Black tax filers.<sup>10</sup> IRS filing and auditing processes do not rely on racial group variables, and as such the disparity in auditing of Black filers, while not attributable to intentional discrimination, does serve as a proof point that race-blind practices do not guarantee that a policy or practice meets the standard of equal protection.

**Equity Standard: Distributional analysis should include a comprehensive understanding of the program and potential interaction effects.** Consider for example, the Social Security program provides social insurance for retirees, survivors, and workers who experience a disability. Social Security benefits provide a lifetime, inflation-protected annuity with critical insurance against the risk of living to advanced ages. Many studies have confirmed and documented how life expectancy varies by race and other factors, and that people of color consistently, on average, live shorter lives than their white counterparts. As a result, the retirement component of the Social Security program provides greater benefits to white workers than to other racial groups. Many workers with shorter life expectancies experience disabling conditions, leading them to apply for disability insurance benefits. In this scenario, workers of color receive greater assistance from the disability and survivors' insurance components of the program. Since disability and retirement claiming behavior are related and affect different groups differently, changes to either program should be considered in tandem with their effects on the other. For instance, an increase in the retirement age is likely to increase applications to the disability program, and workers in better health are more likely to be able to delay retirement and offset the reduction in benefits that would occur otherwise.

In addition to documenting the relative burdens between populations within a program or agency, establishing the appropriate baseline for distributional analysis may require a cross-agency analysis when programs and policies across agencies interact and complement each other. For example, in the case of early childhood development programs, look at Department of Health and Human Service and Department of Education programs, including Head Start, Child Care Development Fund, and pre-K funding, in combination. Such a cross-agency focus could support higher-level impact analysis on whole populations of people across systems, beyond discrete streams of programmatic funding.

### *Identifying a Range of Alternatives*

**Equity Standard: Alternatives should address the root cause or occasion where inequity enters the process.** If analysts assess the extent to which each stage of program regulation and implementation is unfair, then there is greater opportunity to propose alternatives that address the root cause or occasion when inequity enters the process. For example, when regulatory review identifies a stage of excess administrative burden, we recommend looking at earlier stages (outreach, eligibility etc.) to identify what barriers to equity may have arisen then.

### *Estimating Benefits, Costs and Transfers and the Role of Distributional Analysis*

**Equity Standard: The value of financial benefits and equitable outcomes should be appropriately weighted to prevent disproportionate burden and harm.** We recognize that equity considerations and analysis do not substitute for cost-benefit analysis, or benefit-burden analysis. But deciding whether to reduce burden by eliminating a particular aspect of regulation, such as complicated eligibility determination, could rest more on the equity analysis than the cost analysis. For example, the Social Security Administration (SSA) recently reviewed its regulations for enforcing the in-kind support and maintenance (ISM) rules for the Supplemental Security Income program (SSI). SSA's review resulted in a recommendation to remove consideration of in-kind food assistance received from family or friends from the calculation of ISM. Enforcing ISM rules requires significant administrative resources from SSA and imposes burdens on program beneficiaries. The burden is high especially when compared to the dollar value of the assistance received by individuals receiving SSI. Ideally, equity and cost analyses would be integrated.

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<sup>10</sup> [https://www.finance.senate.gov/imo/media/doc/werfel\\_letter\\_to\\_sen\\_wyden.pdf](https://www.finance.senate.gov/imo/media/doc/werfel_letter_to_sen_wyden.pdf).

**Equity Standard: Equity and cost analyses should be integrated to increase accuracy.** The proposed revisions to the Circulars expanded the methods for distributional analysis and lay the groundwork for an integrated equity and cost analysis. We argue this holistic approach could increase the accuracy of estimates, without involving more administrative burden. Consider how an equity focus can contribute to a more nuanced and accurate understanding of the costs of a regulation. For example, in the process for determining eligibility for SSDI and SSI disability benefits, some burden-reducing changes could result in a faster determination of eligibility. This faster eligibility determination increases near-term program expenditures. OMB in past reviews of Social Security regulations has understood how this near-term cost increase, designed to ultimately reduce burden, should be understood as very distinct from a permanent program expansion cost or an increase in burden. Similarly, program simplifications can increase program participation, which could in the near-term increase administrative costs (e.g., when staff are trained in new, simpler processes). However, increases in program participation should not be considered as a cost similar to a permanent program expansion, when the increased participation reflects the program fulfilling its obligation to reach all intended beneficiaries or participants. If they are considered the same, the cost would be overestimated.

