

SHINING LIGHT ON THE FEDERAL REGULATORY PROCESS

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

MARCH 14, 2018

Serial No. 115-73

Printed for the use of the Committee on Oversight and Government Reform



Available via the World Wide Web: <http://www.fdsys.gov>
<http://oversight.house.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

30-942 PDF

WASHINGTON : 2018

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

Trey Gowdy, South Carolina, *Chairman*

John J. Duncan, Jr., Tennessee
Darrell E. Issa, California
Jim Jordan, Ohio
Mark Sanford, South Carolina
Justin Amash, Michigan
Paul A. Gosar, Arizona
Scott DesJarlais, Tennessee
Blake Farenthold, Texas
Virginia Foxx, North Carolina
Thomas Massie, Kentucky
Mark Meadows, North Carolina
Ron DeSantis, Florida
Dennis A. Ross, Florida
Mark Walker, North Carolina
Rod Blum, Iowa
Jody B. Hice, Georgia
Steve Russell, Oklahoma
Glenn Grothman, Wisconsin
Will Hurd, Texas
Gary J. Palmer, Alabama
James Comer, Kentucky
Paul Mitchell, Michigan
Greg Gianforte, Montana

Elijah E. Cummings, Maryland, *Ranking
Minority Member*
Carolyn B. Maloney, New York
Eleanor Holmes Norton, District of Columbia
Wm. Lacy Clay, Missouri
Stephen F. Lynch, Massachusetts
Jim Cooper, Tennessee
Gerald E. Connolly, Virginia
Robin L. Kelly, Illinois
Brenda L. Lawrence, Michigan
Bonnie Watson Coleman, New Jersey
Raja Krishnamoorthi, Illinois
Jamie Raskin, Maryland
Jimmy Gomez, Maryland
Peter Welch, Vermont
Matt Cartwright, Pennsylvania
Mark DeSaulnier, California
Stacey E. Plaskett, Virgin Islands
John P. Sarbanes, Maryland

SHERIA CLARKE, *Staff Director*
ROBERT BORDEN, *Deputy Staff Director*
WILLIAM MCKENNA, *General Counsel*
JAMES LESINSKI, *Counsel*
KILEY BIDELMAN, *Clerk*
DAVID RAPALLO, *Minority Staff Director*

CONTENTS

Hearing held on March 14, 2018	Page 1
--------------------------------------	-----------

WITNESSES

Ms. Kris Nguyen, Acting Director for Strategic Issues, Government Accountability Office	
Oral Statement	5
Written Statement	7
Mr. Paul Noe, Vice President, Public Policy, American Forest and Paper Association	
Oral Statement	28
Written Statement	30
Ms. Karen Harned, Executive Director, National Federation of Independent Business: Small Business Legal Center	
Oral Statement	54
Written Statement	56
Professor Nicholas Parrillo, Professor of Law, Yale Law School	
Oral Statement	66
Written Statement	68
Mr. Amit Narang, Regulatory Policy Advocate, Public Citizen	
Oral Statement	89
Written Statement	92

APPENDIX

U.S. General Services Administration, Office of Inspector General, report titled, "Evaluation of GSA Nondisclosure Policy," submitted by Ms. Maloney	128
Submission of Federal Rules Under the Congressional Review Act form, submitted by Mr. Palmer	150

SHINING LIGHT ON THE FEDERAL REGULATORY PROCESS

Wednesday, March 14, 2018

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The committee met, pursuant to call, at 10:02 a.m., in Room 2154, Rayburn House Office Building, Hon. Trey Gowdy [chairman of the committee] presiding.

Present: Representatives Gowdy, Duncan, Jordan, Amash, Farenthold, Meadows, DeSantis, Ross, Walker, Blum, Grothman, Hurd, Palmer, Comer, Maloney, Norton, Connolly, Kelly, Krishnamoorthi, Welch, and Plaskett.

Chairman GOWDY. Good morning. The Committee on Oversight and Government Reform will come to order.

Without objection, the presiding member is authorized to declare a recess at any time.

I want to welcome our guests. I will introduce you individually in just a moment, but for now I will recognize my friend from North Carolina for his opening statement.

Mr. Meadows.

Mr. MEADOWS. Thank you, Mr. Chairman. Thank you for your leadership in calling this hearing.

Obviously, Federal agencies have a very active role assigned to them by Congress, and what they do touches the daily lives of the public. There is no doubt that Federal agencies play an important role in our government, but they should still play by the rules laid down by Congress when it comes to issuing the rules themselves.

The rulemaking process has changed over time and can get very technical, but what has not changed is only Congress can legislate and agencies cannot issue regulations unilaterally. Rules are supposed to be issued in accordance with several statutes and executive orders, but, as is the case with this hearing today, and it will show today, that this doesn't always happen. In fact, in 2016 alone, 18 regulations were issued for each law passed by Congress, not to mention the hundreds of pages of guidance that came along with those regulations.

According to the Federal Register, agencies issued 3,280 rules last year. Now, this amounts to just a little bit less than nine rules per day, including weekends and Federal holidays. Now, that's an improvement over the previous administration, where we saw 10-1/2 rules passed each day in 2016.

Now, several laws and executive orders establish a regulatory process designed to require agencies to consult with the affected

parties, evaluate their benefits and certainly the compliance burdens and other costs, and consider alternatives to regulate.

Now, we know Federal agencies are not consistently following the rules Congress and the President have established. In fact, recently, GAO released the findings of an audit concluding that agencies have become increasingly noncompliant with the Congressional Review Act. And when issuing rules at the end of a Presidential administration—this is particularly evident—especially when they have significant impact, those rules which actually cost the economy at least \$100 million.

Agencies also issue guidance, which is a statement of policy or an interpretation of the law or regulations. Generally, guidance is supposed to inform the public of how to comply with those laws. Unfortunately, we don't know how many guidance documents agencies have issued, nor do we know how much it will cost the economy. One of our witnesses today has written that, while no one knows how many guidance documents are out there, everyone agrees that the total is oceanic in scale.

Late last year, our committee launched an oversight project on regulatory guidance documents. In response to our December request, agencies provided information on more than 12,800 documents. Now, the final number is still rising as agencies continue to produce the information.

Agencies have also had difficulty in complying with a few existing requirements for issuing guidance documents. In fact, in 2015, the GAO undertook an audit of the Departments of Agriculture, Education, Health and Human Services, and Labor and found shortcomings in complying with applicable requirements.

The committee's oversight project also found widespread non-compliance with the CRA in the executive directives. Agencies reported to the committee that they had submitted just 189 guidance documents to Congress and the GAO, as it is required by the CRA. That's a submission rate of less than 0.015 percent.

In the last 5 months, GAO has issued four opinions to Members of Congress finding certain guidance documents are considered rules under the Congressional Review Act and, therefore, must be submitted.

Now, in conclusion, we know that more congressional requests for opinions on whether certain guidance documents are pending before the CRA. Clearly, GAO will never be able to review the more than 12,800 guidance documents in our limited sample, let alone the entire universe of the agency guidance. And there is some sort of disconnect between what the law says and what agencies do.

So we look forward to hearing your testimony today and you shining the light on this regulatory process as we try to make sure that we do what is according to the law and the rules and upholding the will of Congress.

I yield back.

Chairman GOWDY. I thank the gentleman from North Carolina and would now recognize the gentlelady from New York to give her opening statement.

Mrs. MALONEY. Thank you, Mr. Chairman, for calling today's important hearing.

And thank you to all of our witnesses here today.

I would like to start by making one important point: We all agree that rules and guidance documents should be fair, open, and informed by those entities and individuals who are regulated by them. However, we cannot simply eliminate them. That would result in chaos.

I want to point out that it is often members of the business community who want regulations and guidance, because they want certainty, they want clarity. That is critical for them to determine how to invest their time and their resources. Guidance documents, even though they are nonbinding, are often very useful to regulated entities in explaining how they can stay on the right side of the law.

The chairman has invited Professor Nicholas Parrillo to testify today, and I am pleased that he is here. He issued a report highlighting this point. And he based it on interviews with business representatives who stressed the importance of guidance documents.

For example, Marc Freedman, the executive director of labor law policy at the U.S. Chamber of Commerce, and I quote, acknowledged that business sometimes demanded guidance and that it was quite reasonable for the agency to provide it to clarify vague legislative rules, end quote.

Let me give you an example. Industry groups recently asked the IRS to issue guidance about the new tax law. The American Institute of Certified Public Accountants wrote to the IRS that specific areas, and I quote, “need immediate guidance in order for taxpayers and practitioners to comply with their 2017 tax obligations and to make informed decisions regarding cash flow, entity structure, retirement, wealth transfer, and a vast number of other tax planning issues,” end quote.

Professor Parrillo summarized his findings by writing this, and I quote: “It was clear from these interviews that guidance increases an agency program’s integrity and efficiency and shields regulated parties against unequal treatment, unnecessary work, and unnecessary risk,” end quote.

Guidance works best if there is ongoing interaction between regulators and the regulated entities. This interaction can take the form of conversations with stakeholders, advisory committee meetings, townhalls, or even requests for public comment.

But we need to avoid placing an overwhelming burden on Federal agencies. Guidance documents are effective precisely because regulators can issue them more quickly than Federal rulemaking. Imposing burdensome requirements on guidance documents will mean that agencies will stop using them, depriving the business community and others of this very useful tool.

Formal rules are different, because they carry the force of law. They are governed by statutory procedures that require formal public participation and the opportunity to appeal to the courts if these processes are not followed. This has been the law since we enacted the Administrative Procedure Act in 1946.

My concern is that there are multiple recent examples of the Trump administration attempting to circumvent the Administrative Procedure Act or issue agency guidance that is not even public, which leads to less transparency and certainty, not more.

For example, just last week, the Inspector General for the General Services Administration issued what I thought was an excellent report, finding that the agency's guidance on how the staff communicate with Congress, and I quote, "lacks transparency," end quote, and completely omitted whistleblower protection language that is required by the Whistleblower Protection Act.

Specifically, the IG found that GSA, and I quote, "created opportunities for confusion, misinterpretation, and inconsistent application among its officials and employees," end quote.

According to the IG, GSA followed oral instructions from the White House to stop responding to oversight and investigative requests from Members of Congress other than committee chairs. GSA officials communicated this new policy to staff in, quote, "small, in-person meetings," end quote, and through, quote, "telephone calls and hallway conversations."

And I'd like unanimous consent to put this excellent report in the record outlining these conflicts.

Chairman GOWDY. Without objection.

Mrs. MALONEY. In another example, the Department of Labor is withholding from the public an economic analysis of its proposed rule to allow employers to take the tips from restaurant workers and other employees, according to press reports. The Department did not publish its analysis, which showed that, quote, "employees would lose out on billions of dollars in gratuities," end quote.

Hiding from the public an analysis conducted by the agency, especially when it contradicts the agency's own proposal, is the opposite of the transparency we expect in the rulemaking process.

For today's hearing, I am very pleased that we will be able to shine a light on the Federal regulatory process, and I look forward to the testimony.

This is "Sunshine Week." And, after all, as the saying goes, sunlight is the best disinfectant. I hope we can apply that disinfectant across the board and not limit it only to those issues with which some may disagree.

Thank you, Mr. Chairman.

Chairman GOWDY. I thank the gentlelady from New York.

We are pleased to have a distinguished panel of witnesses-slash-experts.

I'm going to introduce you en banc and then recognize you individually for your opening statement.

First, to my left, Ms. Kris Nguyen, Acting Director for Strategic Issues at the Government Accountability Office; she is accompanied by Mr. Robert Cramer, Managing Associate General Counsel at GAO, who will also be sworn in in just a moment; Mr. Paul Noe, vice president of public policy at the American Forest and Paper Association; Ms. Karen Harned, executive director, National Federation of Independent Business: Small Business Legal Center; Professor Nicholas Parrillo, professor of law at Yale Law School; and Mr. Amit Narang, regulatory policy advocate at Public Citizen.

Pursuant to committee rules, I'm going to have to administer an oath to you. So if you would please rise, and we'll do that.

Do you solemnly swear or affirm the testimony you're about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

May the record reflect the witnesses answered in the affirmative. You may be seated.

In order to allow the members to ask their questions and to be good stewards of your time, I just want you to know your opening statements are all part of the record. If I could get you to limit your remarks to 5 minutes.

And there are a set of lights, in theory, that are designed to help with that. So if you—I know a lot of our members have not figured out the lighting system yet, so I'll share it with you. Green, you're good. Yellow, speed up, try to get under the light as quick as you can. Red, if you could begin to maybe wrap up that final thought. So, with that, Ms. Nguyen.

WITNESS STATEMENTS

STATEMENT OF KRIS NGUYEN

Ms. NGUYEN. Chairman Gowdy and members of the committee, thank you for inviting me today to discuss Federal regulatory and guidance practices.

Agencies use Federal guidance and regulations to achieve national goals, such as improving the economy and protecting the health and safety of the public. The importance of improving the transparency of agencies' guidance and regulatory practices is a common theme throughout GAO's body of work.

At your request, this testimony focuses on two reports. Our 2015 report on regulatory guidance addresses selected agencies' adherence to relevant OMB requirements and internal controls. And our recently released report discusses agencies' compliance with procedural requirements for rulemaking, including the Congressional Review Act.

Regarding our 2015 report, we found that USDA, Education, HHS, and Labor did not consistently adhere to OMB requirements when developing significant guidance. Specifically, agencies did not consistently follow OMB requirements for the development and dissemination of significant guidance. While some agencies had written procedures for the approval of significant guidance, others had none or their procedures needed updating. We also found that three of the four agencies consistently applied OMB requirements for public access and feedback; however, one agency, HHS, did not.

Agencies also lack adherence to internal controls for nonsignificant guidance. For example, most sub-agencies we reviewed did not have written procedures for producing guidance, and about half did not regularly evaluate whether issued guidance was effective and up to date.

Nonsignificant guidance is not subject to OMB requirements. As such, application of internal controls is important to help agencies achieve effective guidance practices. In this report, GAO made 11 recommendations to the 4 agencies we reviewed. Three of these recommendations remain unimplemented by HHS. HHS cannot ensure transparency and effectiveness of its guidance practices until it takes steps to improve its adherence to OMB requirements and internal controls.

For the report GAO issued on Tuesday, we reported, among other things, one, the number of regulations issued during Presidential

transition periods and their characteristics and, two, agencies' reported compliance with requirements for issued regulations.

During the transition from the end of the Clinton, Bush, and Obama administrations to the next, the administrations published, on average, about two and a half times more economically significant regulations during transition versus nontransition periods.

Agencies more frequently provided advance notice to the public during transition periods, which provided the public opportunities to influence the development of these regulations. However, we found that agencies less often complied with the CRA in providing Congress time to review and possibly disapprove regulations. This inconsistent compliance with CRA also occurred during nontransition periods. Agencies' most common deficiency was the failure to provide Congress the required time to review regulations.

In this report, GAO recommended OMB identify regulations at risk for not complying with the CRA and work with agencies to ensure compliance.

It is important that agencies consistently provide Congress with the required time to review regulations throughout a President's term and, in particular, during a Presidential transition, when Congress typically has a larger number of regulations to review.

Improvements made in transparency of the guidance and regulatory process benefit not only the public but also improve congressional oversight.

Thank you.

[Prepared statement of Ms. Nguyen follows:]



United States Government Accountability Office

Testimony
Before the Committee on Oversight and
Government Reform, House of
Representatives

For Release on Delivery
Expected at 10:00 a.m. ET
Wednesday, March 14, 2018

FEDERAL REGULATIONS

Opportunities to Improve the Effectiveness and Transparency of Regulatory and Guidance Practices

Statement of Kris Nguyen, Acting Director
Strategic Issues

GAO Highlights

Highlights of GAO-18-436T, a testimony before the Committee on Oversight and Government Reform, House of Representatives

Why GAO Did This Study

Congress has often asked GAO to evaluate the implementation of procedural and analytical requirements that apply to agencies' rulemaking and guidance processes. The importance of improving the transparency of those processes, including providing public participation and sufficient oversight, is a common theme throughout GAO's body of work on federal regulation.

Based on GAO's prior work, this testimony addresses: (1) the extent to which USDA, Education, HHS, and DOL adhered to OMB requirements and internal controls when developing regulatory guidance, and (2) agencies' compliance with the CRA for regulations promulgated during presidential transitions.

What GAO Recommends

In the April 2015 report on regulatory guidance, GAO made eleven recommendations to USDA, Education, HHS, and DOL to ensure adherence to OMB requirements and applicable elements of internal controls. Three of these recommendations to HHS remain open: 1) to develop written procedures for the approval of significant guidance, 2) strengthen application of internal controls over guidance processes, and 3) improve its website.

In the March 2018 report on rulemaking at the end of presidents' terms, GAO recommended OMB, as part of its regulatory review process, identify economically significant regulations at risk of not complying with the CRA and work with agencies to ensure compliance. OMB staff did not agree or disagree with the recommendation.

View GAO-18-436T. For more information, contact Kris Nguyen at (202) 512-2660 or nguyenk1@gao.gov.

March 2018

FEDERAL REGULATIONS

Opportunities to Improve the Effectiveness and Transparency of Regulatory and Guidance Practices

What GAO Found

Agencies GAO reviewed—Departments of Agriculture (USDA), Education (Education), Health and Human Services (HHS), and Labor (DOL) did not consistently adhere to Office of Management and Budget (OMB) requirements and internal controls when developing regulatory guidance, as GAO reported in 2015. Unlike regulations, regulatory guidance is not generally legally binding and is subject to different requirements for regulatory oversight. Agencies weighed various factors when they determined whether to issue guidance. The agencies GAO reviewed issued different amounts of guidance for various purposes, such as explaining plans for implementing regulations. Agencies found few of their guidance documents to be "significant," guidance with a broad and substantial impact on regulated entities. USDA and Education had written procedures for the approval of significant guidance as directed by OMB; DOL's procedures needed updating and to be distributed to appropriate agency officials; HHS did not have any. GAO found that USDA, Education, and DOL consistently applied OMB's requirements for public feedback and access, for example public access to guidance through websites, while HHS did not. Agencies can better ensure consistent application of review processes and public access to significant guidance through better adherence to OMB requirements. GAO also found opportunities for agencies to improve adherence to internal controls for guidance that did not meet OMB's definition of "significant." For example, most subagencies GAO reviewed did not have written procedures for the production of guidance and about half did not regularly evaluate whether issued guidance was effective and up-to-date. Adherence to these internal controls could promote quality and consistency in guidance development processes.

GAO found that agencies did not consistently comply with the Congressional Review Act (CRA) for regulations promulgated during the 120-day presidential transition periods (September 23 through January 20), as defined by the Presidential Transitions Improvements Act of 2015. GAO reported that during the transition from the end of one presidential administration to the next, the Clinton, Bush, and Obama administrations published on average roughly 2.5 times more economically significant regulations during transition periods than during nontransition periods; increases are typical during transition periods. For these regulations, agencies more frequently provided advanced notice to the public, thus providing the public opportunities to influence the development of these transition period regulations before they were finalized. In their published regulations, agencies generally reported complying with four of five procedural requirements for promulgating regulations during both transition and nontransition periods. Agencies are required to 1) assess the impact of regulations on small entities, 2) minimize the burden that information collections impose on the public, 3) assess the costs and benefits of regulations that include federal mandates, and 4) for certain agencies, obtain direct input from small entities during rulemaking. Also, a fifth requirement, agencies must comply with CRA, which provides Congress an opportunity to review and possibly disapprove regulations before they take effect. Agencies less often complied with CRA, during both transition and nontransition periods. The most common deficiency was agencies' failure to provide Congress the required time to review regulations, which GAO has also identified as a deficiency in previous work.

United States Government Accountability Office

Chairman Gowdy, Ranking Member Cummings, and Members of the Committee:

I am pleased to be here today to discuss federal regulatory and guidance practices, focusing, at your request, on our 2015 report on guidance processes at select agencies, and our recently released report on rulemaking at the end of presidents' terms.¹

Agencies use federal regulations and guidance to achieve national goals, such as improving the economy and protecting the health and safety of the public. Congress has often asked us to evaluate the implementation of procedural and analytical requirements that apply to agencies' rulemaking and guidance processes. The importance of improving the transparency of those processes is a common theme throughout our body of work on federal regulation. Based on our work, this testimony discusses: (1) the extent to which the Departments of Agriculture (USDA), Education (Education), Health and Human Services (HHS), and Labor (DOL) adhered to Office of Management and Budget (OMB) requirements and internal controls when developing regulatory guidance and (2) agencies' compliance with the Congressional Review Act (CRA) for regulations promulgated during presidential transitions.² We consistently found opportunities to improve the transparency and effectiveness of regulatory and guidance practices.

My statement is based on work that we have issued on regulatory and guidance processes prepared at the request of Congress. We made 12 recommendations to agencies on the topics that I plan to address today, eight of which have been implemented to date.³ We conducted our work for these reports in accordance with generally accepted government

¹GAO, *Federal Rulemaking: OMB Should Work with Agencies to Improve Congressional Review Act Compliance during and at the End of Presidents' Terms*, GAO-18-183 (Washington, D.C.: Mar. 13, 2018) and *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, GAO-15-368 (Washington, D.C.: Apr. 16, 2015).

²We conducted this work in response to a requirement in Section 5 of the Edward "Ted" Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015, which includes a provision for us to assess final significant regulatory actions promulgated by executive departments during specified presidential transition periods. Pub. L. No. 114-136, § 5 130 Stat. 301, 307-308 (2016).

³The 12 recommendations are from two reports: GAO-15-368 and GAO-18-183. Because GAO-18-183 issued on March 13, 2018 we would not expect OMB to have implemented the included recommendation at the time of this hearing.

auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. A more detailed discussion of prior reports' objectives, scope, and methodology, including our assessment of data reliability, is available in the reports cited in the related products list at the end of this statement.

Agencies Can Better Ensure Effectiveness of Guidance through Consistent Adherence with OMB Requirements and Internal Controls

First, I will discuss our 2015 report on guidance processes at USDA, Education, HHS, and DOL, specifically (1) how these agencies decide whether to issue regulations or guidance and (2) the extent to which they adhere to OMB requirements and internal controls when developing guidance.⁴

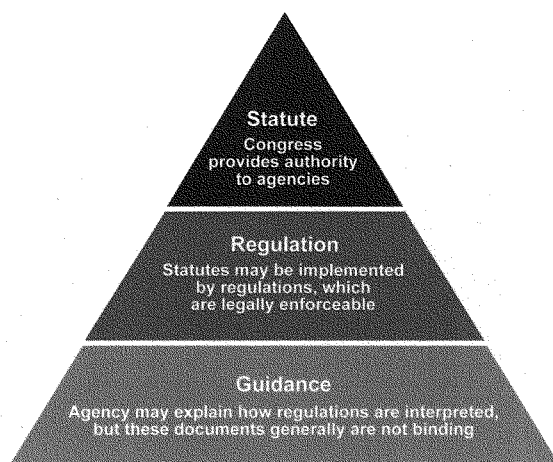
Agency guidance documents, even though they are not generally legally binding as regulations or statutes are, can have a significant effect, both because of their volume and because of their potential to prompt changes in the behavior of regulated parties and the general public.⁵ Guidance generally serves different purposes than those of regulations. Agencies also issue regulatory guidance that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statutory or regulatory issue—as illustrated in figure 1 below. The processes by which agencies issue guidance and regulations are governed by statutes, executive orders, and agencies' policies and procedures, with the aim of greater transparency and public participation, enhanced oversight, and reduced regulatory burdens.⁶

⁴We have also issued a report on Internal Revenue Service (IRS) guidance. See GAO, *Regulatory Guidance Processes: Treasury and OMB Need to Reevaluate Long-standing Exemptions of Tax Regulations and Guidance*, GAO-16-720 (Washington, D.C.: Sept. 6, 2016).

⁵See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 *Cornell L. Rev.* 397, 400 (March 2007).

⁶In particular, the Administrative Procedure Act (APA) establishes broadly applicable requirements for prior notice and public comment. 5 U.S.C. §§ 551–559. However, Congress sometimes enacts laws that direct an agency to issue rules without notice and comment. In addition, the APA recognizes that there are circumstances, such as responding to an emergency situation like a natural disaster, when providing for notice and comment might not be appropriate before issuing a final rule. See GAO, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*, GAO-13-21 (Washington, D.C.: Dec. 20, 2012).

Figure 1: Hierarchy of Statutory and Regulatory Authority



Source: GAO analysis of regulatory authority | GAO-18-436T

Agencies Weighed Various Factors When Deciding Whether to Issue Regulations or Guidance

Agency officials considered a number of factors before deciding whether to issue guidance or undertake rulemaking. Among these factors at the four agencies included in our analysis, a key criterion was whether officials intended for the document to be binding (in which case they issued a regulation).⁷ OMB's Office of Information and Regulatory Affairs (OIRA) staff concurred that agencies understood what types of direction to regulated entities must go through the regulatory process.⁸ Officials

⁷At some agencies certain types of guidance is considered legally binding. The Internal Revenue Service (IRS) has stated that, in addition to statute, and tax regulations, all guidance published in its Internal Revenue Bulletin can be relied upon by taxpayers as authoritative because IRS is bound by it. For more information, see GAO-16-720.

⁸OIRA is the OMB organization responsible for the coordinated review of regulatory actions by executive agencies. OIRA also is responsible for providing meaningful guidance and oversight so that each agency's regulations are consistent with applicable law, the President's priorities, and the principles set forth in executive orders.

from all four agencies also told us that they understood when guidance was inappropriate and when regulation was necessary. They said that they consulted with legal counsel when deciding whether to initiate rulemaking or issue guidance.

For example, HHS's Administration for Community Living officials told us that they considered a number of factors, including whether the instructions to be disseminated were enforceable or merely good practice. Specifically, when Administration for Community Living officials noticed that states were applying issued guidance related to technical assistance and compliance for the state long-term care ombudsman program differently, they decided it would be best to clarify program actions through a regulation. Officials believed that a regulation would ensure consistent application of program requirements and allow them to enforce those actions. They issued the proposed rule in June 2013 and the final rule in February 2015.⁹ In another example, officials at USDA's Food and Nutrition Service told us that the decision to issue guidance or undertake rulemaking depended on (1) the extent to which the proposed document was anticipated to affect stakeholders and the public, and (2) what the subagency was trying to accomplish with the issued document.¹⁰

The agencies used guidance for multiple purposes and differed in the amount of guidance they issued. The purposes of guidance included explaining or interpreting regulations, clarifying policies in response to questions or compliance findings, disseminating suggested practices or leadership priorities, and providing grant administration information. Guidance documents provide agencies valuable flexibility to help regulated agencies comply with agency regulations, and address new issues and circumstances more quickly than may be possible using rulemaking.

Guidance documents that meet OMB's definition of "significant" are subject to the regulatory practices and requirements established by OMB. OMB defines a significant guidance document as guidance with a broad and substantial impact on regulated entities. An economically significant

⁹78 Fed. Reg. 36,449 (June 18, 2013) (proposed rule). 80 Fed. Reg. 7704 (Feb. 11, 2015) (final rule).

¹⁰We reviewed guidance processes at the four departments and 25 of their selected subagencies, or components that (1) were within the requesting committee's jurisdiction and (2) engaged in regulatory or grantmaking activities. For a complete list of subagencies, see GAO-15-358.

guidance document is a significant guidance document that may reasonably be anticipated to lead to an annual effect on the economy of \$100 million or more, among other factors. Guidance that does not fall under the definition of "significant" is not subject to the OMB Bulletin, and those guidance procedures are left to agency discretion.¹¹ The four agencies we reviewed considered few of their guidance documents to be significant. As of February 2015, agencies listed the following numbers of significant guidance documents on their websites: Education, 139; DOL, 36; and USDA, 34.¹² We were unable to determine the number of significant guidance documents issued by HHS. All four agencies told us that they did not issue any economically significant guidance. OIRA staff told us they accepted departments' determinations of which types of guidance meet the definition of significant guidance. Agencies also varied in the amount of guidance they issued, ranging from 10 to more than 100 documents issued in a single year.

Agency officials said that mission or the types of programs administered can affect the number of guidance documents issued. For example, officials from DOL's Bureau of Labor Statistics told us they rarely issue guidance—about 10 routine administrative memorandums each year related to the operation of two cooperative agreement statistical programs. In contrast, DOL's Occupational Safety and Health Administration officials told us they have regularly issued guidance to assist with regulatory compliance, and could easily produce 100 new or updated products each year to provide guidance to regulated entities.

¹¹Although the APA does not generally prescribe processes for review of agency guidance, in 2007 OMB issued a Final Bulletin for Agency Good Guidance Practices (OMB Bulletin) that establishes policies and procedures for the development, issuance, and use of "significant" guidance documents. The Bulletin defines "significant guidance document" as a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to (1) lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended. Guidance that does not fall under the definition of "significant" is not subject to the OMB Bulletin, and those guidance procedures are left to agency discretion. 72 Fed. Reg. 3432 (Jan. 25, 2007).

¹²Education officials noted that their list of significant guidance documents includes documents issued over the past 40 years.

Agencies Should Increase Adherence with OMB Requirements and Internal Controls

We found opportunities for agencies to improve regulatory guidance processes by strengthening compliance with OMB requirements for significant guidance and the use of management controls for producing their guidance documents. In 2015, we made 11 recommendations to USDA, HHS, DOL and Education to better ensure the adherence to OMB requirements for approval and public access of regulatory guidance, to strengthen the use of internal controls in guidance processes, and to improve the usability of websites with online guidance, three of which remain open.¹³ USDA, DOL and Education have addressed recommendations concerning strengthening the application of management controls—internal controls—and improving their websites to ensure the public can easily find, access, and comment on online guidance. These recommendations for HHS remain open as well as an additional recommendation concerning developing written procedures for agency approval of written guidance. These actions would help to ensure appropriate review and use of these documents, and both could also facilitate opportunities for affected parties and stakeholders to provide feedback on those documents.

Adherence to OMB Requirements for Significant Guidance

We found that agencies did not always adhere to OMB requirements for significant guidance. The OMB Final Bulletin for Agency Good Guidance Practices establishes standard elements that must be included in significant guidance documents and directs agencies to (1) develop written procedures for the approval of significant guidance, (2) maintain a website to assist the public in locating significant guidance documents, and (3) provide a means for the public to submit comments on significant guidance through their websites. Education and USDA had written procedures for the approval of significant guidance as directed by OMB. While DOL had written approval procedures, they were not available to the appropriate officials, and DOL officials noted that they required updating. HHS did not have any written procedures. We found that Education, USDA, and DOL consistently applied OMB's public access and feedback requirements for significant guidance, while HHS did not.

¹³GAO-15-368.

We also found opportunities for agencies to improve access to their guidance.¹⁴ In April 2015, we found that subagencies used different strategies to disseminate guidance and all relied primarily on posting the guidance on their websites.¹⁵ USDA, DOL, and Education posted their significant guidance on a departmental website as directed by OMB; at that time HHS did not, but has since posted such a page on its website in response to our recommendation. On their websites, agencies used several approaches—including organizing guidance by audience or topic and highlighting new or outdated guidance—to facilitate access. However, we identified factors that hindered online access, including long lists of guidance and documents dispersed among multiple web pages.

Opportunities also exist for agencies to use the web metrics they already collect to improve how guidance can be accessed. All agencies and their subagencies that we studied collected web metrics, and many used them to evaluate online guidance dissemination. However, many of these subagencies did not use metrics to improve how they disseminated guidance through their websites. Beyond their websites, subagencies found other ways to disseminate and obtain feedback on issued guidance, including focus groups, surveys, and direct feedback from the public at conferences, webinars, and from monitoring visits.

Application of Internal Controls for Guidance Processes

For guidance that does not meet OMB's definition of significant, we found opportunities for agencies to improve guidance development, review, evaluation, and dissemination processes by strengthening their adherence to internal controls. Wider adoption of these practices could better ensure that agencies have internal controls in place to promote quality and consistency of their guidance development processes, and to ensure that guidance policies, processes, and practices achieve desired results, and prevent and detect errors. We recommended that agencies strengthen their application of internal controls to guidance practices by adopting practices, such as:

¹⁴Our ability to access and find significant and nonsignificant guidance online varied. We reported in 2015 that agencies can use available guidelines, such as the Guidelines for Improving Digital Services developed by the federal Digital Services Advisory Group, to help them improve their communications and interactions with customers on their websites.

¹⁵While all components told us they relied primarily on their websites to disseminate guidance, they also used many other dissemination methods, including email and listservs, meetings, social media, and external partners.

-
- **Determining Appropriate Level of Review to Manage Risk:** Most subagencies in our study managed risk by determining appropriate levels of review. Agencies face multiple risks when going through the guidance production process, such as legal challenges that issued guidance is asserting binding requirements without having gone through the rulemaking process. Agencies can manage risk by involving agency management in decisions to initiate guidance, prioritize among proposed guidance, and determine the appropriate level of review prior to issuance.
 - **Maintaining Written Policies and Procedures for the Production of Nonsignificant Guidance:** Most subagencies we reviewed did not have written procedures for the production of non-significant guidance. Written procedures for guidance initiation, development, and review help ensure that actions are taken to address risks and enforce management's directives when an agency is developing regulatory guidance. Documented procedures are an important internal control activity to help ensure that officials understand how to adequately review guidance before issuance.
 - **Ensuring Communication during the Guidance Development and Review Process:** Most subagencies we reviewed had methods to ensure communication during the guidance development and review process. Communication procedures provide an opportunity for subagencies to get feedback from agency management, other federal agencies, and the public before the guidance issues. For example, officials told us that they conferred with other affected subagencies or federal departments to ensure consistency of their guidance during the development of guidance.
 - **Regularly Evaluating Whether Issued Guidance is Effective and Up to Date:** Almost half of the subagencies we reviewed regularly evaluated whether issued guidance was effective and up-to-date. Agencies benefit from procedures to continually reassess and improve guidance processes. Without a regular review of issued guidance, agencies can miss the opportunity to revisit whether current guidance could be improved and thereby provide better assistance to regulated entities and grantees.

Compliance with the Congressional Review Act Could Be Strengthened

Prior studies have indicated that agencies typically issue a larger number of regulations during the transition from the end of one presidential administration to the beginning of the next administration, relative to comparable periods earlier in the administration, a phenomenon often referred to as "midnight rulemaking."¹⁶ The Edward "Ted" Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015 included a provision requiring us to review final significant regulations promulgated by executive departments during the 120-day presidential transition periods (September 23 through January 20) at the end of Presidents Clinton, Bush, and Obama's administrations and compare them to each other and to regulations issued during the same 120-day period in nontransition years since 1996. Among other objectives, we assessed the extent to which there was variation in (1) the number of regulations and their characteristics, such as the types of rulemaking procedures agencies used; and (2) agencies' reported compliance with procedural requirements for promulgating the regulations, such as requirements in the Congressional Review Act (CRA).¹⁷ CRA was enacted to better ensure that Congress has an opportunity to review and possibly disapprove regulations, in certain cases, before they take effect.

¹⁶The Congressional Research Service, "Midnight Rulemaking: Background and Options for Congress," (Washington, D.C.: Oct. 4, 2016). In 2012, a report on this topic was prepared for the consideration of the Administrative Conference of the United States: Jack M. Beermann, *Midnight Rules: A Reform Agenda*, Administrative Conference of the United States, May 14, 2012.

¹⁷Pub. L. No. 114-136, § 5 130 Stat. 301, 307–308 (2016). We did not include rulemaking by independent regulatory agencies that are not under the direct control of the President.

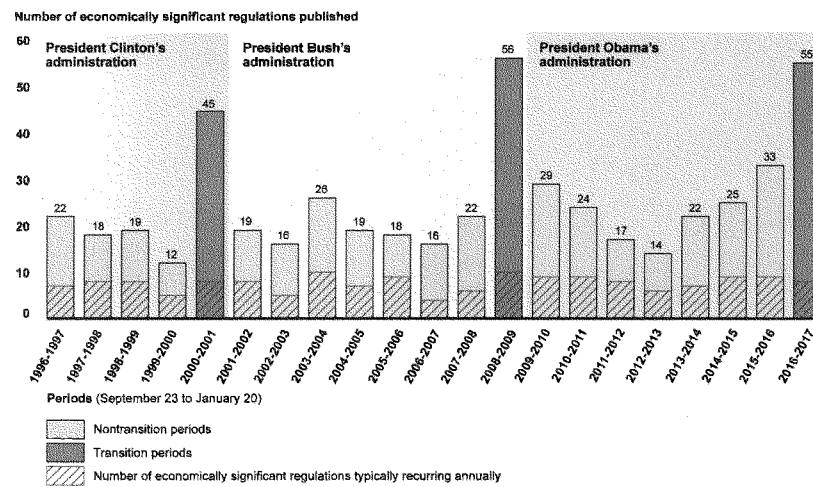
Agencies Published More Economically Significant and Significant Final Regulations and Provided More Opportunity for Public Participation

During the transition periods at the end of each of the three administrations we reviewed, agencies published more economically significant and significant final regulations relative to comparable time periods earlier in each administration (see figures 2 and 3).¹⁸ In particular, the Clinton, Bush, and Obama administrations published on average roughly 2.5 times more economically significant regulations during transition periods than during nontransition periods. But agencies more often, relative to nontransition periods, provided the public an opportunity to influence the development of the transition-period regulations by providing advanced notice of their issuance in the Unified Agenda, and opportunities to comment on proposed regulations before they were finalized.¹⁹

¹⁸Under Executive Order 12866, OMB reviews significant proposed and final rules from agencies, other than independent regulatory agencies, before they are published in the *Federal Register*. The order defines significant regulatory actions as those that: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the executive order. For the purposes of GAO-18-183 and this statement, we differentiate between the results for "economically significant" regulations (criterion 1 above, i.e., generally those with annual economic effects greater than \$100 million) and the results for other significant regulations (criteria 2-4 above). We refer to the latter category as "significant regulations." Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

¹⁹The semiannual Unified Agenda was established by Executive Order 12866 and provides uniform reporting of data on those regulatory and deregulatory activities under development or review throughout the federal government.

Figure 2: Number of Final Economically Significant Regulations Published during Specified Presidential Transition and Nontransition Periods, 1996-2017

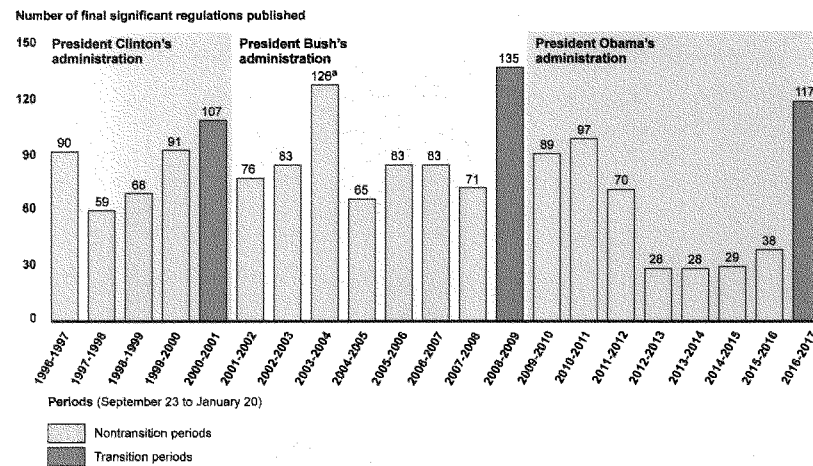


Source: GAO analysis of published regulations. | GAO-18-436T

Note: For the purposes of GAO-18-183 and this statement, we differentiate between the results for "economically significant" regulations (i.e., generally those with annual economic effects greater than \$100 million) and the results for other significant regulations. Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

Agencies typically publish a subset of economically significant regulations every calendar year during the autumn and early winter months, irrespective of whether a President is preparing to leave office. For example, the Department of the Interior updated regulations concerning hunting for migratory birds on federal and tribal lands during 18 of the 21 periods reviewed.

Figure 3: Number of Final Significant Regulations Published during Specified Presidential Transition and Nontransition Periods, 1996-2017



Source: GAO analysis of data from Reginfo.gov on the number of draft significant regulations submitted to the Office of Information and Regulatory Affairs for review. | GAO-18-436T

Note: For the purposes of GAO-18-163 and this statement, we differentiate between the results for "economically significant" regulations (i.e., generally those with annual economic effects greater than \$100 million) and the results for other significant regulations (defined as those that create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the executive order). Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

For the 2003-2004 period, 34 agencies submitted separate draft regulations to the Office of Information and Regulatory Affairs concerning government-wide debarment and suspension and requirements for drug-free workplaces. But these agencies published one final regulation on this topic. The OMB data we used for this figure counted this regulation 34 times instead of just once.

Some Regulations Did Not Comply with the Congressional Review Act

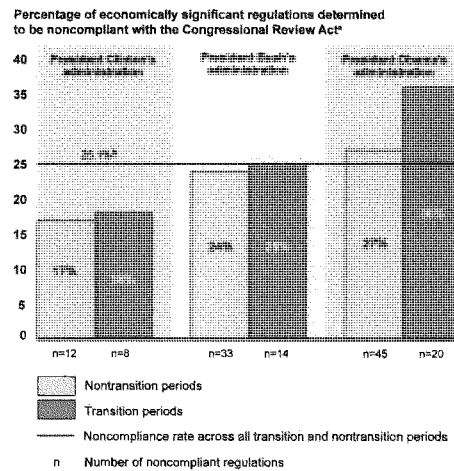
In their published regulations, agencies generally reported complying with four of five procedural requirements for promulgating regulations during both transition and nontransition periods—the Regulatory Flexibility Act (RFA), the Small Business Regulatory Enforcement Fairness Act (SBREFA), the Paperwork Reduction Act (PRA), and the Unfunded

Mandates Reform Act of 1995 (UMRA). These laws require agencies to consider the impact of regulations on small entities, impose additional requirements on the Environmental Protection Agency and the Occupational Safety and Health Administration to obtain input from small entities for rulemaking efforts that are expected to have a significant economic impact on a substantial number of small entities, require all agencies to minimize the burden on the public of information collections, and require agencies to prepare an assessment of the anticipated costs and benefits for any regulation that includes a federal mandate requiring nonfederal parties to expend resources without being provided funding to cover the costs, respectively.²⁰ Agencies reported complying for nearly all economically significant regulations and the majority of significant regulations with these four laws. Agencies less often complied with one or more CRA requirements.²¹ Over 25 percent of economically significant regulations did not comply with the CRA (see figure 4). We estimated that 15 percent of significant regulations published across all periods reviewed failed to meet at least one of the CRA requirements we reviewed.

²⁰Later, the Dodd-Frank Wall Street Reform and Consumer Protection Act imposed the SBREFA requirement for obtaining input from small entities on the Consumer Financial Protection Bureau, an independent regulatory agency not covered in GAO-18-183.

²¹CRA requires agencies to submit regulations to Congress and to us and to delay the effective date of certain regulations in order to provide Congress an opportunity to review and possibly disapprove of regulations before they become effective.

Figure 4: Final Economically Significant Regulations Determined to be Noncompliant with the Congressional Review Act during Specified Presidential Transition and Nontransition Periods, 1996-2017



Source: GAO analysis of published regulations, GAO major rule reports, and the *Congressional Record*. | GAO-18-436T

^aThe noncompliance rate across all three transition periods combined was 26.9 percent, compared to 24.3 percent during all nontransition periods combined.

^bFor the purposes of GAO-18-183 and this statement, we differentiate between the results for "economically significant" regulations (i.e., generally those with annual economic effects greater than \$100 million) and the results for other significant regulations. Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

The most common CRA deficiency for economically significant regulations was agencies' failure to provide Congress the required time to review and possibly disapprove regulations, which we had also identified as a deficiency in previous work.²² Among the most active regulatory agencies for economically significant regulations, the Departments of

²²GAO, *Congressional Review Act*, GAO-08-268T (Washington, D.C.: Nov. 6, 2007).

Health and Human Services and Transportation had higher rates of noncompliance than the government-wide percentages for both the transition and nontransition periods we reviewed. However, noncompliance was not limited to these two agencies; 17 of the 23 agencies that published economically significant regulations during the periods we reviewed had at least one noncompliant regulation.²³

Though agencies are responsible for complying with CRA, OMB is responsible under Executive Order 12866 for oversight of agencies' rulemaking, consistent with law, and reviews regulations before publication, which provides an opportunity to identify and help agencies avoid potential noncompliance. Economically significant regulations for which OMB completed its review within 3 months before the planned effective date were at high risk of not complying with CRA, thus increasing the risk that agencies would not provide Congress with the required time for its reviews. We recommended that OMB, as part of its regulatory review process, identify economically significant regulations at potential risk of not complying with CRA and work with agencies to ensure compliance. OMB staff did not take a position agreeing or disagreeing with the recommendation.