Another example of how integrating equity could result in greater accuracy shows up in benefit-cost formulas. The formula for distributing Federal Emergency Management Assistance disaster preparedness grants may exacerbate inequity if it prioritizes protecting the highest-value properties rather than households with the fewest resources to prepare or recover. An appropriate weighting of the value of financial benefits that considers existing disparities in wealth, income, and access to pre- and post-disaster capital can provide an equity-informed benefit-cost analysis.

We also call attention to implications of the recent enactment of the Administrative Pay-As-You-Go Act of 2023, as part of the Fiscal Responsibility Act of 2023.<sup>11</sup> This new requirement focuses on the cost of discretionary administrative actions, and how agencies report to OMB such actions that exceed certain thresholds and offset those costs with other discretionary actions. The OMB Director may waive this requirement if the Director determines the discretionary action “is necessary for the delivery of essential services” or “is necessary for effective program delivery.” An equity analysis may suggest that fulfilling program obligations to reach all intended participants is necessary for program delivery, and therefore **costs associated with achieving those obligations should not be considered discretionary or if considered discretionary should be waived.** Equity should be an important factor in deciding on what actions are discretionary or eligible for a waiver.

## Where New and Additional Guidance Is Needed

The examples above suggest not only how to implement the proposed revisions with attention to equity, but also areas where OMB and OIRA could issue new guidance and proposed methods.

A more expansive view on simplification of program processes could be to reduce the number of times people have to submit the same eligibility information to different programs—and how it could reduce time spent by staff across programs. Regulations could grant permission to *link data* given with consent by applicants in one program to other programs for which they apply and are eligible. As noted above with other simplification processes, there could be near-term administrative costs, in this case of linking or sharing data with the appropriate data privacy protections. Regulatory review could determine whether the benefits manifest not only in reduced application-related time for program staff and participants across programs, but also as agencies reaching groups of people often deemed “hard to reach” are able to access, enroll, and participate in such programs.

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<sup>11</sup> H.R. 3746, “Fiscal Responsibility Act of 2023. Available at <https://www.govinfo.gov/content/pkg/BILLS-118hr3746ih/pdf/BILLS-118hr3746ih.pdf>.

This review for data linkage opportunities also could be incorporated into *periodic cross-program review*. States offer a proof of concept that this type of cross-program linkage is feasible. States that have integrated data systems between schools, colleges, and workforce systems have, in some cases, been able to enroll participants in federally funded programs more quickly because they see a fuller picture of eligibility across programs. There also are many examples of existing data and program linkages between federally funded programs. Agencies and their grantees require more guidance about how to review the implementation of such linkages in terms of equity benefits and costs.

## Conclusion

Through the Equity Scoring Initiative, PolicyLink and the Urban Institute will continue to build tools that address structural racism in governing, working strategically within legislative, regulatory and legal systems and structures at the federal level, and potentially even the state level. We recognize the need for immediate reform to the regulatory analysis processes of the OMB Circulars. We are also clear that this work requires both a sprint and a marathon. In the sprint, we applaud these efforts of regulatory reform, and we look forward to the econometric models that this revised set of standards will produce as analysts further consider how programs might be designed to more accurately assess, estimate, and plan for real-world impacts on people, and particularly low-income communities and communities of color who have experienced the greatest disinvestment of and preclusion from the benefits of federal investments. In the marathon, we will stay the course and continue building an Equity Scoring Initiative that delivers the promise of equitable governing for All.

*Since the summer of 2021, Urban Institute and PolicyLink have been collaborating on the Equity Scoring Initiative, a research project to equip legislators with the tools they need to systematically measure the future equity impact of proposed legislation. The views expressed in this public comment are those of the authors and collaborators and should not be attributed to the Urban Institute, its trustees, or its funders.*

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