One of the common themes in our work over several decades is the need for transparency of the regulatory review process and opportunities for increasing public participation and congressional oversight. The potential effects of guidance underscore the need for consistent and well-understood processes for the development, review, dissemination, and evaluation of guidance. Further, we found that while there were increased opportunities for public participation for regulations promulgated at the end of Presidents' terms, there are increasing instances of noncompliance with delay requirements under the Congressional Review Act. Ensuring that agencies consistently provide Congress with the required time to review, and possibly disapprove regulations, is important throughout a President's term, and particularly following a presidential transition when Congress typically has a larger number of regulations to potentially review. Improvements made in transparency of the rulemaking process benefit not only the public, but congressional oversight.

²³See GAO-18-183 for a more detailed discussion of the scope and methodology.

Chairman Gowdy, Ranking Member Cummings, and Members of the Committee, this concludes my prepared statement. Once again, I appreciate the opportunity to testify on these important issues. I would be pleased to address any questions you or other members of the Committee might have at this time.

**GAO Contact and
Staff
Acknowledgments**

For questions about this statement, please contact me at (202) 512-2660 or nguyentt@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals making key contributions to this testimony were Tim Bober, Tara Carter, Colleen Corcoran, Robert Cramer, Alix Edwards, Shirley A. Jones, Heather Krause, Barbara Lancaster, Michael O'Neill, and Andrew J. Stephens.

Related GAO Products

Federal Rulemaking: OMB Should Work with Agencies to Improve Congressional Review Act Compliance during and at the End of Presidents' Terms. GAO-18-183. March, 13, 2018.

Regulatory Guidance Processes: Treasury and OMB Need to Reevaluate Long-standing Exemptions of Tax Regulations and Guidance. GAO-16-720. September 6, 2016.

Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices. GAO-15-368. April 16, 2015.

Regulatory Guidance Processes: Agencies Could Benefit from Stronger Internal Control Practices. GAO-15-834T. September 23, 2015.

Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments. GAO-13-21. December 20, 2012.

This is a work of the U.S. government and is not subject to copyright protection in the United States. The published product may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.

GAO's Mission

The Government Accountability Office, the audit, evaluation, and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

**Obtaining Copies of
GAO Reports and
Testimony**

The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's website (<https://www.gao.gov>). Each weekday afternoon, GAO posts on its website newly released reports, testimony, and correspondence. To have GAO e-mail you a list of newly posted products, go to <https://www.gao.gov> and select "E-mail Updates."

Order by Phone

The price of each GAO publication reflects GAO's actual cost of production and distribution and depends on the number of pages in the publication and whether the publication is printed in color or black and white. Pricing and ordering information is posted on GAO's website, <https://www.gao.gov/ordering.htm>.

Place orders by calling (202) 512-6000, toll free (866) 801-7077, or TDD (202) 512-2537.

Orders may be paid for using American Express, Discover Card, MasterCard, Visa, check, or money order. Call for additional information.

Connect with GAO

Connect with GAO on Facebook, Flickr, Twitter, and YouTube. Subscribe to our RSS Feeds or E-mail Updates. Listen to our Podcasts. Visit GAO on the web at <https://www.gao.gov>.

**To Report Fraud,
Waste, and Abuse in
Federal Programs**

Contact:

Website: <https://www.gao.gov/fraudnet/fraudnet.htm>
Automated answering system: (800) 424-5454 or (202) 512-7470

**Congressional
Relations**

Orice Williams Brown, Managing Director, WilliamsO@gao.gov, (202) 512-4400,
U.S. Government Accountability Office, 441 G Street NW, Room 7125,
Washington, DC 20548

Public Affairs

Chuck Young, Managing Director, youngc1@gao.gov, (202) 512-4800
U.S. Government Accountability Office, 441 G Street NW, Room 7149
Washington, DC 20548

**Strategic Planning and
External Liaison**

James-Christian Blockwood, Managing Director, spel@gao.gov, (202) 512-4707
U.S. Government Accountability Office, 441 G Street NW, Room 7814,
Washington, DC 20548



Please Print on Recycled Paper.

Chairman GOWDY. Thank you.
Mr. Noe.

STATEMENT OF PAUL NOE

Mr. NOE. Thank you, Chairman Gowdy and members of the committee, for the honor to testify before you today on behalf of the American Forest and Paper Association and the American Wood Council.

Regulatory transparency is an important and timely issue that really goes to the heart of our governmental system—due process, transparency, and fundamental fairness and accountability. AF&PA and AWC applaud the committee for addressing this issue.

For over 32 years, I have worked on regulatory policy, including in the Senate and the White House Office of Management and Budget, private practice, and trade associations. Having lived in the belly of the beast, I strongly believe there are many ways in which our rulemaking process could be more transparent and accountable. Today, I'd like to offer just a handful of problems and potential solutions.

First, more light should be shined on the vast but often mysterious part of the administrative law universe which is agency guidance, also called regulatory dark matter. To be sure, appropriate guidance can play a very beneficial role in regulatory programs, and I don't want to miss that fundamental point. But the truth is nobody knows how many guidance documents there are or how to find them all.

Eleven years ago, when I was at the White House Office of Management and Budget, I worked on an OMB bulletin for agency good guidance practices that requires: first, agency procedures for the approval and use of significant guidance documents; second, standard elements—for example, agencies were directed to avoid inappropriate mandatory language—and, third, public access and feedback procedures. Each agency was required to maintain on its website a current list of its significant guidance documents that were in effect, and there also was a requirement to provide for public comment and public requests for modification or repeal of guidance, as well as a presumption of pre-adoption notice and comment for economically significant guidance.

The bulletin is rooted in longstanding recommendations of non-partisan expert organizations, but, unfortunately, both congressional oversight and GAO reports have shown, as you've just heard, that agencies have not been complying with this bulletin.

Thus, I think Congress should elevate good guidance practices into statute. And I think an excellent first step would be enactment of the Guidance Out of Darkness Act, sponsored by Congressman Walker. I can't imagine why anyone would oppose a bill requiring Federal agencies to post all of their guidance on a centralized, publicly accessible location on their website.

Sometimes agencies have even gone further, and they've circumvented the notice-and-comment requirements of the Administrative Procedure Act to essentially regulate through guidance. Congress passes broadly written statutes. Agencies follow with broadly written regulations. And then, over the years, agencies fill in the gaps with highly detailed guidance.

As the D.C. Circuit put it, quote, “The phenomenon is familiar. Law is made without notice and comment, without public participation, without publication in the Federal Register or the Code of Federal Regulations.”

I commend the Department of Justice for addressing the improper use of agency guidance, and I think more should be done on a government-wide basis.

Second, for over 37 years, regulatory agencies often have circumvented the Presidential orders requiring that regulations maximize net benefits to society by interpreting their statutes to preclude full cost-benefit balancing. This is a huge but unrecognized problem that undermines agency accountability and transparency and leads to unnecessarily wasteful and ineffective regulations that are not designed to enhance societal well-being.

President Trump should take a historic step to ensure smarter regulation by directing the agencies, including the independent regulatory commissions, to interpret their statutes to fully allow benefit-cost balancing unless prohibited by law.

Third, agencies should be more transparent about key information supporting regulatory decisions.

And, finally, for the last 12 years, agencies have done a very poor job of complying with the Congressional Review Act. It clearly mandates that before a rule can take effect the agency must submit the rule to Congress for review. And covered rules include both legally binding regulations and agency guidance documents.

Various reports have shown that many rules have not been submitted to Congress since the law was enacted in 1996, and that’s especially true for guidance. That raises questions whether these rules are legally in effect. And it also raises questions about Congress’ ability to overturn those rules today under the expedited procedures of the Congressional Review Act even if the rules were issued years ago.

Thank you again for the opportunity to testify today.

I would be happy to address any questions you may have.

[Prepared statement of Mr. Noe follows:]



**American
Forest & Paper
Association**



AMERICAN WOOD COUNCIL

**Statement of Paul R. Noe
Vice President, Public Policy
American Forest & Paper Association
American Wood Council**

Before

**House Committee on Oversight and Government Reform
"Shining Light on the Federal Regulatory Process"
March 14, 2018**

Chairman Gowdy, Ranking Member Cummings, and Members of the Committee, my name is Paul Noe, and I am the Vice President for Public Policy for the American Forest & Paper Association and the American Wood Council. Thank you for the honor to testify before you on regulatory transparency. This is a fundamentally important issue that goes to the heart of our governmental system -- due process, fundamental fairness and accountability, and we applaud the Committee for doing the hard work of addressing it.

I have been involved in regulatory policy in Washington for over 32 years, including the privilege of having served as counsel to Chairmen Fred Thompson, Ted Stevens and Bill Roth on the Senate Governmental Affairs Committee, and as a drafter of agency good guidance practices when I served as Counselor to Administrator John Graham at the Office of Information and Regulatory Affairs (OIRA) in the White House Office of Management and Budget (OMB). My experience working for the heavily regulated forest products industry for the last nine years further reinforces my appreciation of the importance of transparency and accountability in our regulatory process. Today, I would like to focus on a handful of specific agency problems and offer some solutions regarding the need for: (1) better compliance with good guidance practices; (2) stronger compliance with presidential orders on benefit-cost analysis, such as Executive Order 12866, by interpreting regulatory statutes to allow for balancing the benefits and costs of regulations to maximize societal well-being; (3) greater transparency about the key information supporting regulatory decisions; and (4) better compliance with the Congressional Review Act.

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, tissue and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are

committed to continuous improvement through the industry's sustainability initiative - *Better Practices, Better Planet 2020*. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures over \$200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately \$50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

The American Wood Council (AWC) is the voice of North American wood products manufacturing, representing over 75 percent of an industry that provides approximately 400,000 men and women in the United States with family-wage jobs. AWC members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC also advocates for balanced government policies that affect wood products. AF&PA and AWC work together to advance policies of issues of mutual concern, including regulatory reform.

I. The Need for Better Good Guidance Practices.

The forest products industry has seen both sides of the coin on agency guidance. In some instances, questions of implementation can be appropriately, effectively and efficiently resolved through guidance. In others, the use of agency guidance may lack appropriate transparency and due process, even to the point of inappropriately and unlawfully substituting for regulation. Accordingly, AF&PA and AWC support legislative and administrative efforts that ensure transparency, due process and effective management for significant agency guidance.

A. Background¹

President Reagan's Executive Order 12291, which firmly established OMB review of rules, was quite broad in scope and applied to virtually all "rules" -- including both regulations (legally binding legislative rules) and agency guidance (non-binding interpretive rules and policy statements). When President Clinton replaced the Reagan Order in 1993 with Executive Order 12866, it honed in on "significant" regulatory actions. Given the vastness of federal regulatory activity, and the limited resources of OIRA, it was eminently sensible to try to sort the significant agency activity from the insignificant. The problem is that while the Clinton Order applied to significant regulations, it neglected guidance documents -- covering only rules that "the agency intends to have the force and effect of law." But there is no doubt that guidance documents can be quite significant. In fact, agencies issue over 3400 regulations

¹ See John D. Graham and Paul R. Noe, "Due Process and Management for Guidance Documents: Good Governance Long Overdue," 1 Yale J. on Reg. 103 (2008).

annually, but the volume of guidance documents is orders of magnitude larger,² and nobody actually knows how many there are.

Starting in 2002, as part of its obligation to provide recommendations for reform under the "Regulatory Right-to-Know Act," OIRA requested public comment on problematic agency guidance and regulations, and received public nominations of 49 problematic guidance documents in need of reform.³ OIRA received further public comments on problematic guidance in response to its request for public comment on its draft Report to Congress on the Costs and Benefits of Federal Regulation in 2004 and 2005⁴ and on the proposed Bulletin.⁵ The public response was striking – hundreds of comments from a wide array of groups raised concerns – small businesses, farmers, state and local governments, homebuilders, colleges and universities, large businesses, hospitals, trade associations, funeral directors, public interest groups, think tanks, bird watchers, and others. A cursory review of the Preamble to the OMB Bulletin, the comments that OMB received and posted on its website, and the scholarly literature⁶ provide many examples.

Although guidance documents may not properly carry the force of law, they are a key component of regulatory programs. As the scope and complexity of regulatory programs has grown, agencies increasingly have relied on guidance documents to provide direction to their staff and to the public. That generally is to the good, and I want to clearly acknowledge that agency guidance often is both very important and very helpful to the regulated community and others. As OMB stated:

² See, e.g., Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1469 (1992) (noting that the formally adopted rules of the Federal Aviation Administration are two inches thick, but the corresponding guidance materials, over forty feet; Part 50 of the Nuclear Regulatory Commission's regulations on nuclear plant safety, in loose-leaf edition, is 3/16 of an inch, but the supplemental technical guidance is 9 3/4 inches; and the formally adopted regulations of the IRS occupy one foot of shelf space, but Revenue rulings and similar publications, about twenty feet); see also H. Comm. on Gov't. Reform, "Non-Binding Legal Effect of Agency Guidance Documents," H.R. Rep. No. 106-1009 (2000) (noting that between March 1996 through 1999, NHTSA had issued 1225 guidance documents, EPA 2653, and OSHA 1641).

³ OMB, Key to Public Comments, https://www.whitehouse.gov/omb/infocore/key_comments (last visited June 24, 2016); see also, OMB, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities*, at pp. 75-85 https://www.whitehouse.gov/sites/default/files/omb/assets/omb/infocore/2002_report_to_congress.pdf (last visited June 24, 2016).

⁴ OMB, *Peer Review and Public Comments on the 2005 Draft Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, http://www.whitehouse.gov/omb/infocore/2005_cb/toc.html (last visited June 24, 2016); OMB, *Public Comments on 2004 Draft Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, https://www.whitehouse.gov/omb/infocore/2004_cb_list_2004cb/ (last visited June 24, 2016).

⁵ OMB, *Comments on Proposed Bulletin on Good Guidance Practices*, https://www.whitehouse.gov/omb/regpol/good_guid_c-index/ (last visited June 24, 2016).

⁶ See, e.g., Robert A. Anthony, "Interpretive Rules, Policy Statements, Guidances, Manuals and the Like –Should Federal Agencies Use Them to Bind the Public?" 41 Duke L.J. 1311 (1992); Robert A. Anthony, "'Interpretive' Rules, 'Legislative' Rules and 'Spurious' Rules: Lifting the Smog," 8 Admin. L.J. (Spring 1994).

"Agencies may properly provide guidance to interpret existing law through an interpretative rule, or to clarify how they will treat or enforce a governing legal norm through a policy statement. . . . Guidance documents, properly used, can channel the discretion of agency employees, increase efficiency by simplifying and expediting agency enforcement efforts, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties."⁷

Unfortunately, many concerns have been raised that agency guidance practices should be better managed, more consistent, transparent and accountable. These concerns are reinforced by the GAO report that Congress requested on implementation of the OMB Bulletin by four cabinet departments.⁸ Moreover, there is growing concern that, in some cases, guidance documents essentially are being used in lieu of regulations -- without observing the procedural safeguards for regulations. As the D.C. Circuit put it:

"The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations."⁹

The concern about the need for better management, transparency and due process for the development and use of guidance documents inspired OIRA to develop the OMB Bulletin for Agency Good Guidance provisions, supplemented by a provision in Executive Order 13422 for OMB review of agency guidance. In pertinent part, E.O. 13422 provided:

"Significant Guidance Documents

Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with advance notice of any significant guidance documents. . . . Upon the request of the Administrator, for each matter identified as, or determined by the

⁷ OMB, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, at p. 72.

https://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/2002_report_to_congress.pdf

⁸ U.S. Government Accountability Office, *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, GAO-15-368 (April 2015) (reviewing implementation of OMB Bulletin for Agency Good Guidance Practices by the departments of Health and Human Services, Labor, Education and Agriculture and finding significant deficiencies).

⁹ *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1019 (D.C. Cir. 2000) (striking down emissions monitoring guidance as requiring notice and comment through legislative rulemaking procedures).

Administrator to be, a significant guidance document, the issuing agency shall provide to OIRA the content of the draft guidance document, together with a brief explanation of the need for the guidance document and how it will meet that need. The OIRA Administrator shall notify the agency when additional consultation will be required before the issuance of the significant guidance document."

Together, Executive Order 13422 and the OMB Bulletin establish the first government-wide "rules of the road" to manage the development and use of guidance documents. The E.O. 13422 gave clear authority to OMB to review significant agency guidance documents, a streamlined version of how OMB reviews significant agency regulations. The agencies, in turn, were required to give OMB advance notice of their upcoming significant guidance documents. OMB would be responsible for ensuring that other interested agencies in the federal family received notice, and occasionally, an opportunity to provide input into the most important guidance documents.

The OMB Bulletin on Good Guidance Practices fit hand in glove with E.O. 13422. First, agencies must implement written procedures for the approval of significant guidance documents by appropriate senior officials. Agency employees should not depart from significant guidance documents without appropriate justification and supervisory concurrence. Second, significant guidance documents must have standard elements, such as information identifying the document as guidance, the issuing office, the activity and persons to whom it applies, the date of issuance, title and docket number.

Most notably, agencies are directed to avoid inappropriate mandatory language. This provision was intended to help curb the problem of "regulation by guidance document" criticized in the Appalachian Power decision and others. It also will obviate wasteful litigation and increase fairness and accountability in the exercise of regulatory power.

The Bulletin also establishes public access and feedback procedures. For example, agencies are required to maintain on their Web sites a current list of their significant guidance documents, and to provide a means for the public to electronically submit comments on significant guidance documents, or to request that they be created, reconsidered or modified. Finally, the Bulletin establishes pre-adoption notice and comment requirements for guidance documents that rise to the level of being "economically" significant.

When President Obama took office, he retained the OMB Bulletin, but he rescinded E.O. 13422. To substitute for the good guidance provisions of E.O. 13422, the OMB Director issued a memo to restore the regulatory review process to what it had been under Executive Order 12866 between 1993 and 2007. The memo stated: "During this period, OIRA reviewed all significant proposed or final agency actions, including significant policy and guidance documents. Such agency actions and documents remain subject to OIRA's review under Executive Order 12866."

My understanding is that, under that approach, OIRA reviewed little guidance, and when it did, the practice was ad hoc and disorganized. This comes as no surprise since there

was no written authority for the practice -- and no procedures governing it. The problem is that:

- OIRA desk officers had to already know the guidance existed, and
- They had to get permission to call in a guidance.

The shortcomings of this approach are obvious. It is impossible to review what you don't know exists. The review process is broken when the first time OIRA desk officers know about an important guidance document is when they read about it in the Washington Post. How many significant guidance documents do you think an OIRA desk officer might not know about before it was issued? Plenty, I can assure you. And would it be clearly unreasonable for agencies to feel that OMB had no business looking at their draft guidance without any explicit authorization? It was no accident that the provision for OIRA review of guidance was elevated into an Executive Order rather than simply being added to the Bulletin.

Ignoring guidance inadvertently can undermine OMB's authority to review regulations, similar to how it undermines court review, as the D.C. Circuit explained in Appalachian Power. The agency could issue broad, open-ended legislative rules that pass through interagency review (and court review, and for that matter, Congressional review). Then the agency could follow with guidance "expanding the commands in the regulations" to a degree that would have raised concerns if those details had appeared in the regulations. In fact, one might wonder how OMB's abstention from managing and coordinating significant guidance documents may have contributed to the growth in "spurious rules" cases in the courts, which increasingly have criticized agencies for issuing binding rules without observing the public notice and comment procedures that Congress required in the Administrative Procedure Act.¹⁰

B. The Precedent for Good Guidance Practices

Even before the OMB public comment process, there was a strong foundation for the good guidance practices in E.O. 13422 and the OMB Bulletin that was rooted in the recommendations of leading authorities that stood for decades. This foundation

¹⁰ The growth in so-called "spurious rule" court cases in the 1990s may not be a coincidence. See, e.g., Gen. Elec. Co. v. EPA, 290 F.3d 377 (D.C. Cir. 2002) (striking down PCB risk assessment guidance as a spurious rule requiring notice and comment); Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) (striking down emissions monitoring guidance as spurious rule requiring notice and comment); U.S. Chamber of Commerce v. Dep't of Labor, 174 F.3d 206 (D.C. Cir. 1999) (striking down OSHA Directive as a spurious rule requiring notice and comment). See also, OMB, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3435 (Jan. 25, 2007); OMB, *Key to Public Comments*, https://www.whitehouse.gov/omb/regpol/good_guid_c-index/ (last visited June 24, 2016).

includes the work of many authorities – including the Executive Branch,¹¹ Congress,¹² the courts,¹³ the American Bar Association,¹⁴ and legal scholars.¹⁵

First, the Administrative Conference of the United States (ACUS)¹⁶ issued recommendations for the development and use of agency guidance documents. As far back as the mid-1970s, for example, ACUS recognized the importance of ensuring a notice and comment process for the most significant guidance documents. ACUS Recommendation 76-5 states:

“Before an agency issues, amends or repeals an interpretive rule of general applicability or statement of general policy which is likely to have a substantial impact on the public, the agency normally should utilize the procedures set forth

¹¹ Recommendations of the Administrative Conference of the United States, *Agency Policy Statements*, Rec. 92-2, 1 C.F.R. § 305.92-2 (1992), available at <http://www.law.fsu.edu/library/admin/acus/305922.html> (stating that agencies should not issue statements of general applicability intended to be binding without using legislative rulemaking procedures and that agencies should afford the public a fair opportunity to challenge the legality or wisdom of policy statements and to suggest alternative choices); Recommendations of the Administrative Conference of the United States, *Interpretive Rules of General Applicability and Statements of General Policy*, Rec. 76-5, 1 C.F.R. § 305.76 (1992), available at <http://www.law.fsu.edu/library/admin/acus/305765.html> (stating that agencies should utilize APA notice and comment procedures for interpretive rules of general applicability or statements of general policy likely to have a substantial impact on the public); *The Food and Drug Administration's Development, Issuance, and Use of Guidance Documents*, 62 Fed. Reg. 8961 (Feb 27, 1997) (notice) (establishing FDA's original good guidance practices); OMB, *Draft Report to Congress on the Costs and Benefits of Federal Regulations*, 67 Fed. Reg. 15,014, 15,034-35 (Mar. 28, 2002) (detailing concerns over soliciting public comments on problematic agency guidance practices and specific examples of guidance documents in need of reform).

¹² See, e.g., U.S. Government Accountability Office, *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, GAO-15-368 (April 2015); Congressional Review Act of 1996, 5 U.S.C. §§ 801-808 (2000) (providing fast-track procedures for Congressional resolutions of disapproval of rules and incorporating the APA definition of "rule" to cover guidance documents); *Food and Drug Administration Modernization Act of 1997*, 21 U.S.C. § 371(h) (2000) (establishing FDA good guidance practices as law); Congressional Accountability for Regulatory Information Act, H.R. 3521, 106th Cong. § 4 (2000) (proposing to require agencies to notify the public of the non-binding effect of guidance documents), H. Comm. on Government Reform, *Non-Binding Legal Effect of Agency Guidance Documents*, H.R. Rep. No. 106-1009 (2000) (criticizing "backdoor" regulation); *Food and Drug Administration Modernization and Accountability Act of 1997*, S. Rep. No. 105-43, at 26 (1997) (raising concerns about the lack of transparency and consistency in the use of guidance documents).

¹³ See, e.g., *supra* note 10.

¹⁴ ABA, *Annual Report Including Proceedings of the Fifty-Eighth Annual Meeting* 57 (1993) (recommending notice and comment for guidance documents likely to have a significant impact on the public); ABA, *Recommendation on Federal Agency Web Pages* 1 (2001), <http://www.abanet.org/adminlaw/federa02.pdf> (recommending that agencies post on their Websites, *inter alia*, all important policies and interpretations).

¹⁵ See, e.g., Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: *Lifting the Smog*, 8 Admin. L.J. 1 (1994); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?* 41 Duke L.J. 1311 (1992); see also, OMB, *Final Bulletin for Agency Good Guidance Practices*, at pp. 2-3 & n. 2, 6.

¹⁶ ACUS is a federal advisory agency charged with providing recommendations on administrative procedure issues. ACUS has made hundreds of recommendations on administrative procedure issues, and most were adopted by agencies or by Congress. See Florida State University College of Law, *ABA Administrative Procedure Database*, www.law.fsu.edu/library/admin/acus/acustoc.html (last visited June 24, 2016).

in the Administrative Procedure Act subsections 553(b) and (c) Where there has been no prepromulgation notice and opportunity for comment, the publication of an interpretive rule of general applicability or a statement of general policy... should include ... an invitation to interested persons to submit written comments."¹⁷

ACUS Recommendation 92-2 later added:

"Agencies should not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures.... Policy statements of general applicability should make clear that they are not binding.... Agencies that issue policy statements should examine, and where necessary, change their ... procedures ... to allow as an additional subject requests for modification or reconsideration of such statements."¹⁸

In 1993, the American Bar Association (ABA) reaffirmed the ACUS recommendations on the use of informal notice and comment procedure for significant guidance documents.¹⁹ In 2001, the ABA further recommended that agencies "explore means to maximize the availability and searchability of existing law and policy on their websites" and include "their governing statutes, all agency rules and regulations, and all important policies, interpretations, and other like matters which members of the public are likely to request."²⁰

Moreover, Congress produced what became a model for OMB's Good Guidance Practices.²¹ In the Federal Food and Drug Administration Modernization Act of 1997, Congress directed the FDA to issue regulations establishing good guidance practices.²² Congress was particularly concerned about public knowledge of, and access to, FDA guidance documents; the lack of a systematic process for adopting guidance

¹⁷ Recommendations of the Administrative Conference of the United States, *Interpretive Rules of General Applicability and Statements of General Policy*, Rec. 76-5, 1 C.F.R. § 305.76-5 (1992), available at <http://www.law.fsu.edu/library/admin/acus/305765.html>.

¹⁸ ACUS, *Agency Policy Statements*, Rec. 92-2, 1 C.F.R. § 305.92-2 (1992), available at <http://www.law.fsu.edu/library/admin/acus/305922.html>.

¹⁹ ABA, *Annual Report Including Proceedings of the Fifty-Eighth Annual Meeting* 57 (1993) ("[T]he American Bar Association recommends that: Before an agency adopts a nonlegislative rule that is likely to have a significant impact on the public, the agency provide an opportunity for members of the public to comment on the proposed rule and to recommend alternative policies or interpretations, provided that it is practical to do so; when nonlegislative rules are adopted without prior public participation, immediately following adoption, the agency afford the public an opportunity for post-adoption comment and give notice of this opportunity.").

²⁰ ABA, *Recommendation on Federal Agency Web Pages* 1 (2001), <http://www.abanet.org/adminlaw/federa02.pdf>.

²¹ As OMB stated in its Preamble (pp. 4-5), FDAMA and FDA's implementing regulations, as well as the recommendations of the former Administrative Conference, informed the development of the Bulletin.

²² *Food and Drug Administration Modernization Act of 1997*, 21 U.S.C. § 371(h) (establishing FDA good guidance practices as law).

documents and for allowing public input; and inconsistency in the use of guidance documents.²³ Those same concerns apply to other agencies as well.

C. The Need for Action²⁴

The case for Congressional action is strong. The OMB Bulletin has been in effect since early 2007 in both Republican and Democratic administrations. Over eleven years is more than enough time for the agencies to have fully complied with basic good guidance practices. Yet clearly they have not, as shown by Congressional oversight, including hearings by Senator Lankford²⁵ and others. Moreover, in 2015, the U.S. Government Accountability Office issued a report²⁶ on how four major departments – the Departments of Agriculture, Education, Health and Human Services, and Labor and their 25 component agencies – have complied with the OMB Bulletin. The report showed those departments and their component agencies generally had a long track record of failing to comply with basic good government requirements of the Bulletin, including the following:

- All components claimed they did not issue any economically significant guidance (and thus were not required to conduct pre-adoption notice and comment);
- Only six of 25 components had written procedures to ensure consistent application of guidance (p.25);
- HHS had no written procedures for approval of significant guidance, and DOL's procedures were not available to its staff;
- Nearly half of the components did not regularly evaluate whether issued guidance remained effective;
- HHS did not post significant guidance was not posted on a departmental website as required by OMB;
- Public online access to guidance was difficult to find and they failed to use of metrics to improve dissemination.

GAO concluded with the following recommendations:

- HHS and DOL should ensure consistent application of OMB requirements for significant guidance; and

²³ *Food and Drug Administration Modernization and Accountability Act of 1997*, S. Rep. 10543, at 26 (1997).

²⁴ See Paul Noe, "Shining the Light on Regulatory Dark Matter," AF&PA Blog (Feb. 6, 2018), <http://www.afandpa.org/media/blog/blogs/2018/02/06/shining-the-light-on-regulatory-dark-matter-due-process-and-management-for-agency-guidance-documents>

²⁵ See, e.g., U.S. Senate Committee on Homeland Security & Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management, *Hearing on Examining the Use of Agency Regulatory Guidance, Part II* (June 30, 2016), 114th Cong. 2nd Sess., Washington DC.

²⁶ U.S. Government Accountability Office, *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, GAO-15-368 (April 2015).

- All four departments should strengthen use of internal controls in guidance production processes and improve online guidance dissemination.

It is evident that more should be done to improve the development and use of agency guidance. For example, Congress could elevate good guidance practices into statute. An excellent first step would be enactment of the “Guidance Out Of Darkness Act,” H.R. 4809, sponsored by Congressman Walker. The GOOD Act would require federal agencies to post all of their guidance in a centralized, accessible location on their website. This is a common sense and long overdue requirement of the OMB Bulletin that the agencies have failed to comply with.²⁷

The Administration also could do more to promote good guidance practices. In fact, the Department of Justice (DOJ) recently provided leadership by issuing a memorandum in November to prohibit improper guidance documents at DOJ²⁸ and also by more recently issuing a memorandum to curb improper use of guidance in civil enforcement cases.²⁹

Yet, more can and should be done. For example, the Office of Management and Budget could do more to promote good guidance practices on a government-wide basis by updating the Bulletin. First, OMB should have procedures for the agencies to inform it and other agencies about their intentions to use guidance, coordinate with other interested agencies, receive input, and be transparent. Basic procedures are needed for OMB and other agencies to get a “heads up” during the development of agency guidance. Also, the resources should be provided to do the job right. Second, the agencies could follow the recommendations of the Administrative Conference of the United States and the ABA Administrative Law Section to provide streamlined pre-adoption notice-and-comment for significant guidance documents – not just “economically significant” guidance – or allow public comment after issuance where there is a need for prompt action. My understanding is that FDA does this already and the practice has been generally successful.

²⁷ Congress also might want to investigate whether agencies have complied with the requirement in 5 U.S.C. 552(a)(1)(D) to publish in the Federal Register statements of general policy and interpretations of general applicability.

²⁸ Memorandum from Attorney General Jeff Sessions to all Components, “Prohibition on Improper Guidance Documents” (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download>

²⁹ Memorandum from Associate Attorney General Rachel Brand to Heads of Litigating Components, “Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases” (Jan. 25, 2018), <https://www.justice.gov/file/1028756/download>

II. Curtail the Evasion of Presidential Orders on Benefit-Cost Analysis by Interpreting Regulatory Statutes to Allow for Full Benefit-Cost Balancing.

A. Background

While efforts to promote the use of benefit-cost analysis³⁰ have been longstanding, over time a remarkable consensus has emerged. In the Executive Branch, there is a striking similarity among the principles for benefit-cost balancing and centralized review of regulation required by every president for over 37 years, from Ronald Reagan to Donald Trump. The Judicial Branch, and the Supreme Court in particular, has clarified that benefit-cost analysis can have a central role in a host of regulatory programs, and if agencies ignore this invitation, they could jeopardize the very regulations they want to promote. In Congress, there is a renewed interest in requiring benefit-cost analysis by statute that is greater than any time in the past 20 years.

On their face, probably the greatest consensus on the “cost-benefit state”³¹ is reflected in the Executive orders governing regulatory analysis and review. Going back to 1981, President Reagan’s Executive Order 12291 established general requirements that, “to the extent permitted by law:

- “[r]egulatory action shall not be undertaken unless the **potential benefits to society for the regulation outweigh the potential costs to society**,” and
- “[r]egulatory objectives shall be chosen to **maximize the net benefits to society**” (Emphasis added).

Similarly, President Clinton’s E.O. 12866, issued in 1993 and still in effect, requires that agencies, to the extent permitted by law:

- “propose or adopt a regulation only upon a reasoned determination that the **benefits of the intended regulation justify its costs**,” and
- “in choosing among alternative regulatory approaches, . . . select those approaches that **maximize net benefits** (including potential economic, environmental, public health and safety, and other advantages; distributive

³⁰ Benefit-cost analysis (BCA) is “[a] systematic quantitative method of assessing the desirability of government projects or policies when it is important to take a long view of possible side-effects.” OMB Circular A-94, “Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs,” Appendix A (1992). BCA involves calculating and comparing the benefits and costs of regulatory options, including an account of foregone alternatives and the status quo, with the goal of identifying the option that would maximize societal welfare. As Justice Breyer explained, “every real choice requires a decisionmaker to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs.” *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009). The term “benefit-cost analysis” can be used interchangeably with “cost-benefit analysis.”

³¹ I adopt the definition of the “cost-benefit state” advanced by President Obama’s former OIRA Administrator, Cass Sunstein – “that government regulation is increasingly assessed by asking whether the benefits of regulation justify the costs of regulation.” Cass R. Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection*, Chicago, IL, American Bar Association, Section of Administrative Law and Regulatory Practice (2002).

effects; and equity) unless a statute requires another regulatory approach” (Emphasis added).

President Obama's E.O. 13563 (2011) reaffirms the Clinton order and reiterates virtually verbatim the two provisions listed above, as well as others. E.O. 13563 also more strongly embraces quantitative benefit-cost balancing than the Clinton order by elevating both provisions to general principles” that the agencies “must” execute and by adding a new principle promoting quantitative benefit-cost analysis and risk assessment:

- “In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.”

Thus, there has been strong bipartisan consensus that benefit-cost balancing should play a central role in the question of whether and how to regulate. As the Clinton Administration explained in OMB's first Report to Congress on the Costs and Benefits of Federal Regulation (Sept. 30, 1997):

“[R]egulations (like other instruments of government policy) have enormous potential for both good and harm. Well-chosen and carefully crafted regulations can protect consumers from dangerous products and ensure they have information to make informed choices. Such regulations can limit pollution, increase worker safety, discourage unfair business practices, and contribute in many other ways to a safer, healthier, more productive and more equitable society. Excessive or poorly designed regulations, by contrast, can cause confusion and delay, give rise to unreasonable compliance costs in the form of capital investments, labor and on-going paperwork, retard innovation, reduce productivity, and accidentally distort private incentives.

The only way we know how to distinguish between regulations that do good and those that cause harm is through careful assessment and evaluation of their benefits and costs. Such analysis can also often be used to redesign harmful regulations so they produce more good than harm and redesign good regulations so they produce even more net benefits.” (p. 10)

While this remarkable political consensus is laudatory, insufficient progress has been made over the last 37 years. There are many reasons why presidential orders directing agencies to implement regulatory statutes through benefit-cost balancing have been far less effective than intended. This includes the severe and chronic under-funding of OIRA (which now has far more responsibilities and less than half the staff it had under President Reagan);³² institutional limitations of the agencies and OMB; and political

³² When OIRA was created in fiscal year 1981, it had a full-time equivalent (FTE) ceiling of about 97 staff; by fiscal year (FY) 2016, OIRA had about 47 staff. See Susan Dudley & Melinda Warren, G.W. Regulatory Studies Center and Washington University in St. Louis, “Regulators’ Budget from Eisenhower to Obama: An Analysis of the U.S. Budget

dysfunctions, including interest group dynamics and Presidential electoral politics.³³ But one of the greatest yet most readily addressable impediments to the cost-benefit state is that ***the regulatory agencies have interpreted their statutes to limit their ability to fully engage in benefit-cost balancing and to maximize societal well-being, as required by the President.***³⁴

Why? Agencies have interpreted their regulatory statutes in ways that circumvented the presidential orders and the requirement to maximize net benefits to society, sometimes relying on selected pieces of legislative history to limit their interpretations of the statutory text. Of course, none of that legislative history met the Bicameralism and Presentment requirements for legislation and thus did not require or authorize non-compliance with the presidential benefit-cost orders.

While only a small minority of statutes explicitly ***mandate*** benefit analysis-cost,³⁵ and a very small minority ***prohibit*** it,³⁶ the challenge has been what agencies should do when implementing the large majority of regulatory statutes that are ***silent or ambiguous*** on cost-benefit balancing. One problem that may have contributed to agency evasion of the presidential orders is that, in earlier Supreme Court case law from 1981 and 2001, there was some misleading dicta that some claimed established a “presumption” against

for Fiscal Years 1960 through 2017” (May 2016), at p. 20 (Table A-3). In contrast, the agency staff dedicated to writing, administering and enforcing regulations rose from 146,000 in FY1980 to over 278,00 in FY2016. As OIRA’s budget was reduced from about \$14 million in 1981 to \$8 million in FY2016 in constant 2009 dollars, the agencies’ budgets increased from about \$16.4 billion in FY1980 to over \$61 billion in FY2016 in constant 2009 dollars. At the same time, OIRA’s statutory responsibilities have grown through a wide variety of requirements, including: the Small Business Regulatory Enforcement Fairness Act, the E-Government Act, the Unfunded Mandates Reform Act, the Congressional Review Act, the Information Quality Act, the Regulatory Right-to-Know Act, the Small Business Paperwork Relief Act, and a variety of appropriations riders. See Comment Letter on Federal Regulatory Review from Paul R. Noe, American Forest & Paper Association, to OMB’s Office of Information and Regulatory Affairs (March 16, 2009), [citing](#) Comment Letter on Federal Regulatory Review from Rosario Palmieri, National Association of Manufacturers, to OMB’s Office of Information and Regulatory Affairs (March 16, 2009).

³³ See, e.g., John D. Graham and Paul R. Noe, “Beyond Process Excellence: Enhancing Societal Well-Being,” in *Achieving Regulatory Excellence*, Brookings Institution Press (2016) (discussing the institutional impediments in the Executive Branch to ensuring that regulations do more good than harm -- such as bureaucratic turf battles among the agencies, failure to utilize both internal and external expertise, bias, the mismatch between the vast volume of regulation and OIRA’s shrinking resources, the large volume of “stealth regulation” such as guidance not submitted for OIRA review, lack of support for OIRA by varying administrations or leaders, and lack of judicial review for benefit-cost balancing -- as well as the political impediments in the Executive Branch and Congress to ensuring that regulations do more good than harm).

³⁴ John D. Graham and Paul R. Noe, “A Paradigm Shift in the Cost-Benefit State,” University of Pennsylvania Law School RegBlog (April 26, 2016), <https://www.regblog.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/>

³⁵ See Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (providing for EPA to mitigate unreasonable environmental effects).

³⁶ See *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001) (Section 109 of Clean Air Act does not grant EPA the authority to consider cost in setting National Ambient Air Quality Standards).

benefit-cost balancing unless it was clearly authorized in the regulatory statute.³⁷ But more recently, the Supreme Court has made quite clear that agencies have broad discretion to implement their regulatory statutes through benefit-cost balancing.³⁸

Shortly after President Reagan's groundbreaking Executive Order 12291 imposed a cost-benefit test on regulations -- and three years before the Chevron USA v. Natural Resources Defense Council (1984)³⁹ decision deferring to EPA's interpretation of an ambiguous statute -- the Supreme Court held, in American Textile Manufacturers Institute v. Donovan (1981),⁴⁰ that the Occupational Safety and Health Administration was not *required* to engage in cost-benefit analysis in setting "feasible" public health and safety standards. But the majority also asserted in dicta that "when Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute."⁴¹

Twenty years later, in Whitman v. American Trucking Associations (2001), an unanimous Supreme Court found it "implausible" that the modest standard to set national ambient air quality standards at a level "requisite to protect public health with an adequate margin of safety" gave the EPA the discretion to determine whether costs should moderate the health standards. Writing for the Court, Justice Scalia stated that, to prevail in their quest to have the EPA take costs into account, the industry respondents would have to show a "textual commitment" of authority for the EPA to consider costs in standard setting, and "*that textual commitment must be a clear one.*" Yet, in a prescient concurring opinion, Justice Stephen Breyer warned that the Court should resist

"a presumption, such as the Court's presumption that any authority the [Clean Air] Act grants the EPA to consider costs must flow from a "textual commitment" that is "clear." ... In order better to achieve regulatory goals-- for example, to allocate resources so that they save more lives or produce a cleaner environment-- regulators must often take account of all of a proposed regulation's adverse effects, at least where those adverse effects clearly threaten serious and disproportionate public harm. Hence, I believe that, other things being equal, we should read silences or ambiguities in the language

³⁷ See, e.g., Jonathan Cannon, "The Sounds of Silence: Cost-Benefit Canons in *Enterger Corp. v. Riverkeeper, Inc.*," 34 Harv. Envir. L. Rev. 425 (2010); Amy Sinden, "Cass Sunstein's Cost-Benefit Lite: Economics for Liberals," 29 Colum. J. Envtl. L. 191, 240 (2004).

³⁸ E.g., compare John D. Graham and Paul R. Noe, "A Paradigm Shift in the Cost-Benefit State," University of Pennsylvania Law School RegBlog (April 26, 2016), <https://www.regblog.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/> with Amy Sinden, "Supreme Remains Skeptical of the 'Cost-Benefit State,'" University of Pennsylvania Law School RegBlog (Sept. 26, 2016) <http://www.regblog.org/2016/09/26/sinden-cost-benefit-state/>; and see John D. Graham and Paul R. Noe, "A Reply to Amy Sinden's Critique of the 'Cost-Benefit State,'" University of Pennsylvania Law School RegBlog (Sept. 27, 2016) <http://www.regblog.org/2016/09/27/graham-noe-reply-critique-cost-benefit-state/>.

³⁹ 467 U.S. 837 (1984).

⁴⁰ 452 U.S. 490 (1981).

⁴¹ 452 U.S. at 509.

of regulatory statutes as permitting, not forbidding, this type of rational regulation.⁴² (Emphasis added).

Finally, in Entergy Corp. v. Riverkeeper, Inc. (2009), the Supreme Court disposed of the dicta relating to a purported “presumption” against cost-benefit balancing.⁴³ Riverkeeper involved a challenge to an EPA regulation under section 316(b) of the Clean Water Act, which required that the EPA adopt a standard to “reflect the best technology available for minimizing adverse environmental impact.” The EPA, with the strong encouragement of the White House Office of Management and Budget (OMB), based its standard on cost-benefit analysis. Although the statutory provision was silent on the use of cost-benefit analysis, the Supreme Court applied Chevron deference in holding that “it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden.” Aligning the issue of agency authority to use cost-benefit analysis with Chevron, the Court reasoned that “it is eminently reasonable to conclude that” the Clean Water Act’s “silence is meant to convey nothing more than a refusal to tie the agency’s hands as to whether cost-benefit analysis should be used, and if so to what degree.” In so doing, the Court disavowed the purported “presumption” against benefit-cost analysis embodied in American Textile and limited American Trucking to “the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion.” The Court concluded that the Clean Water Act’s silence “cannot bear that interpretation.”⁴⁴

Riverkeeper raised the ante for agencies that ignore cost-benefit analysis. Although Riverkeeper did not *require* the agency to use cost-benefit analysis, its logical corollary is that an agency must now provide a reasoned explanation if it should choose to regulate in a way that would do more harm than good, or provide a reasoned explanation why the agency is indifferent to that outcome. Otherwise, the agency’s regulation could be vulnerable to an arbitrariness challenge under the Administrative Procedure Act.

That became quite clear in the Supreme Court’s decision in Michigan v. EPA (2015),⁴⁵ which involved a challenge to the EPA’s decision to regulate hazardous air pollutants, such as mercury, from power plants. Section 112(n) of the Clean Air Act authorizes the EPA to regulate hazardous air pollutants from power plants only if it concludes that regulation is “appropriate and necessary.” In reaching that conclusion, the EPA had said that cost was irrelevant. The Court held that the EPA strayed beyond the bounds of reasonable interpretation in concluding that cost is not a relevant factor in determining whether to regulate under the “capacious” phrase, “appropriate and necessary.”

⁴² 531 U.S. at 490.

⁴³ 556 U.S. 208 (2009).

⁴⁴ 129 S. Ct. at 1508.

⁴⁵ 135 S. Ct. 2699 (2015).

Writing for a 5-4 majority in Michigan, Justice Antonin Scalia bluntly stated, “no regulation is ‘appropriate’ if it does significantly more harm than good.” Quoting Justice Breyer’s concurring opinion in Riverkeeper, Justice Scalia further reasoned that:

“Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions. It also reflects the reality that “too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.” Against the backdrop of this established administrative practice, it is unreasonable to read an instruction to an administrative agency to determine whether “regulation is appropriate and necessary” as an invitation to ignore cost.”⁴⁶

Notably, although the dissenters argued that the EPA could (and did) consider cost at the later stage in developing its regulation, all nine Justices agreed on the principle that, unless Congress states otherwise, “an agency **must take costs into account** in some manner before imposing significant regulatory burdens.” (Emphasis added).⁴⁷

The wisdom in Justice Breyer’s American Trucking concurrence supporting cost-benefit balancing has prevailed. The Supreme Court now defers to agency interpretations of “silences or ambiguities in the language of regulatory statutes as **permitting, not forbidding**, this type of rational regulation.”⁴⁸

B. The Need for Action

The importance of clarifying agency authority to use cost-benefit balancing should not be underestimated. The majority of environmental statutes -- and, to my knowledge, the majority of *all* regulatory statutes -- are silent or ambiguous on cost-benefit analysis. And agencies too often interpret such statutes as only allowing limited consideration of costs and benefits.

Within the broad range of relevant ambiguous statutes, three categories merit consideration -- statutory provisions that: (1) are silent or ambiguous on the consideration of costs and lack a broad “omnibus factor,”⁴⁹ (2) do not explicitly require benefit-cost analysis but authorize consideration of costs and/or contain one or more

⁴⁶ 576 U.S. at ___, Slip Op. at 7-8 (emphasis added).

⁴⁷ Under longstanding principles of administrative law, an agency may not lawfully neglect an important aspect of a problem. Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Michigan v. EPA made clear that, unless Congress states to the contrary, cost is an important aspect of the problem of whether or not to regulate.

⁴⁸ American Trucking, 531 U.S. at 490 (Justice Breyer, concurring) (emphasis added).

⁴⁹ The term “omnibus factor” is used to capture broad, open-ended statutory decisional criteria that typically are intended to allow the regulatory agency to consider any factor important for determining the regulatory standard that might not otherwise be captured in the other decisional criteria specified by Congress.

broad omnibus factors, such as anything that the agency head considers “appropriate,” “necessary,” “relevant,” “feasible,” “reasonable,” “in the public interest,” etc., and (3) authorize benefit-cost analysis but are ambiguous on the extent or rigor of the benefit-cost balancing that may be done. (For examples of statutory provisions in each of these categories, see the Appendix attached to this testimony.) I believe that the Supreme Court decisions in Entergy Corp. v. Riverkeeper, Inc. and Michigan v. EPA advance benefit-cost balancing in interpreting all three subcategories of ambiguous statutes.

President Trump should take an historic step to enhance societal well-being by directing agencies, including independent agencies, to reexamine their statutory interpretations in light of Riverkeeper and its progeny and -- unless prohibited by law -- implement those statutes through cost-benefit balancing. As the Supreme Court has concluded, it is “eminently reasonable” to ensure that regulations do more good than harm.⁵⁰

III. Greater Transparency on Information Supporting Regulatory Decisions.

Agencies should be more transparent about key information – whether developed by third parties or by the agency – supporting regulatory decisions. Key agency information and analyses that support important regulatory decisions, such as benefit-cost analyses and risk assessments, should be reproducible. Congressman Meadows’ “CLEAR” Act (the “Comprehensive Listing of Evidence for Assessments of Regulations Act,” H.R. 4230) relates to that concern. The CLEAR Act requires disclosure of research source code and data used by a Federal agency in assessing the costs and benefits of new regulations. It is important to protect personal and confidential information from disclosure, as section 2(a)(2) acknowledges.

Benefit estimates can be very hard for the public to understand, given the complexities and facets that are often hidden in the “black box.” This challenge is especially true for benefit assessments under various environmental statutes, such as the Clean Air Act. In fact, according to the recent 2017 annual report from the Office of Management and Budget, \$182 to \$684.1 billion⁵¹ or 80% of monetized benefits⁵² (and 70% of costs) associated with Federal regulations reviewed by OMB over the last decade come from air regulations. The report goes on to caution that aggregate estimates of benefits and costs are “subject to some methodological variations and differing assumptions” over time that is especially true for EPA’s air pollution regulations.⁵³ This observation highlights the importance of Agencies revealing the various inputs to these analyses working backwards from the monetized estimate to the underlying assumptions about

⁵⁰ Riverkeeper, 129 S. Ct. at 1508.

⁵¹ Office of Management and Budget, Office of Information and Regulatory Affairs, Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act (2017), at p. 11.

⁵² *Id.*, p. 12;

⁵³ *Id.*, p. 21 & note 39.

studies used, cause and effect assumptions, model choices, treatment of confounding variables in modeling approaches, and distinguishing between associations and true causality, which has a much higher scientific standard to demonstrate.

IV. Better Compliance with the Congressional Review Act.

A. Background

Congress intended the reach and power of the Congressional Review Act (CRA) to be great because it felt there was an imbalance between Congress and the regulatory state – the so-called “fourth branch of government.” Article I, Section 1 of the Constitution is quite clear: “**All legislative powers** herein granted shall be vested in a Congress of the United States . . .” (emphasis added). The legislative and policymaking power of the regulatory state has become enormous. The vast majority of “laws” governing our country are no longer enacted by the people’s elected representatives in Congress, but are promulgated by agencies as regulations.

To put this in context, the Competitive Enterprise Institute publishes a chart they call the “Unconstitutionality Index,” which compares the annual output of agency rules versus Congressional statutes. The contrast is quite striking: over a 15-year period, agency rulemaking output exceeded Congressional legislation by a factor varying from 12-fold to 51-fold, as shown in the following chart:

<i>The Unconstitutionality Index</i>			
Public Laws vs. Agency Rulemakings			
Year	Final Rules	Public Laws	THE "INDEX"
2003	4148	198	21
2004	4101	299	14
2005	3975	161	25
2006	3718	321	12
2007	3595	188	19
2008	3830	285	13
2009	3503	125	28
2010	3573	217	16
2011	3807	81	47
2012	3708	127	29
2013	3659	72	51
2014	3554	224	16
2015	3410	115	30
2016	3853	211	18
2017	3281	117	28

Index: <https://cei.org/blog/2018-unconstitutionality-index-28-federal-agency-rules-every-law-congress-passes>

Moreover, the Judiciary has upheld practically every delegation by Congress to the agencies over the past 80 years so long as Congress identifies "an intelligible principle." The courts also have accorded great deference to agency interpretations of their statutes under Chevron⁵⁴ and deference to agency interpretations of their regulations under Auer v. Robbins.⁵⁵

During the New Deal, Congress developed the legislative veto to curb the administrative state and added legislative veto provisions to hundreds of different statutes,⁵⁶ but the Supreme Court declared the one-House legislative veto unconstitutional in INS v. Chadha (1983).⁵⁷ Consistent with the Bicameralism and Presentment Clauses of the Constitution, the Congressional Review Act was an effort to restore Congress' legislative and policymaking authority. As the joint statement of the bill managers stated:

⁵⁴ 467 U.S. 837 (1984).

⁵⁵ 519 U.S. 452 (1997).

⁵⁶ See Paul J. Larkin, Jr., "Reawakening the Congressional Review Act, 41 Harv. J. of Law & Pub. Policy 187 (2017), at 194-96.

⁵⁷ 462 U.S. 919 (1983).

“As more and more of Congress’ legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments. In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress that balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.”⁵⁸

In the CRA, Congress created a new chapter in the Administrative Procedure Act, chapter 8, of Title 5 of the United States Code. The CRA provides expedited procedures for Congress to review and possibly invalidate agency rules. After Congress receives a rule, a member can introduce a resolution to disapprove the rule, and the resolution is referred to the relevant committee. However, only 30 Senators or Representatives can discharge the resolution of disapproval from committee to the floor. In the Senate, there is no filibuster. A resolution can be brought up at any time, and it is not subject to amendment, point of order, or motion to postpone consideration. Debate is limited to a maximum 10 hours, evenly divided, and a motion to further limit debate is in order and not debatable.⁵⁹

If a resolution of disapproval is signed into law by the President, the rule is invalidated, and “a new rule that is ***substantially the same*** as such a rule may not be issued” unless specifically authorized by a new statute.⁶⁰

The CRA also is very broad in scope. First, the CRA adopts the definition of “agency” in the Administrative Procedure Act (APA), 5 USC § 551(1). This includes independent regulatory agencies. Moreover, the CRA adapts the APA definition of a “rule” at 5 USC § 551(4). While the CRA has an exclusion for rules of particular applicability, a covered “rule” includes “the whole or part of an agency statement of general . . . applicability and future effect designed to ***implement, interpret, or prescribe law or policy***” This includes not only legally binding regulations developed through notice and comment (known as “legislative rules”), but also ***agency guidance*** (known as interpretive rules or policy statements). As the legislative history states, the definition of a covered “rule” does not turn on whether a given agency must normally comply with the notice-and-comment provisions of the APA. Covered rules include those developed through: (1) formal rulemaking, under 5 USC § 556, § 557; (2) “informal” rulemaking, under 5 USC § 553; (3) ***“publication rules” -- statements of general policy and interpretations of general applicability required to be published in the Federal***

⁵⁸ Cong. Rec. S. 3683 (daily ed. April 18, 1996).

⁵⁹ 5 U.S.C. § 802(d)(2).

⁶⁰ 5 USC § 801(b).

*Register under 5 USC § 552(a)(1)(D); and (4) all other rules that do not meet the procedural specifications of the first three classes (including guidance documents such as agency memoranda, frequently asked questions, letters, bulletins, circulars, manuals, etc.).*⁶¹

In the CRA, Congress exercised broad authority over all of those rules. The first provision of the CRA states: “Before a rule can take effect, the Federal agency promulgating such rule shall submit” to each House of Congress and to GAO a report containing a copy of the rule and a concise statement relating to the rule, including whether it is major, and the proposed effective date of the rule.⁶² Moreover, the clock to introduce a joint resolution of disapproval using Congress’ expedited review procedures does not start to run until “the later of the date on which the rule is published in the Federal Register or Congress receives the report submitted under § 801(a)(1).”⁶³ In short, every “rule” -- legislative rule, interpretive rule, and policy statement -- that has not yet been properly submitted to Congress for its review is available for being considered under the Congressional Review Act today.⁶⁴ Moreover, agency non-compliance with the CRA submission requirement has called into question whether any rule that was not been submitted to Congress since the CRA was enacted is legally in effect.⁶⁵

B. The Need for Action

Various reports indicate that agencies have failed to comply with the Congressional Review Act. In many cases, agencies have submitted their major regulations to Congress, but this commonly does not appear to be the case for many guidance (interpretive rules and policy statements), and to a lesser extent for non-major regulations. Most frequently, agencies have failed to submit to Congress rules that were not published in the Federal Register (which is common for informal agency interpretive rules and policy statements). Some researchers have counted thousands of rules that were not sent to Congress as required by the CRA.⁶⁶ The Pacific Legal Foundation

⁶¹ See Cong. Rec., § 3687 (daily ed. April 18, 1996).

⁶² 5 USC § 801(a)(1)(A).

⁶³ 5 USC § 802(b)(2).

⁶⁴ See Larkin, “Reawakening the Congressional Review Act,” *supra* note 56, at 214-15, 252; Todd F. Gaziano, Pacific Legal Foundation, Congressional Testimony, “Rulemakers Must Follow the Rules, Too: Oversight of Agency Compliance with the Congressional Review Act,” before the House Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Committee on the Judiciary (Sept. 28, 2017).

⁶⁵ *Id.*

⁶⁶ See, e.g., Curtis W. Copeland, “Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress” (July 15, 2014), available at <https://www.redtaperollback.com/wp-content/uploads/2017/05/CurtisCopelandCongressionalReviewActManyRecentFinalRulesWereNotSubmittedtoGAOandCongress07-15-2014.pdf>; Congressional Research Service, “Congressional Review Act: Rules Not Submitted to GAO and Congress,” Report R40997, (Dec. 29, 2009), available at <https://redtaperollback.com/wp-content/uploads/2017/04/CRS122909.pdf>; U.S. Government Accountability Office, “Federal Rulemaking:

launched a project tracking rules that have not been submitted to Congress, and they list on their website about 17 such significant rules.⁶⁷ The Brookings Institution also has issued a report finding that about 348 significant rules issued during the last two decades were not properly submitted to both Houses of Congress and the U.S. General Accountability Office (GAO), as required under the CRA.⁶⁸ Thus, the issue of agency non-compliance with the Congressional Review Act is ripe for Congressional inquiry.

V. Conclusion.

In summary, the lack of transparency and accountability in our rulemaking process is longstanding and ripe for reform. To name just a handful of examples: (1) agencies should follow good guidance practices in developing and using guidance; (2) unless prohibited by law, agencies should interpret their regulatory statutes to fully comply with the longstanding presidential orders to ensure that their regulations provide benefits that justify the costs and maximize societal well-being; (3) agencies should disclose to the public the key information underlying important regulatory decisions; and (4) agencies should better comply with the Congressional Review Act.

Regulatory transparency is foundational to good government and long overdue. Thank you again for the honor to testify before you. I would be happy to address any questions you may have.

Perspectives on 10 Years of Congressional Review Act Implementation," GAO-06-601T (March 30, 2016), available at <http://www.gao.gov/assets/120/113245/pdf>

⁶⁷ See <https://www.redtaperollback.com/rules/>

⁶⁸ See Philip A. Wallach & Nicholas W. Zeppos, "How Powerful is the Congressional Review Act," Brookings Institution (April 4, 2017), available at <https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/>.

APPENDIX – Categories of Regulatory Statutes

1. Silent or Ambiguous on Costs and Lack an Omnibus Factor		
Statute	U.S. Code	Regulatory Authority
Clean Water Act	33 USC § 1326(b)	“... reflect the <i>best</i> technology available for minimizing adverse environmental impact.” <u>Entergy v. Riverkeeper</u>: “best” in § 1326(b) can mean most cost-effective; benefit-cost balancing upheld.
Resource Conservation and Recovery Act	42 USC § 6901	“establish such standards . . . as may be <i>necessary</i> to protect human health and the environment” <u>See MI v. EPA</u>: refusal to consider cost in determining whether Clean Air Act regulation was “appropriate and necessary” was arbitrary and capricious under that “capacious” phrase.
2. Authorize Consideration of Cost and/or Include an Omnibus Factor		
Clean Air Act	42 USC § 7412(n)	determine whether regulation is “<i>appropriate and necessary</i>” <u>MI v. EPA</u>: refusal to consider cost was arbitrary and capricious under the “capacious” phrase of § 7412(n), “appropriate and necessary.” “No regulation is ‘appropriate’ if it does significantly more harm than good.”
Clean Water Act	33 USC § 1314(b)(2)	use “<i>best</i> technology <i>economically achievable</i>” (BAT). In assessing BAT, “take into account . . . the <i>cost</i> of achieving such effluent reduction, <i>non-water quality environmental impacts (including energy requirements)</i>, and <i>such other factors as the Administrator deems appropriate.</i>”

3. Clearly Authorizes Benefit-Cost Analysis, But Ambiguous on Extent or Rigor of Benefit-Cost Balancing		
Energy Policy Conservation Act	42 USC § 6295(o)	Energy conservation standards must be "... <i>economically justified</i> ... considering ... (I) the <i>economic impact</i> ...; (II) the <i>savings</i> in operating costs ... <i>compared to any increase in the price of, or in the initial charges for, or maintenance expenses</i> ...; (III) ... <i>savings</i> likely to directly result from the imposition of the standard ... (IV) any <i>lessening of the utility or performance</i> of the covered products ...; (V) the impact of <i>any lessening of competition</i> ...; (VI) the <i>need for national energy and water conservation</i> ; and (VII) <i>other factors as the Secretary considers relevant.</i> "
Dodd-Frank Act	15 USC § 78c(f)	Whenever SEC is required to consider whether an action is "<i>necessary and appropriate in the public interest</i>, the Commission shall also consider, in addition to the protection of investors, whether the action will promote <i>efficiency, competition, and capital formation.</i>" <u>Business Roundtable v SEC</u>, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011) (SEC's "failure to apprise itself – and hence the public and Congress – of the economic consequences of a proposed regulation makes promulgation of the rule arbitrary and capricious").

Chairman GOWDY. Thank you.
Ms. Harned.

STATEMENT OF KAREN HARNED

Ms. HARNED. Thank you, Chairman Gowdy, Ms. Maloney, and the rest of the committee, for having this hearing today. On behalf of the NFIB, National Federation of Independent Business, I appreciate the opportunity to testify regarding making the Federal regulatory process more transparent.

Overzealous regulation is a continuous concern for small business. The uncertainty caused by future regulation effectively acts as a boot on the neck of small business, negatively impacting the small-business owner's ability to plan for future growth. In a small business poll on regulations, NFIB found that almost half of small businesses surveyed viewed regulation as a very serious or somewhat serious problem.

So it is not surprising to learn that America's small-business owners view President Trump's commitment to rolling back unnecessarily burdensome and duplicative regulation as one of his administration's greatest accomplishments in his first year in office.

Due in large part to the Trump administration's deregulatory agenda, small-business optimism is at its highest level in decades, according to NFIB's survey on small-business economic trends, which we do monthly.

But much more work can and should be done to make the Federal regulatory process more transparent and more accountable to the American people, particularly when it comes to regulation through guidance documents and other sub-regulatory pronouncements that impose new mandates on small business.

The NFIB Small Business Legal Center outlined this phenomenon in our September 2015 report, "The Fourth Branch & Underground Regulations," where we also cataloged these abuses.

Make no mistake: As Paul just said, easy-to-understand guidance documents can be an effective tool to help small-business owners understand their legal regulatory obligations. In fact, the Legal Center frequently directs small-business owners to such helpful guidance documents like DOL's Wage and Hour tip sheets and EPA's One-Stop Shop page for small-business compliance assistance.

But there is a bright line between merely restating the law as it stands and establishing regulatory policy through guidance. A true guidance or advisory should do no more than restate the requirements of established law, ideally doing this as plainly and simply as possible. It should not impose new affirmative burdens on the regulated community.

NFIB appreciates this committee's efforts to find solutions that will shine light on the regulatory process. In particular, NFIB believes that H.R. 4809, the Guidance Out of Darkness Act, would be a positive step forward in providing transparency of agency guidance documents and other sub-regulatory activities.

We also think Congress should consider requiring agencies to organize guidance materials in some manner that is easily navigable and user-friendly.

Additionally, NFIB respectfully offers one overarching principle for Congress to consider as it explores other legislative solutions: The regulated public should have a right to voice concerns over any newly announced policy, rule, or administrative interpretation of law that could impose affirmative regulatory burdens on them. Regardless of whether the rule in question might be characterized as legislative or interpretive, we maintain that it should only be adopted and enforced if it has gone through some form of notice and comment.

Finally, NFIB commends Attorney General Sessions for setting an example for other agencies to follow with his November 16, 2017, memorandum that instructs Department of Justice officials to no longer issue guidance documents that purport to create rights or obligations that bind persons or entities outside of the executive branch.

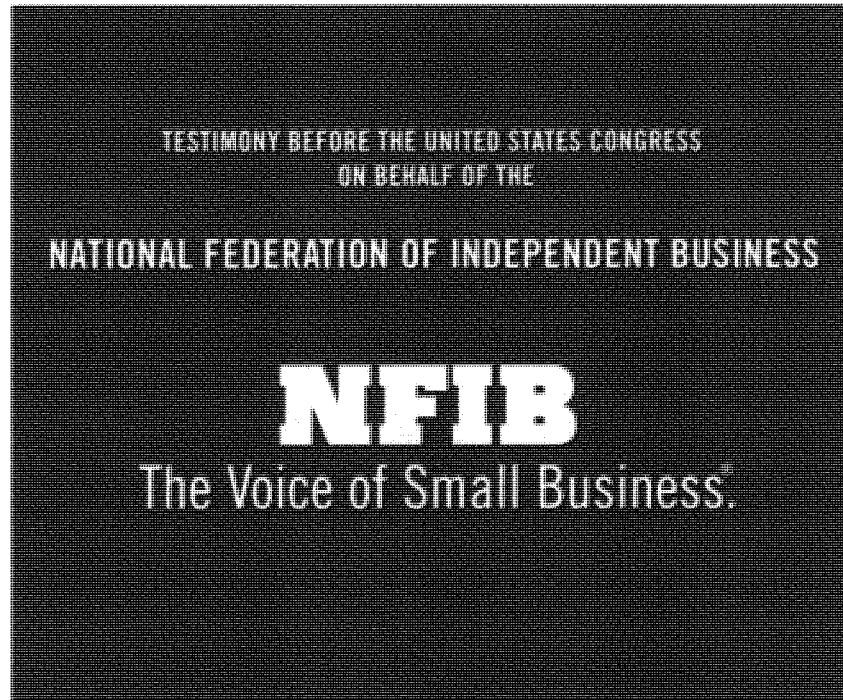
And we applaud then-Associate Attorney General Rachel Brand for following up on that directive with an instruction earlier this year to heads of civil litigating components and U.S. attorneys that they are not to use the Department's enforcement authority to effectively convert agency guidance documents into binding rules in affirmative civil enforcement litigation.

NFIB encourages other agencies in the Federal Government to follow course and Congress to consider legislative solutions that would codify this practice.

NFIB applauds this committee for highlighting the need to bring transparency to its regulation in all forms, including agency guidance documents. Such transparency is critical for America's small-business owners, who struggle to keep up with the myriad of regulations on the books while they run and grow their business.

Thank you for having me testify today, and I look forward to your questions.

[Prepared statement of Ms. Harned follows:]



Statement for the Record of Karen R. Harned
Executive Director, NFIB Small Business Legal Center

Before the

**United States House of Representatives
Committee on Oversight and Government Reform**

Hearing on: "Shining Light on the Federal Regulatory Process"

March 14, 2018

National Federation of Independent Business (NFIB)
1201 F Street, NW Suite 200
Washington, DC 20004

Chairman Gowdy and Ranking Member Cummings,

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record this testimony for the House Committee on Oversight and Government Reform hearing entitled, "Shining Light on the Federal Regulatory Process."

My name is Karen Hamed, and I serve as the Executive Director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB proudly represents hundreds of thousands of members nationwide from every industry and sector.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

Impact of Regulation on Small Business

Overzealous regulation is a continuous concern for small business. The uncertainty caused by future regulation effectively acts as a "boot on the neck" of small business – negatively impacting a small business owner's ability to plan for future growth. Since January 2009, "government regulations and red tape" have been listed as among the top-three problems for small business owners, according to the NFIB Research Center's monthly Small Business Economic Trends survey.¹ Within the small business problem clusters identified by the NFIB's Small Business Problems and Priorities report, "regulations" rank second only behind taxes.²

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden.³ This is not surprising since it's the small business owner, not one of a team of "compliance officers" who is charged with understanding new regulations, filling out required paperwork, and ensuring the business complies with new federal mandates. The small business owner is the compliance officer for her business and every hour that she spends understanding and complying with federal regulation is one less hour she has available to service customers and plan for future growth.

In a Small Business Poll on regulations, NFIB found that almost half of small businesses surveyed viewed regulation as a "very serious" (25 percent) or "somewhat serious" (24 percent) problem.⁴ NFIB's survey was taken at the end of 2016, and, at that time, 51

¹ *Small Business Economic Trends*, NFIB Research Center (January 2018), 18, available online at <https://www.nfib.com/assets/SBET-January-2018-1.pdf> (last visited March 1, 2018).

² Holly Wade, *Small Business Problems and Priorities*, NFIB Research Foundation, 17, (August 2016), available online at <https://www.nfib.com/assets/NFIB-Problems-and-Priorities-2016.pdf> (last visited March 1, 2018).

³ Babson, *The State of Small Business in America 2016*; Crain, Nicole V. and Crain, W. Mark, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, (September 10, 2014), available online at <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf> (last visited March 1, 2018).

⁴ Holly Wade, *Regulations*, Vol. 13, Issue 3, 2017, 6, available online at <http://411sbfacts.com/files/Regulations%202017.pdf> (last

percent of small business owners reported an increase in the number of regulations impacting their business over the last three years.⁵

Compliance costs, difficulty understanding regulatory requirements, and extra paperwork are the key drivers of the regulatory burdens on small business.⁶ Understanding how to comply with regulations is a bigger problem for those firms with one to nine employees since 72 percent of small business owners in that cohort try to figure out how to comply themselves, as opposed to assigning that responsibility to someone else.⁷

Finally, NFIB's research shows that it's the volume of regulations that poses the largest problem for 55 percent of small employers, as compared to 37 percent who are most troubled by a few specific regulations.⁸

Small Business Applauds Deregulation Under Trump Administration

With that as background, it is not surprising to learn that America's small business owners view President Trump's commitment to rolling back unnecessarily burdensome and duplicative regulation as one of his Administration's greatest accomplishments in his first year in office. Every president has contributed to the problem of overregulation, with tens of thousands of pages added to the Federal Register every year.

The Trump Administration, to its great credit, has reversed that trend -- reducing the number of pages in the Federal Register by 36 percent (61,949 pages in 2017 as compared to 97,110 pages in 2016).⁹ For the fiscal year 2017, President Trump promised to eliminate two regulations for every new one proposed. But the Administration exceeded that goal -- eliminating 22 regulations for every new regulatory action.¹⁰ Indeed, agencies undertook 67 deregulatory actions and levied only three regulatory rules.¹¹

And the Trump Administration promises even more deregulation in 2018.¹² To that end, on September 7, 2017, Office of Information and Regulatory Affairs (OIRA) Administrator Neomi Rao issued a memorandum to the regulatory reform officers at all federal agencies directing each agency to propose "a net reduction in total incremental regulatory costs for FY 2018."¹³ The Administrator noted that this instruction carries out

visited March 1, 2018).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 10.

⁸ *Id.* at 9.

⁹ Records provided by Law Librarians Society of D.C., available online at <http://www.llsdc.org/assets/sourcebook/fed-reg-pages.pdf> (last visited March 1, 2018).

¹⁰ Budget and Spending Fact Sheet: "President Donald J. Trump is Delivering on Deregulation," (December 14, 2017), available online at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-delivering-deregulation/> (last visited March 1, 2018).

¹¹ *Id.*

¹² *Id.*

¹³ Memorandum from Neomi Rao, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President, to Regulatory Reform Offices at Executive Departments and Agencies regarding "FY 2018 Regulatory Cost Allowances," (Sept. 7, 2017), available online at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/FY%202018%20Regulatory%20Cost%20Allowances.pdf> (last visited March 12, 2018).

“the regulatory policies and priorities outlined in Executive Orders 13771 and 13777, including the goal ‘to lower regulatory burdens on the American People by implementing and enforcing regulatory reform.’”¹⁴ Administrator Rao, quoting Executive Order 13777, said “[i]t is the policy of the United States to alleviate unnecessary regulatory burdens placed on the American people.”¹⁵

Agencies Increasingly Use “Guidance Documents” And Other “Sub-regulatory” Pronouncements To Regulate

Knowing the negative impact that unnecessary and burdensome regulation has on small business, it has been disconcerting to see agencies increasingly use guidance documents and other “sub-regulatory” pronouncements to impose new mandates on small business. The NFIB Small Business Legal Center outlined this phenomenon and cataloged abuses of it in our September 2015 report, “The Fourth Branch & Underground Regulations.”¹⁶

Underground Regulation Through Guidance

Make no mistake, easy-to-understand guidance documents can be an effective tool to help small business owners understand their regulatory obligations. Practical considerations likewise demand that agencies must prepare documents breaking-down and summarizing regulatory requirements, the steps necessary for permit approvals, enforcement priorities, etc. Such guidance documents are important, not only as a tool to ensure that agency employees interpret and apply existing statutes and regulations in a consistent manner, but also in giving the regulated community fair notice as to how the agency intends to administer and enforce the law. In fact, the NFIB Small Business Legal Center frequently directs small business owners to such helpful guidance documents, like the Department of Labor’s (DOL) Wage and Hour Tip Sheets and the Environmental Protection Agency’s (EPA) one-stop page for small business compliance assistance.¹⁷

But there is a bright and discernable line between merely restating the law as it stands and establishing regulatory policy through “guidance.”

In a true guidance or advisory, the document should do no more than restate the requirements of established law -- ideally as plainly and simply as possible. But where the agency offers an interpretation that seeks to apply existing legal principles to address questions of statutory interpretation that are not well settled, there is a significant risk that the new interpretation may impose affirmative burdens on the regulated community.¹⁸ While the agency’s interpretation would have to be applied and

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *The Fourth Branch & Underground Regulations*, NFIB Small Business Legal Center (September 2015), available online at: <https://www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf> (last visited March 11, 2018).

¹⁷ Department of Labor Wage and Hour Division Fact Sheets, available online at: <https://www.dol.gov/WHd/fact-sheets-index.htm> (last visited March 11, 2018); U.S. EPA Small Businesses Resource Information Sheet, available online at: <https://www.epa.gov/sites/production/files/2017-06/documents/smallbusinessinfo.pdf> (last visited March 11, 2018).

¹⁸ “FDA’s growing dependence on guidance documents presents a couple of problems. First, these informal announcements may operate as de facto rules but escape normal procedural safeguards for their promulgation or review. Second, they allow the FDA to take positions that do not even constrain agency officials, which leaves regulated entities guessing about their rights and obligations.” Lars Noah, *Governance by the Backdoor: Administrative Law (Lessons?) at the FDA*, 93 Neb. L. Rev. 89, 97 (2014).

affirmed in court before it could be officially incorporated into the standing body of regulatory law, the “guidance” may nonetheless impose immediate burdens on the regulated community as a practical matter. This is because a newly announced interpretation puts the public on notice that the agency intends to administer and enforce the law in a certain manner. Anyone who ignores the new interpretation -- proceeding with business as usual -- risks fines, sanctions, enforcement actions, and/or lawsuits.

Underground Regulation Through Amicus

Another way an Administration can set federal regulatory policy without raising public awareness -- and political backlash -- is through strategic amicus filings in cases between private litigants, where there is potential to establish precedential authority on a question of statutory interpretation. These “friend of the court” briefs are intended to guide the court’s analysis on difficult legal questions. In principle they should offer useful insights, expertise and practical considerations that the court may find helpful in resolving thorny issues.¹⁹

In some cases a judge will call upon the Department of Justice (DOJ), or other agencies, to file an amicus brief because courts assume that an agency, charged with administering and enforcing a statute, may offer particularly valuable insight and institutional expertise.²⁰ In other cases, federal agencies proactively file these briefs when they have identified cases that, in their view, raise important open questions of statutory construction.²¹ Most commonly these briefs urge reversal of an arguably errant district court judgment that the agency believes causes disharmony between jurisdictions, or which might otherwise have serious implications for how the agency administers or enforces a statute.

As such, agencies have traditionally used amicus briefs as a tool to ensure consistent interpretations of statutes or to weigh in on cases of great importance.²² But, in recent years, some scholars have raised concerns over the appearance that amicus briefs are being used to advance the President’s political agenda. Notably, University of Maryland Law School professor, Deborah Eisenberg published a comprehensive analysis of the DOL’s amicus practices since the New Deal.²³ Her study confirmed that there has been a steep escalation in DOL’s amicus activity in the past quarter-century.²⁴ Though the up-tick began under the Clinton and George W. Bush administrations, amicus activity significantly increased under the Obama administration.²⁵

In this vein, there is certainly a legitimate role for an agency, charged with administering and enforcing a statute on behalf of the public, to bring to light practical considerations

¹⁹ Federal Rules of Appellate Procedure, Rule 29, (stating that an amicus must explain why its brief is desirable and relevant).

²⁰ Deborah Thompson Eisenberg, Regulation by Amicus: The Department of Labor’s Policy Making in the Courts, 65 Fla. L. Rev. 1223, 1244, FN 128 (2013).

²¹ See e.g., Ben James, DOL Says Judge Dropped Ball In Hearst Intern Wage Row, Law360 (April 7, 2014).

²² See e.g., Eisenberg, *supra* note 20 at 1245 (“The most active DOL amicus curiae activity in FLSA cases occurred immediately after the Act’s passage. After the battle to achieve passage of the FLSA, the Roosevelt and Truman administrations used amicus briefs to establish judicial precedents broadly construing the scope of the FLSA’s protections. Indeed, more than half of all FLSA amicus briefs in the database (170 out of 324 briefs) were filed by these two administrations.”)

²³ See generally, *supra* note 20.

²⁴ *Id.*

²⁵ *Id.*

and institutional expertise that may elucidate an issue. As with private parties who may have an interest in the resolution of a statutory issue, these agencies may have some organic interest in their amicus filings. But, when an administration changes its position or announces a new interpretation in amicus filings -- or even in a direct enforcement action -- there is a likelihood that the newly asserted position is politically or ideologically motivated.²⁶ And regardless of whether the agency has in fact asserted its new position to influence public policy, it nonetheless undermines the goal of ensuring public notice and opportunity for comment when adopting a position that will impose new burdens on individuals or businesses.

Underground Regulation Through Executive Order

Finally, the President can set policies that substantively impose new burdens on the regulated community through executive orders. In some cases, the President chooses to allow an opportunity for notice-and-comment on important executive orders; however, in recent years executive orders have been issued without an opportunity for open and transparent deliberation.

NFIB believes none of the "sub-regulatory" tools outlined above are an appropriate way to create new regulatory obligations since each imposes a new burden without going through the Administrative Procedure Act's (APA) notice-and-comment process.

Example Of Agencies Inappropriately Using "Sub-regulatory" Pronouncements To Impose New Regulatory Burdens On Small Business

IRS Prohibits Stand-Alone Reimbursement Accounts under the Affordable Care Act

When Congress passes complex regulatory schemes, like the Affordable Care Act (ACA or "Act"), it can be very difficult for the regulated community to understand its legal obligations. For agencies implementing a law like the ACA, the goal should be to issue guidance that restates the law in straightforward terms that any person can understand without resorting to lawyers and accountants. Unfortunately, in the implementation of the ACA, the U.S. Department of Health and Human Services, DOL, and the Internal Revenue Service (IRS), in many cases, did not effectively explain the ACA's requirements in easily digestible terms.

Even worse, in some cases, where the Obama administration offered "guidance," it was not so much 'restating the law' as providing an interpretive gloss. Rather than explaining certain ambiguous provisions, federal agencies issued interpretive statements which effectively pronounced new rules -- imposing legal obligations and liabilities that Congress may not have ever intended. Still worse, these underground regulations were pronounced without any opportunity for public comment. One clear example was IRS's guidance on stand-alone reimbursement accounts (*i.e.*, the practice of giving employees a set amount of money for their health care expenses on a monthly or annual basis in lieu of health insurance). The IRS issued a guidance document, which declared this

²⁶ Eisenburg, *supra* note 20 at 1229 ("The increasingly politically charged nature of both agency's amicus efforts as seen during the Bush and Obama administrations in particular -- and the ideological split in the Supreme Court's decisions about whether to defer to them portends a chaotic future for FLSA litigation in the lower courts. But one thing is clear: the agency amicus strategy can be a potent tool of policymaking.").

practice illegal under the ACA -- even though no single provision of the ACA directly addressed stand-alone reimbursement accounts.

This interpretive rule was certainly consistent with the Obama administration's stated goal to achieve near-universal health insurance coverage through, among other things, employer-provided health insurance. So, it was not surprising that the IRS chose to interpret ambiguous provisions of the ACA in a manner that affirmatively discouraged employers from giving employees money to use toward their health expenses in lieu of providing health insurance. But there was no clear textual prohibition on this practice -- likely because many in Congress assumed employers would be free to continue offering these benefits to employees or to pursue this arrangement as an alternative to paying costly health insurance premiums.

Many small business owners wanted to provide their employees with some financial assistance toward their health care expenses, even if they couldn't afford to offer health insurance. But IRS never sought input from these business owners. Instead, the agency chose to issue a definitive interpretation of the ACA -- proclaiming the practice illegal -- without any public outreach. Through sub-regulatory guidance, IRS effectively made law. And employers who chose to defy IRS risked severe penalties of \$100 per day, for each employee or \$36,500 per employee, per year.²⁷

Yet one cannot go so far as to say that the agency's interpretive rule was plainly inconsistent with the text of the ACA. Indeed, the Act was either silent or incoherent on this issue. But, the troubling thing is that courts will generally defer to an agency's interpretation, which enables the Executive Branch to flesh out ambiguities in accordance with the President's preferred policy objectives, as what happened here.²⁸ The agency's interpretation may or may not comport with the interpretation a court might think most appropriate; however, it will likely receive deference if challenged.²⁹

Although IRS refused to conduct notice-and-comment outreach before issuing that interpretive rule, America's small business owners spoke up loudly to their elected officials. Appropriately, Congress -- not unelected bureaucrats -- passed the 21st Century Cures Act and affirmatively made law allowing small employers to provide stand-alone health reimbursement accounts to their employees.³⁰

DOL Changes its Interpretation of Qualifying Exempt Employees Under the FLSA

Employers must properly classify their employees as either "exempt" or "non-exempt" under the Fair Labor Standards Act (FLSA) because only "exempt" employees can be paid a flat salary.³¹ "Non-exempt" employees must be paid an hourly wage and are entitled to overtime if they work more than 40 hours in a week. As such, employers face the possibility of federal enforcement actions and lawsuits for backpay should they

²⁷ According to NFIB research, in 2015, 16 percent of small employers were in violation of the rule and another 20 percent were seriously considering offering the prohibited benefit. Small Business's Introduction to the Affordable Care Act, Part III, NFIB Research Foundation, (November 2015), available online at: <https://www.nfib.com/assets/nfib-aca-study-2015.pdf> (last visited March 11, 2018).

²⁸ *Perez v. Mortgage Bankers Ass'n*, No. 13-1041, 2015 WL 998535, at 15 (U.S. March 9, 2015) (J. Thomas concurring).

²⁹ *Id.* at 12 (J. Scalia concurring).

³⁰ Section 18001 of Pub. 114-255 (December 13, 2016).

³¹ 29 U.S.C. 201

misclassify an employee.

In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012), the U.S. Supreme Court held that an agency should not receive deference on a newly asserted position where the agency has failed to give the public fair notice of the change, or where individuals and businesses have acted -- in reasonable reliance -- on the agency's previous position. The case was brought by pharmaceutical sales representatives who alleged that they had been misclassified as "exempt employees" when they should have been classified as "non-exempt."

The employer in *SmithKline* had prudently relied on existing DOL regulations, which addressed the exemption for "outside salesm[e]n."³² Long-standing DOL regulations defined the term to mean "any employee... [w]hose primary duty is ... making sales..."³³ Since 1940 DOL stressed a *liberal* interpretation of the term.³⁴ But, in a 2009 amicus brief, filed in the Second Circuit, DOL announced a new, and more narrow, interpretation of its regulations.³⁵ And DOL filed amicus briefs in *SmithKline* to further advance this new position, but with an apparently 'evolving' rationale.³⁶

Under DOL's new interpretation unveiled in the agency's amicus filings, pharmaceutical sales representatives could not qualify as exempt "outside salesm[e]n" because they did not *technically* consummate sales.³⁷ As a technical matter pharmaceutical sales representatives are forbidden by law from finalizing a sale. Under state and federal law they may only promote their company's prescription drugs, meaning that, at most, they could obtain a "nonbinding commitment from a physician to prescribe those drugs in appropriate cases."³⁸ But, for decades DOL had allowed pharmaceutical companies to treat their sales representatives as falling within the "outside salesman" definition.³⁹ As the defendant-company pointed out, DOL had explicitly "stressed that [the] requirement[.] [for qualification as an outside salesman,] [was] met whenever an employee 'in some sense [made] a sale.'"⁴⁰ As such, the Supreme Court appropriately viewed DOL's new position with skepticism, not only because it constituted a change in position, but because it would result in an "unfair surprise" for employers.⁴¹

The Supreme Court ultimately refused to defer to DOL's new position because it would

³² *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

³³ 29 C.F.R. § 541.500.

³⁴ *SmithKline Beecham Corp.*, 132 S. Ct. at 2163.

³⁵ "DOL first announced its view that pharmaceutical sales representatives are not outside salesmen in a series of amicus briefs, there was no opportunity for public comment, and the interpretation that initially emerged from the DOL's internal decision making process proved to be untenable." *SmithKline Beecham Corp.*, 132 S. Ct. at 2160.

³⁶ "The DOL changed course after the Court granted certiorari in this case, however, and now maintains that '[a]n employee does not make a 'sale' ... unless he actually transfers title to the property at issue.' The DOL's current interpretation of its regulations is not entitled to deference under *Auer v. Robbins* ... Although *Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief ... this general rule does not apply in all cases. Deference is inappropriate, for example, when the agency's interpretation is 'plainly erroneous or inconsistent with the regulation', or when there is reason to suspect that the interpretation 'does not reflect the agency's fair and considered judgment on the matter' ... There are strong reasons for withholding *Auer* deference in this case. Petitioners invoke the DOL's interpretation to impose potentially massive liability on respondent for conduct that occurred well before the interpretation was announced. To defer to the DOL's interpretation would result in precisely the kind of 'unfair surprise' against which this Court has long warned." *SmithKline Beecham Corp.*, 132 S. Ct. at 2159.

³⁷ *Id.* at 2166.

³⁸ *Id.* at 2163-64.

³⁹ *Id.* at 2163.

⁴⁰ *Id.*

⁴¹ *Id.* at 2167.

have imposed “massive liabilit[ies] on [employers] for conduct that occurred well before [the new] interpretation was announced.”⁴² The Court based its decision on equitable concerns over the lack of notice to the regulated public. This suggests that due process concerns can, and should, trump an agency’s discretion on matters for which the agency has already spoken, at least where individuals or businesses have acted in reliance on the agency’s original position. More broadly, NFIB believes that regulation by amicus is the type of sub-regulatory, opaque regulation that agencies should be prohibited from using.

Congressional Solutions

NFIB appreciates this committee’s efforts to find solutions that will shine light on the regulatory process, particularly when it comes to guidance documents and the other “sub-regulatory” activities I have outlined above. In particular, NFIB believes H.R. 4809, the “Guidance Out Of Darkness Act” or “GOOD Act,” would be a positive step forward in providing transparency of agency “sub-regulatory” activities. We also think Congress should consider requiring agencies to organize guidance materials in some manner that is easily navigable and user-friendly.

Additionally, NFIB respectfully offers one over-arching principle for Congress to consider as it explores other legislative solutions: the regulated public should have a right to voice concerns over any newly announced rule, policy, or administrative interpretation of law that may impose affirmative regulatory burdens on individuals or businesses. We would call this a moral imperative in a liberal democratic system.

Indeed, if government exists to serve the people, it has fiduciary-like duties to ensure transparency and provide concerned citizens with an opportunity to be heard. Otherwise, there is an undue risk that government serves its institutional interests or may be captured by the interests of politically powerful factions. Thus, we maintain that government necessarily violates its fiduciary duties to the public when the President, or an agency, adopts burdensome rules outside the light of an open and deliberative notice-and-comment process.

The principle is straight-forward. Regardless of whether the rule in question might be characterized as either a “legislative” or “interpretive” one, we maintain that it should only be adopted and enforced if it has gone through some form of notice-and-comment process. This is a normative argument -- a matter of good governance.

As the law currently stands, only “legislative rules” must go through notice-and-comment. But perhaps it is time consider tweaking that rule. For one, it is notoriously difficult to distinguish between legislative and interpretive rules. Yet, more fundamentally, liberal democratic principles demand that institutions should be reformed to at least ensure transparency and the opportunity for public comment on “important” or “significant” rules, which we would define as those imposing substantive regulatory burdens, including added compliance costs.

⁴² *Id.*

We submit that a “guidance” should more properly be viewed as a substantive regulation if it imposes new compliance costs or otherwise exposes individuals or businesses to new liabilities. If the interpretation is not already well settled, it should not be applied unless and until concerned citizens have had an opportunity to voice their concerns. Under this framework, only controversial “guidance documents” would need to go through notice-and-comment procedures because guidance on settled questions would not be viewed as imposing any new regulatory burden. Of course, the APA currently exempts “interpretive rules” from notice-and-comment procedures. But maybe it is time to reconsider that exemption, considering the reality that agencies frequently pronounce changes in regulatory policy in a manner that imposes new burdens on the public without giving any opportunity for citizens to voice concerns. At least notice-and-comment would encourage public participation, awareness and perhaps meaningful dialogue.

NFIB, therefore, commends Attorney General Sessions for essentially doing just what we suggest regarding the operations of the Department of Justice in a November 16, 2017, memorandum entitled “Prohibition on Improper Guidance Documents.” The memorandum to all department components instructed, “[e]ffective immediately, Department components may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local, and tribal governments.)”⁴³ Attorney General Sessions’ memorandum was followed by a memorandum from then Associate Attorney General Rachel Brand instructing heads of civil litigating components and U.S. Attorneys “not to use its enforcement authority to effectively convert agency guidance documents into binding rules” in affirmative civil enforcement litigation.⁴⁴

NFIB encourages other agencies in the federal government to follow course and Congress to consider legislative solutions that would codify this practice.

Conclusion

NFIB applauds this Committee for highlighting the need to bring transparency to regulation in all its forms, including agency guidance documents and other regulatory pronouncements. Such transparency is critical for America’s small business owners who struggle to keep up with the myriad of federal regulations on the books while they run and work to grow their businesses.

Thank you for inviting me to testify today. I look forward to answering any questions you may have.

⁴³ Memorandum from U.S. Attorney General Jeff Sessions for “all components,” regarding “Prohibition on Improper Guidance Documents” (November 16, 2017), available online at: <https://www.justice.gov/opa/press-release/file/1012271/download>

⁴⁴ Memorandum from U.S. Associate Attorney General Rachel Brand for “heads of civil litigating components and U.S. Attorneys” regarding “Limiting Use of Agency Guidance Documents In Affirmative Civil Enforcement Cases” (January 25, 2018), available online at: <https://www.justice.gov/file/1028756/download>

Chairman GOWDY. Yes, ma'am. Thank you.
Professor.

STATEMENT OF NICHOLAS PARRILLO

Mr. PARRILLO. Mr. Chairman, Ms. Maloney, and members of the committee, thank you for the opportunity to testify this morning.

The principal basis for my testimony is a study of Federal agency guidance documents that I conducted as a consultant for the Administrative Conference of the United States, for which I interviewed 135 individuals across a range of agencies, industries, and NGOs.

The Conference recently completed the process of adopting a new recommendation on guidance. I participated extensively in that process, and I broadly support the recommendation, though I am not testifying as a representative of the Conference.

The term "guidance" covers all general statements that an agency makes, short of issuing full-blown regulations, that advise the public on how the agency plans to exercise its discretion or interpret law.

Guidance is an important means for increasing the transparency of regulation. When an agency chooses individual targets for enforcement or decides individual applications for licenses or benefits, the agency has the option to proceed case by case. The case-by-case approach can subject regulated parties to uncertainty and unequal treatment. Guidance redresses this problem by telling regulated parties in a general, comprehensive, understandable way how the agency plans to handle individual proceedings.

Regulated parties often want this guidance and complain about not getting enough of it. On the other hand, guidance can undermine transparency if guidance substitutes for notice-and-comment rulemaking.

Given these competing considerations, we confront what you might call a transparency tradeoff. You can try to increase transparency if you mandate that any policy an agency makes about a certain matter has to be made through an open process like notice and comment, but an open process eats up scarce agency resources. So, if the agency is strapped, it may react to this mandate by giving up articulating any general policy on the matter, which would be the worst outcome for transparency.

In grappling with this tradeoff, it helps to consider why guidance is exempt from notice and comment to begin with. Guidance, unlike a full-blown regulation, is supposed to be nonbinding. The idea is that it's okay to issue a policy without the safeguards of notice and comment so long as the policy is not cut and dried, so long as the agency in individual proceedings is flexible and open-minded when regulated parties argue for individual departures from the policy.

But agencies are sometimes inflexible. One might assume that flexibility is an agency's path of least resistance, such that inflexibility must be the product of some conscious and nefarious purpose to treat guidance like a regulation. But that kind of blanket assumption is mistaken. Agencies face external pressures and unintended internal dynamics that can make them inflexible by default.

The new Conference recommendation suggests organizational reform measures to counter this inflexibility. Admittedly, many of these measures require managerial initiative and the commitment of resources, which may be in short supply.

For example, an agency may inflexibly refuse to approve a company's request for a departure from guidance because the agency fears that the company's competitors will complain about an unlevel playing field or that NGOs and the media will complain about favoritism. The Conference explains how the agency can head off these complaints by being transparent and publishing reasons for the departure that become applicable to all similar cases going forward. But formulating defensible reasons is costly.

To their credit, some agencies have sought to provide a degree of transparency and public participation on a wholesale basis when a guidance document is first adopted—measures that may approach notice and comment without going all the way.

As my research and the Conference recommendation indicate, the benefits and costs of such participation for the agency and the public depend on certain factors that vary a lot by program and document.

Also, agencies undertaking these measures need to anticipate certain pitfalls. For example, if an agency promises to take public comment pre-adoption on more guidance documents than it has the resources to process the comments for, it may end up leaving a lot of documents in draft form indefinitely, which can cause stakeholder confusion.

I'll be happy to discuss these matters and any others in response to your questions. Thank you.

[Prepared statement of Mr. Parrillo follows:]

Written Testimony of
 Nicholas R. Parrillo
 Professor of Law, Yale Law School

Before
 United States House of Representatives
 Committee on Oversight and Government Reform
 “Shining Light on the Federal Regulatory Process”
 March 14, 2018

Chairman Gowdy, Ranking Member Cummings, and members of the Committee, thank you for the opportunity to testify on the federal regulatory process and the role of guidance in that process.

The term “guidance” covers all general statements that an agency makes, short of issuing full-blown binding regulations, that advise the public on how the agency plans to exercise its discretion or interpret law.¹ Part I of my testimony explains that guidance is a very important means for increasing the transparency of federal agencies, though the use of guidance can detract from transparency if it substitutes for notice-and-comment rulemaking. If one’s goal is to increase transparency, one must confront a difficult tradeoff: if you attempt to increase transparency by requiring an agency to make policy only through highly participatory processes like notice and comment (which eat up lots of agency resources), the agency may give up articulating any policy at all, which is actually the worst outcome for transparency. Part II examines the principal justification for why guidance can be issued without notice and comment:

¹ “Guidance” is an umbrella term that covers what the Administrative Procedure Act (APA) calls “general statements of policy” and “interpretative rules.” 5 U.S.C. § 553(b)(A). Neither of these two terms is defined in the APA, but the widely cited ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) defines general statements of policy as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power” and defines interpretative rules as “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” Id. at 30 n.3. “Guidance” is conventionally understood to include not only statements addressed directly to the public but also public statements addressed to agency staff with the understanding that the statements will affect the staff’s treatment of members of the public (e.g., a published enforcement manual or permit-writing manual). See Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 556 (1977) (noting that guidance “might be addressed either to the staff or to the public without any real difference in impact”). Also, “guidance” is conventionally understood to include not only statements formally addressing a generic class of persons but also statements that are technically addressed to just one or a few named parties yet are understood to advise the public more generally on similar situations going forward (e.g., letters in response to individual requests for interpretations insofar as these are published and understood as precedential). See Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3435 (2007).

that guidance, unlike a full-blown regulation, is not binding. In particular, I consider a common critique of this justification, i.e., that guidance is practically coercive in real life. Guidance can have powerful coercive effects in certain identifiable circumstances, but these effects are far from universal, and even when they happen, they typically are not consciously intended by agency officials. Coercive effects can be mitigated by certain institutional reforms, though many of these reforms would require resources and managerial initiative that may be in short supply. Part III considers the distinct questions that arise when guidance is deregulatory in nature, such that its use may shut out the people protected by regulatory statutes from participating in agency initiatives that may harm them. Part IV examines the ways in which agencies, when using guidance instead of notice-and-comment rulemaking, can foster transparency and public participation in ways that approach what is done in full-blown rulemaking. I consider the costs and benefits of these practices, which vary widely between different agencies and policies, and I note how they may sometimes lead to unintended and perverse consequences that require our vigilance.

Overall, this is a subject fraught with tradeoffs between competing goods, variation between different regulatory areas, the risk of unintended consequences, and solutions that will work only with a commitment of scarce resources. Because of all this, improvements are most likely to be effective if pitched at a workable level of specificity. This counsels caution regarding any sweeping trans-agency legislation. It counsels in favor of seeking improvement at the level of an individual agency or program, either through oversight or possibly through legislation if there is sufficient groundwork laid through dialogue with the agency and experimentation at the agency. In dealing with any particular agency or program, my hope is that this testimony is helpful in setting forth questions that must be asked, pitfalls that must be watched for, and a toolkit of potential reform practices to be considered for their suitability.

The principal basis for my testimony is a study that I conducted on federal agency guidance as a consultant for the Administrative Conference of the United States (ACUS).² The

² NICHOLAS R. PARRILLO, *FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE*, FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (Oct. 12, 2017), available at <https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf> [hereinafter Parrillo Report]. The focus of the study was guidance documents that are supposed to be nonbinding on the agency and the public. This focus definitely includes all general statements of policy (a.k.a. policy statements), as there is a consensus that policy statements are defined—and distinguished from full-blown regulations—by their nonbinding status. This focus would also include interpretative rules insofar as interviewees thought such rules were supposed to be nonbinding. However, there is inconsistency and confusion in the case law and among officials and

study rested mainly on interviews that I conducted with people from a range of agencies, industries, and NGOs. In all, I interviewed 135 individuals, with the vast majority of interviews lasting for between 60 and 90 minutes each, all between September 2016 and July 2017. The interviews were unstructured. Of the 135 interviewees, 26% were in agencies (all career officials), 48% in industry, 19% in NGOs and unions, and 7% “other.” Of the people outside the agencies (that is, in industry, NGOs, unions, or “other”), who totaled exactly 100, there were 58 former agency officials (of whom 35 had been career, 10 had been Democratic political appointees, and 13 had been Republican political appointees). I located the interviewees through a chain-referral process, beginning with a nucleus of well-networked individuals with diverse sectoral affiliations (ACUS agency contacts and ACUS public members), asking them for names of knowledgeable people, interviewing those people, asking those interviewees for yet more names, and so forth iteratively. This method leverages the knowledge of people within the system to find out who the knowledgeable people are; it is a method suited to a subject like the everyday workings of guidance, which is relatively unexplored and fraught with “unknown unknowns.”³

Although ACUS commissioned the study, my analysis and conclusions were my own; the study was published with me listed as sole author, including a disclaimer noting that the opinions

stakeholders about whether interpretative rules are to be nonbinding or if they are to be defined instead (or perhaps additionally) by the fact that they are confined to providing merely incremental clarifications of the underlying statutes or regulations that they interpret. For an excellent critical review of how the case law has sought to define policy statements and interpretative rules, see Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. (forthcoming 2018), manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2958267 (Jan. 31, 2018). For more detail on the scope of my study with respect to policy statements and interpretative rules, see Parrillo Report, *supra* note 2, at 22-26. In adopting a Recommendation on the use of guidance after receiving my study on how agencies should handle documents meant to be nonbinding, ACUS directed its Recommendation at policy statements (the category of guidance that is clearly of nonbinding status) while noting that “many” parts of the Recommendation “may also be helpful with respect to agencies’ use of interpretive rules.” ACUS Recommendation 2017-5: Agency Guidance Through Policy Statements, 82 Fed. Reg. 61728, 61734 (Dec. 29, 2017).

³ Because following up every single interview lead would have rapidly multiplied the interviewee pool beyond what I could manage, I sought to strike a balance between breadth and depth, following the chain-referral process for one “link” of the chain wherever it led, then following it for the second “link” only for certain regulatory areas, and then for the third “link” only for two agencies on which I wanted to go into particular depth (those being EPA, because of the unmatched scale of its regulatory operations and its unmatched prevalence in legal controversy over both guidance and legislative rulemaking, and FDA, because of its heavy reliance on guidance documents and its use of an unusually formalized process for issuing guidance). I also sought additional referrals on a supplemental basis to fill certain gaps in my understanding, yielding a small number of additional interviewees. In the end, 24% of the interviewees were expert on EPA, 23% on FDA, and between 4% and 11% each on OSHA, the Department of Energy, USDA, FAA, HHS (besides FDA), and the banking regulatory agencies. For a complete description of the study’s methodology, see Parrillo Report, *supra* note 2, at 196-205.

and views therein were my own and not necessarily those of ACUS's members.⁴ In addition to conducting the study, I extensively participated in ACUS's internal process for devising and adopting a Recommendation on agency use of guidance. I broadly support the Recommendation that the Conference (drawing partly upon my suggestions but also making many changes to them) ultimately adopted.⁵ I shall discuss certain aspects of that Recommendation in my testimony. However, I am not giving any of this testimony as a representative of ACUS.

I. Guidance as a Plus and Minus for Transparency

A. Guidance as a Plus for Transparency

Guidance is a very important means for boosting the transparency of government. This is clearest when, in the absence of issuing guidance, the agency would fall back on case-by-case individual decisionmaking.

To appreciate this point, we must start by recognizing that acts of Congress often give a lot of discretionary power to agencies. Congress may prohibit an activity in vague terms, and an agency may then be empowered to interpret the prohibition and, given limited resources, decide which violators will be pursued and which not. Or Congress may provide for the grant of a license or benefit on certain conditions, which may be vaguely stated, and a federal agency may then be empowered to fill in the gaps and decide which regulated parties seeking the license or benefit will get it.

In circumstances like these, where agencies have wide latitude to interpret law and exercise discretion in any individual proceeding, it is possible the agency will make its decisions case-by-case—an approach that is usually not transparent.⁶ To be sure, certain legal doctrines

⁴ As noted on the cover page of my report, cited in *supra* note 2: "This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views and recommendation expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited."

⁵ ACUS Recommendation 2017-5, *supra* note 2. Besides serving as a consultant to ACUS on this project, I am also a member of the approximately 100-person assembly that is the plenary decisionmaking body for ACUS, having served in that capacity since July 2016. However, because I served simultaneously as consultant for the project on guidance, I was recused from voting on the Recommendation arising from that project.

⁶ Case-by-case decisionmaking, despite its disadvantages for transparency, is generally permitted as a matter of administrative law. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

require the agency to treat like cases alike, but those doctrines do not apply to enforcement,⁷ and even in areas where they do apply, they may do little practical good where individual cases are so fact-bound, or so few, or (conversely) so numerous that it is hard to identify relevant precedent when new cases arise. Case-by-case decisionmaking can therefore subject regulated parties to great uncertainty about what they are supposed to do and what to expect of the agency. A regulated party may invest a lot of resources in seeking a license or benefit according to a certain understanding of what the agency expects, only to find out, after the investment is sunk, that the agency wanted something different. Or a regulated party may take a certain course of action, believing it will not lead to any trouble, only to be hit with an enforcement proceeding, at which point the party finds out what the agency expected *after* suffering the reputational damage and process costs of enforcement. In either of these cases, the regulated party could have avoided serious losses if only it had known in advance what the agency was thinking. When regulated parties do not know what the agency is thinking, it becomes harder for them to plan for the future and invest in productive activity. Moreover, when individual proceedings are decided case-by-case, there is higher risk that similarly situated parties will be treated differently; this is always problematic, and especially if the parties are market competitors.

Guidance is the readiest means for an agency to tell the public what it is thinking—to announce how it plans to make individual decisions on enforcement, licenses, benefits, etc., and to do so in a more general, comprehensive, and understandable way than is possible through particularized explanations of fact-bound individual determinations.⁸

Given that regulated parties want to know what the agency is thinking, it is no surprise that a huge number of them—I would guess most firms in most industries most of the time—consider guidance a positive good that they affirmatively want. For example, when I interviewed the counsel to the home appliance manufacturers’ association, he said that, without guidance, we would be “cast adrift” in terms of what the agency regulating us thinks.⁹ Even interviewees who mounted very substantial critiques of what they considered the abuse of guidance recognized that

⁷ *Heckler v. Chaney*, 470 U.S. 821 (1985) (holding that individual nonenforcement decisions are committed to agency discretion and not subject to judicial scrutiny).

⁸ For full discussion of the advantages of guidance over case-by-case decisionmaking, see Parrillo Report, *supra* note 2, at 28-30.

⁹ Cited in *id.* at 35.

much guidance was nonetheless essential and that businesses sometimes wanted agencies to issue *more* guidance.¹⁰

Indeed, it will often be harder for an agency *not* to issue guidance than to issue it, since refraining from issuing guidance may require remaining resolutely silent in the face of regulated parties' entreaties for clarification.¹¹ When regulated firms come to EPA saying they are confused and need something explained, "EPA's instinct is to answer the question," as a former program office director at the agency told me.¹² This is no surprise: regulated parties seek guidance so they can get in line with agency expectations and head off confrontation, and that is in the agency's interest, too. And once the agency starts answering questions, it would be hard for the agency to keep those answers secret even if it wanted to. The same interviewee gave an example of how EPA clarificatory letters could be obtained by a regulated party through the Freedom of Information Act.¹³ Another former EPA program office director recalled that, once his office began issuing such individualized answers in the form of letters, those letters got "passed around" among industry, and parties besides the addressees began to rely upon them.¹⁴ And once guidance is being provided to individuals who seek it, the agency begins to see that it would be more efficient and fair to provide that guidance in the form of more general public documents. A former SEC official recalled that, decades ago, he spent 30 hours per week on "phone duty," answering the inquiries of regulated parties who called in. The giving of advice in this ad hoc manner by individual staff members, he said, was inferior to the provision of general guidance, toward which the SEC more recently shifted. More general guidance was better because ad-hoc advice-giving led to inconsistency between answers, ate up more staff time, and created an unlevel playing field among regulated parties, some of whom phoned while others did not.¹⁵ Thus, unless an agency shuts itself off from stakeholder demands, or foregoes obvious means to increase efficiency and fairness, it is going to end up issuing guidance.

The upshot of all this is that numerous agencies issue large amounts of guidance. Guidance's page count for various agencies has been estimated to dwarf that of actual

¹⁰ On regulated parties' demand for guidance, see *id.* at 35-37.

¹¹ This paragraph draws upon Parrillo Report, *supra* note 2, at 36-37.

¹² Cited in *id.* at 36.

¹³ Cited in *id.* at 36.

¹⁴ Cited in *id.* at 36.

¹⁵ Cited in *id.* at 36-37.

regulations by a factor of twenty, forty, or even two-hundred.¹⁶ As suggested in the preceding paragraph, guidance can proliferate in so many diverse, decentralized, and program-specific ways—often in bottom-up fashion when regulated parties ask questions of frontline officials—that there is no comprehensive catalogue of all of it.

B. Guidance as a Minus for Transparency

Despite guidance’s potential to promote transparency, it can sometimes be a minus for transparency if an agency issues guidance when it would otherwise issue full-blown binding regulations (known as “legislative rules”). The reason is that legislative rules are required to be issued through the legislative rulemaking process of the Administrative Procedure Act (APA), including notice and comment, in which the agency publishes a proposed rule, takes comments from the public, and then, upon issuing a final rule, gives an extensive response to the comments—an extraordinary degree of agency engagement with stakeholders. Guidance, by contrast, is exempt from this highly participatory and open process.¹⁷ What officially justifies this lessened process for guidance is that guidance is not binding on the agency or the public in the way a legislative rule is. (On whether this nonbinding status is a reality or a fiction—and thus whether it can really justify the less-open process for issuing guidance—see Part II below.)

C. The Transparency Tradeoff

When it comes to transparency, guidance involves a difficult tradeoff. On the one hand, guidance provides more transparency about what the agency’s thinking is than does case-by-case decisionmaking. On the other hand, guidance provides less transparency about how the agency formulates what it thinks than does legislative rulemaking. It would be a mistake to think we can maximize transparency by telling agencies always to formulate their general thinking through legislative rulemaking. That is because such rulemaking takes a long time and expends a lot of

¹⁶ See Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1468-69 (1992) [hereinafter Strauss, *Rulemaking Continuum*]; Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 805 (2001). For more on the ubiquity of guidance, see Parrillo Report, *supra* note 2, at 34-35.

¹⁷ 5 U.S.C. § 553(b)(A). I must add a qualification to the point that guidance, when substituted for legislative rulemaking, diminishes transparency. Because legislative rules are officially binding while guidance is not (see *infra*, Part II), it is possible to write guidance in more colloquial language than can be used in legislative rules. This makes it easier to use guidance as a means to explain regulatory schemes to less-sophisticated regulated parties who lack counsel—a plus for transparency. Parrillo Report, *supra* note 2, at 30-31.

agency resources.¹⁸ There is only so much policy that can be formulated through that process in the near term. If we tell an agency that, on a certain matter, it must formulate its general thinking (if at all) only through legislative rulemaking, then maybe the agency will opt for such rulemaking instead of guidance, and there will be an increase in transparency. But maybe the agency will instead give up developing *any* general thinking on the matter, or greatly delay doing so, because it has already expended all the resources it has currently available for legislative rulemaking on other matters that are crying out for such treatment. In that case the agency ends up leaving the matter to case-by-case decisionmaking, which is the worst outcome for transparency.¹⁹ Regarding FDA, which industry has sometimes criticized for its overuse of guidance, an executive at a drug manufacturer said he could see the argument “in the abstract” for why legislative rulemaking was better, but he said sardonically that he preferred to know what FDA was thinking “rather than wait twenty years” for a legislative rulemaking to finish. Guidance, he said, is “the best you can do.”²⁰ More generally, we should be cautious about imposing additional process requirements on the issuance of guidance in the name of transparency, because such requirements can potentially discourage issuance of guidance to begin with, perversely diminishing transparency on net.

II. Is the Nonbinding Status of Guidance Reality or Fiction?

How should an agency strike a balance between the transparency benefits of issuing guidance and the transparency disadvantages of not going through legislative rulemaking? The conventional answer is that legislative rules are legally defined by the fact that they are binding on the agency and the public, whereas guidance documents are not.²¹ Thus, if the agency wants to articulate its thinking in a way that is cut-and-dried, to be followed automatically in later individual proceedings, then it must formulate that thinking through legislative rulemaking. But if the agency wants to articulate its thinking on a more tentative basis, with the understanding that it reserves discretion to be flexible and open-minded about doing things differently in later individual proceedings, then it can articulate its thinking through guidance. It is okay for the

¹⁸ See Parrillo Report, *supra* note 2, at 31-34.

¹⁹ See *American Mining Congress v. MSHA*, 995 F.2d 1106, 1111-12 (D.C. Cir. 1993).

²⁰ Cited in Parrillo Report, *supra* note 2, at 33.

²¹ At least, general statements of policy are universally thought to be nonbinding; the question of whether interpretative rules are nonbinding is more uncertain. See *supra* note 2.

agency to forego public engagement when it originally formulates a norm wholesale *so long as* the agency is going to engage with regulated parties' arguments for doing things differently later, at the retail level, when the norm is individually applied.²²

This mandate that guidance be nonbinding and flexible has made guidance a subject of controversy. The fear is that agencies in real life are not tentative or flexible when it comes to guidance but instead follow it as if it were a binding legislative rule, and regulated parties are under coercive pressure to do the same. If agencies do use guidance as a binding norm, as feared, they undermine the mandate of the APA that general binding policies should be made only through the open and participatory procedures of legislative rulemaking.

Is this fear based on reality? To answer this question, we must break it into two parts. First, we must ask what pressure a regulated party feels to follow guidance when the guidance is operative, that is, when the agency has not granted a party's individual request for a dispensation from the guidance. Second, we must ask whether agencies are practically open to granting such dispensations—in other words, are agencies flexible?

A. When and Why Regulated Parties Are Under Pressure To Follow Guidance Absent a Dispensation

Regulated parties often (though not always) feel strong pressure to follow guidance. But the origins of this pressure usually lie not in some plot hatched by the agency but instead in a series of structural factors hard-wired into modern regulation and the legislation that establishes it, nearly all of which are vastly beyond the control of the agency officials who are issuing or using a guidance document. In other words, this is not the kind of pressure that can be mitigated by using legislation or oversight to tell officials not to act with coercive intent, for official intent is not usually what is at play here.

There are four major structural factors that incentivize regulated parties to follow guidance. First, legislation may require regulated parties to obtain pre-approval, that is, to seek the affirmative assent of the agency in order to get some legal advantage, like a permit or monetary benefit. If the advantage sought is important to the party, and if the agency's decision

²² As Michael Asimow aptly stated: "If the public is denied an advance opportunity to influence a policy statement, it should have a fair chance to persuade a decisionmaker to follow a different course when the discretionary function is actually exercised in a subsequent investigation, formal or informal adjudication, or other proceeding." Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 391.

is uncertain and subject to delay, the incentive to follow whatever the agency's wishes appear to be (including guidance) can be overwhelming.²³ Second, the legislative scheme may subject the regulated party to continuous monitoring and frequent evaluations by the agency. If the law is complex, the regulated party will inevitably end up failing to comply with at least a few prohibitions or approval requirements. To insure against this contingency, the party will invest in its relationship to the agency, that is, seek to build up the agency's trust and confidence in its good faith and cooperativeness, including by following guidance.²⁴ Third, the regulated firm is a "they," not an "it," and the last generation has seen rapid growth in new cohorts of corporate personnel—most prominently "compliance officers"—whose backgrounds, socialization, and career incentives arguably give them an especially strong incentive to maintain good relations with the agency and therefore to follow guidance.²⁵ Fourth, a regulated party subject to ex post enforcement will have an incentive to follow guidance that increases with the probability of detection of noncompliant behavior, the cost of an enforcement proceeding irrespective of outcome, the probability of an unfavorable outcome, and the probable sanction in that event. This fourth factor is probably the most obvious, but I must emphasize that its incentive power cannot be simply assumed, for it varies greatly depending on the structure of the statute and the agency. In some (though far from all) contexts, dynamics arise similar to those in coercive plea-bargaining, meaning the regulated party cannot expect, without prohibitive risk, to get the accusation meaningfully examined and adjudicated by an official distinct from the enforcement personnel. This creates a strong incentive to avoid being accused in the first place.²⁶

Conversely, in areas where these four structural factors are mostly weak or absent, interviews indicate that regulated parties are relatively less likely to follow guidance. Examples are FTC consumer protection, CFPB regulation of most nonbanks, EPA enforcement against permitless discharges into protected waters, and OSHA regulation of most employers.²⁷ Thus, the pressure to follow guidance, though real, is far from universal.

If an agency official works within a statutory and regulatory structure where most or all of the four factors are robust, then whatever that official issues in the form of guidance will quite

²³ Parrillo Report, *supra* note 2, at 37-44.

²⁴ *Id.* at 45-56.

²⁵ *Id.* at 56-64. Although one may argue that this growth is driven partly by governmental pressure, that pressure emanates mainly from the U.S. Sentencing Commission's Organizational Guidelines and from Justice Department prosecutorial practice, *id.* at 58, rather than from any regulatory agency.

²⁶ *Id.* at 64-76.

²⁷ *Id.* at 76-90.

likely be followed by regulated parties. But that is not because any agency official sets out with conscious purpose to coerce anybody. The structural incentives to follow the guidance will operate on regulated parties regardless of the official's subjective state of mind. Of course it is possible that an official may consciously recognize these structural incentives and consciously anticipate that they will operate in a way that shifts regulated parties' behavior toward what the guidance says. Indeed it seems fair to assume that most high-ranking agency officials would be aware of these factors. But if such knowledge disqualifies those officials from issuing guidance, then all agencies operating in areas where most or all of the four factors listed above are robust (pre-approval requirements, long-term firm-agency relationships, compliance cohorts in industry, and high-stakes ex post enforcement) would be largely disqualified from ever issuing guidance. That is to say, many and perhaps most agencies would be disqualified from ever issuing guidance, despite its importance to government transparency and the fact that numerous regulated parties demand it. That cannot be right.

If we really want to protect regulated parties from feeling strongly pressured to follow guidance in the absence of an agency dispensation, we would have to reform quite substantially the structural features of the administrative state that create strong incentives to discern and follow an agency's wishes. There *are* arguments for reforming those structural features, but these would have major consequences and implicate a host of issues ranging well beyond the controversy over guidance. Pre-approval requirements have been condemned by some as intolerable encroachments on liberty,²⁸ but abolishing them would entail radical rollbacks of health, safety, and environmental regulation and could worsen uncertainty for regulated industry; more incremental reforms are also possible, but these, too, implicate wide-ranging questions.²⁹ The tendency of heavily-regulated businesses to invest in positive relationships to their regulator may create dangers of coercion or favoritism, and there are obvious (if costly) means of preventing those relationships from forming (as by rotating agency personnel), yet doing so would dramatically increase information costs to the agency,³⁰ and might incline it to become

²⁸ Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407 (1995)

²⁹ Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133 (2014) (on the use of general permits).

³⁰ Cf. DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 663 (2010) ("Firms' reputations matter in part because a resource-constrained and uncertain regulator is compelled to rely partially upon trust").

more impersonal, exacting, and punitive.³¹ The rise of the compliance profession has been attacked as a stealth reform imposed on corporate America by unelected and ill-informed Justice Department prosecutors,³² but corporate compliance programs are now the norm across many industries are considered by many to be a salutary development; in any case, they cannot be eliminated without a major dislocation. And while there are proposals to reform administrative law enforcement to make settlement bargaining less coercive—for example, to redraft statutes to diminish liability and penalties or to establish more neutral, independent institutions to oversee enforcement personnel³³—these, too, have high costs and wide-ranging implications.

B. When and Why Agencies are Inflexible When Asked for Dispensations

Although structural factors create a strong incentive to follow certain guidance absent a dispensation, the agency can mitigate this coercive effect by being open-minded and flexible when a regulated party seeks a dispensation.³⁴ But in real life, agencies are sometimes inflexible. One might assume that flexibility is the path of least of resistance for an organization, such that any inflexibility must reflect some conscious and nefarious plan. But that is wrong. Federal agencies face a host of external pressures and internal dynamics that can make them naturally inflexible. The very real fact of agency inflexibility can be mostly (though not entirely) explained by agencies' sensitivity to competing rule-of-law values that favor consistency, by their lack of resources, and by their inertia in the face of unintended organizational tendencies that foster rigidity.

First off, we must recognize that agencies are quite often under active stakeholder pressure to *be inflexible* (a.k.a., to be consistent) and that these stakeholder pressures spring from legitimate concerns that agencies would be remiss to ignore. Most prominently, any regulated firm that receives a favorable departure from guidance will put its competitors at a disadvantage, and those competitors will protest. Further, they may come to lose faith in the predictability of the agency and in the idea that the agency provides them a level playing field—a shift that may

³¹ If a regulator has a continuing series of interactions with a regulated party, it may need to be punitive only as a last resort within a larger framework that begins (and usually ends) with presumptive mutual trust. See generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992).

³² Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2117-30 (2016).

³³ Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1143-50 (2016).

³⁴ See Parrillo Report, *supra* note 2, at 13 (collecting authorities on the need for flexibility and open-mindedness on guidance).

cause them to withdraw from cooperation with the agency, thereby diminishing compliance and making the whole regulatory program less effective.³⁵ Meanwhile, individualized flexibility on guidance, if it favors a particular regulated party, smacks of favoritism and thereby attracts the negative scrutiny of the media, NGOs, and members of Congress.³⁶ On top of all this, some competitors of the firm that received the favorable departure from guidance will be stung by the apparent unfairness and understandably ask, “why can’t I get this exception, too?” One departure thus invites other requests for departure, and these requests eat up the agency’s resources and pose the danger that any coherent policy will unravel. To prevent all this from happening, the agency may simply deny departure requests to avoid opening the floodgates to begin with.³⁷

Significantly, there is a way for an agency to maintain flexibility while addressing these legitimate pressures for consistency: it can take an approach that emphasizes transparency about departures from guidance, which I call *principled flexibility*.³⁸ That is, for each departure the agency makes, it gives a written explanation that is accessible to other agency officials and to the public, with the understanding that the exception then becomes generally applicable to like cases prospectively. Principled flexibility helps refute accusations of favoritism, cabins the rationale for each departure so as to avoid opening the floodgates to more requests, promotes fairness among competitors by ensuring that all exceptions become generally available on a prospective basis, and aids predictability because the obligation to provide a reason for each departure will tamp down the number of departures and make it easier to anticipate when departures may happen. In some contexts (though certainly not all), principled flexibility may be required by the APA’s arbitrary-or-capricious standard, though it is not practical to think judicial enforcement will be the main driving force behind agencies’ adoption of it.

Crucially—and unfortunately—principled flexibility is not easy to implement, though many agencies try. It takes resources and runs into certain managerial obstacles. Most

³⁵ Parrillo Report, *supra* note 2, at 93-98.

³⁶ *Id.* at 98-101.

³⁷ *Id.* at 101-03.

³⁸ *Id.* at 103-07. My formulation of principled flexibility is inspired by two sources. One is Robert Kagan’s study of the Nixon wage-price freeze (which is not about guidance but policy-application more generally), and particularly Kagan’s distinction between the “judicial mode” of policy-application (corresponding to principled flexibility) and “legalism” (corresponding to inflexibility). ROBERT A. KAGAN, *REGULATORY JUSTICE: IMPLEMENTING A WAGE-PRICE FREEZE* 91-96 (1978). The other source is Peter Strauss’s suggestion that guidance be treated like agency adjudicatory precedent, with an APA-style obligation to give reasons for any departure. Strauss, *Rulemaking Continuum*, *supra* note 16, at 1472-73, 1485-86.

important, the reason-giving mandate means that every request for departure requires time and money to evaluate. Regulated parties requesting departures can bear some of this cost, but saddling them with it chills requests for departures to begin with (thereby increasing practical inflexibility). And besides, the agency itself has to do some independent investigation. Inflexibility resulting from the cost of evaluation and reason-giving manifests itself especially in programs that combine a high volume of individual decisions, scant resources, and time pressure. Further, the need for a higher-level official to sign off on each departure—which many agencies require and many commentators and institutional pronouncements endorse—forces departures through a bottleneck of political appointees and senior civil servants who have especially limited time and lack fine-grained information about the matters they are reviewing. This renders departures yet harder to grant.³⁹ A former senior EPA official now in private practice, reflecting on these factors, expressed frustration with EPA personnel's rigid use of guidance but did not accuse them of bad faith: "they feel stuck," she said.⁴⁰

On top of these organizational and resource-based obstacles to principled flexibility, there are additional such obstacles that stand in the way of flexibility of any kind, principled or not.⁴¹ Flexibility requires that regulated parties be able to go over the heads of frontline officials who deny departures and act too rigidly, but such appeals may antagonize the frontline officials and prompt them to retaliate. Such retaliation may be unconscious, but the prospect of it can nonetheless chill regulated parties from seeking flexibility. Even if officials never retaliate, a perception within the regulated community that they do so, if not actively dispelled by the agency, can have a similar effect. For their part, higher-level officials, when faced with appeals, have various institutional motives to back up their subordinates irrespective of the merits of the case. More subtly, the rule/guidance distinction is not intuitive to most people (except perhaps lawyers), and that lack of understanding can make flexibility harder to achieve. In addition, the day-to-day business of a government office can socialize its personnel to be less receptive to regulated-party requests, though sometimes more receptive. Offices that have day-to-day habits of cooperating with industry (like program offices engaged in rulemaking) tend to be more flexible on guidance-related matters than, say, enforcement offices. Finally, it is possible to get

³⁹ For full discussion of obstacles to implementing principled flexibility, see Parrillo Report, *supra* note 2, at 107-116.

⁴⁰ Cited in *id.* at 16.

⁴¹ On obstacles discussed in this paragraph, see *id.* at 116-27.

agencies to be more flexible by giving training on the rule/guidance distinction to their personnel, though this tends to be most effective when the trainers are embedded relatively close to the decisionmakers and can monitor and counsel them on an ongoing basis—something that is not cheap.

All that said, there are some instances in which agencies hold fast to guidance not because of legitimate external pressures for consistency, nor because of inertia or resource poverty in the face of organizational pathologies, but instead because agency personnel think the guidance is right.⁴² That is, they are committed to the substantive content of the guidance, and this can keep the agency from being practically open to the possibility of departure. Of the many reasons why agencies are inflexible, this one is the most problematic. If an agency is not going to consider departing from a policy, by reason of thinking the policy is right, that is the archetypal scenario for legislative rulemaking. Notably, however, the interviews indicate that the agency personnel who are committed to the substance of a guidance document are often the political appointees or the career officials but not both;⁴³ thus, if a strong norm in favor of flexibility and open-mindedness can be articulated, it may be possible for the politicals to effectively invoke the norm against the career officials and vice versa.

Any reform effort to address the coercive effects of guidance must recognize that agency flexibility is a good aspiration, but it is not the path of least resistance. Being flexible requires undertaking active managerial reform and may involve expending resources. Consistent with this understanding, ACUS Recommendation 2017-5 sets forth organizational measures that will promote flexibility, including (1) publishing reasons for individual departure decisions and making them applicable to all like cases going forward; (2) assigning departure decisions to components of the agency most likely to be socialized to have productive dialogue with stakeholders; (3) redirecting appeals from frontline denials of flexibility to higher-level officials who are *not* the direct superiors of the officials who issued the initial denial; (4) training and monitoring frontline officials to ensure they understand the rule/guidance distinction and treat parties' requests for departures in a welcoming manner; and (5) facilitating opportunities for ombudspersons, stakeholder associations, or other intermediaries to make departure requests and give feedback to the agency on guidance practices more broadly. But the Recommendation

⁴² Id. at 128-32.

⁴³ Id. at 129-31.

recognizes that, given the costs of these measures, agencies cannot, as a practical matter, make these efforts in favor flexibility on everything all the time. Priorities must be set. In deciding which guidance documents warrant the most active exertions in favor of flexibility, the Recommendation assigns a higher priority to guidance documents likely to have a greater impact on the public, e.g., because regulated parties are under strong pressure to follow them absent a dispensation (due to structural factors discussed above). It assigns a lower priority to guidance documents whose value lies more in providing consistency and predictability per se than in the document's choice of substantive content.⁴⁴

III. Deregulatory Guidance and Regulatory Beneficiaries

Distinct questions may arise when it comes to deregulatory guidance, that is, guidance that promises, at least tentatively, to treat regulated entities favorably, as by suggesting that a certain course of regulated-party conduct enjoys a safe harbor in license applications or is a low priority for enforcement. If this guidance shifts the status quo in a more industry-friendly direction, one can expect regulated parties to alter their behavior so as to follow it, not because of any of the quasi-coercive structural factors discussed in Part II, but simply because it is what they want to do. But if this happens, the people Congress intended to protect by regulation—regulatory beneficiaries—may be harmed. Under D.C. Circuit case law, such beneficiaries can get the guidance struck down if it is too rigid, meaning the agency must either go through legislative rulemaking or rework the guidance to be more flexible (i.e., so that the agency, in any particular individual proceeding, remains “open-minded” to the possibility of treating the regulated party *more stringently* than the deregulatory guidance suggests).⁴⁵

It is doubtful that flexibility in deregulatory guidance is typically a useful remedy for regulatory beneficiaries. Flexibility operates at the micro-level of individual adjudicatory and enforcement proceedings. In most such proceedings, no regulatory beneficiaries are going to show up. There will thus be nobody to make the requests for departure that are the lifeblood of flexibility.⁴⁶ It seems the best approach—except in the select areas where NGOs representing beneficiaries have the practical capacity to participate in individual adjudication and

⁴⁴ ACUS Recommendation 2017-5, *supra* note 2, at 61736 (paragraphs 7-8).

⁴⁵ See Parrillo Report, *supra* note 2, at 132-33.

⁴⁶ *Id.* at 135-37.

enforcement—is for agencies to seek to promote participation by regulatory beneficiaries by soliciting such beneficiaries’ views (and the views of NGOs who represent them) on a wholesale rather than retail basis, at the time when guidance is initially issued or modified at a general level. This will usually be the form of participation most suited to NGOs’ limited resources.

IV. Public Participation in the Issuance of Guidance

Though the APA does not require it, agencies can voluntarily provide for public participation in the formulation and issuance of guidance. This means transparency and participation occur at the wholesale level, as distinct from the retail level when a guidance document is applied in individual proceedings where a particular party may argue for a dispensation. This wholesale form of participation may be especially suited to regulatory beneficiaries, as noted in Part III, but it can also be quite valuable to regulated parties and to the agency itself.

There are diverse means by which agencies can seek public input on the formulation and issuance of a guidance document. The agency can reach out individually to selected stakeholders whom it already knows; it can hold public discussions on developing the guidance at stakeholder meetings, workshops, forums, roundtables, sessions at conferences, webinars, or other such events (for which invitations will often be distributed through agency listservs); it can use an advisory committee as a channel for public participation; or it can voluntarily undertake notice and comment on a published draft of the guidance document before adopting the guidance, which is the maximal option in terms of broad, open, and impersonal participation.⁴⁷ Note, however, that voluntary notice and comment on guidance is still usually much faster and less costly than legislative rulemaking, since it does not involve the same demands in terms of cost-benefit analytic requirements, record-building and voluminous responses to comments in contemplation of judicial review, etc.⁴⁸

In deciding what level of public participation an agency should seek on the issuance of guidance—and especially in deciding whether the agency should undertake notice and comment on it—we must weigh several potential benefits and costs. One potential benefit is the technical

⁴⁷ Id. at 139-43.

⁴⁸ Id. at 143-50.

information that stakeholders may provide, which may greatly improve the guidance (e.g., by helping the agency anticipate and account for potential implementation problems). That said, broadening participation (with notice and comment being the maximum) may see diminishing returns on this front, depending on how concentrated or diffuse the actors with useful information are. If information is concentrated, then narrow outreach to a few stakeholders may provide just as good technical information at much less cost.⁴⁹

A second potential benefit of notice and comment on guidance is that it gives the agency better political information, that is, helps the agency anticipate which stakeholders may challenge the guidance at a political or legal level, so the agency can make a better-informed decision on whether to proceed and how, diminishing the likelihood of being overridden by Congress or the courts. That said, there is enough inertia in agency-stakeholder interactions that, if the agency refrains for seeking input and simply issues the guidance, stakeholders may acquiesce in a way they would not if the agency were openly tentative about the initiative. Tentativeness can sometimes invite resistance and confrontation.⁵⁰

A third potential benefit of notice and comment on guidance is that it may increase the legitimacy of the guidance and of the agency itself, in the sense of giving stakeholders a sense that the agency issues guidance through a fair process in which they have “buy-in,” which may increase stakeholder willingness to cooperate with and support the agency and its program. There are at least three specific ways in which notice and comment can increase legitimacy, though each has its complications and limits. First, notice and comment can give stakeholders confidence that the agency understands and is responsive to their concerns. But this is a double-edged sword: under some circumstances notice and comment can come to seem like an empty gesture and might therefore alienate stakeholders (e.g., if the agency rarely makes changes in response to comments, or finds the cost of giving a response to comments prohibitive).⁵¹ Second, because notice and comment is more general and impersonal than other forms of participation, it can foster legitimacy by deflecting charges that an agency is biased in terms of which voices it is willing to hear. This point seems especially important for NGOs, some of whose officials see notice and comment as leveling the playing field between them and industry. Public comment also allays the anxiety that officials commonly have about the possibility of

⁴⁹ Id. at 150-53.

⁵⁰ Id. at 153-54.

⁵¹ Id. at 155-57.

being accused of favoritism. Yet that very anxiety can lead agencies not only to undertake notice and comment but also to *close off* any interchanges with stakeholders that occur outside the public-comment process, which some industry representatives thought was counter-productive, since it prevents iterative and informal dialogue that may be optimal for agency learning.⁵²

Third, notice and comment may increase legitimacy simply by broadening the pool of participants, as exemplified by the fact that some draft guidance documents have recently been focal points for “mass comment” campaigns sponsored by advocacy groups, rising to the tens of thousands of comments. If the rulemaking context is any guide, however, agencies have tended to ignore such mass comments, or to use them only in an opportunistic way; it is not entirely clear how agencies can use such comments meaningfully, as they are not usually written to be part of a deliberative and analytic decisionmaking process, as opposed to a plebiscitary one.⁵³

Against the potentially great yet uncertain benefits of notice and comment on guidance (technical and political information and legitimacy), one must measure the costs, in time and resources. Several interviewees pointed out that, if agency personnel responsible for guidance expend effort to seek public input on the guidance they issue, they will have less capacity to issue guidance on other subjects, leaving regulated parties adrift in some areas. One major question is whether the agency should provide a response to the comments it receives: this renders participation more meaningful, yet it greatly increases the cost to the agency. Further, it is possible that the cost of participation may rise so high as to seriously hamper the agency’s capacity to make policy at all, which may actually *delegitimize* the agency in the eyes of regulatory beneficiaries—an unintended and extremely perverse consequence.⁵⁴

Thus, the potential benefits and costs of notice and comment on guidance are numerous, they vary with context, and they are sometimes counter-intuitive. Notice and comment will often be worth it, but deciding whether it is involves a context-specific judgment.

For this reason, decisions about whether to seek notice and comment on guidance should be made document-by-document, or perhaps agency-by-agency, in the sense that an agency can adopt a procedural rule requiring notice and comment for an objectively-defined broad category of its guidance. But a government-wide requirement for notice and comment on anything but the

⁵² Id. at 157-60.

⁵³ Id. at 160-62.

⁵⁴ Id. at 162-66.

very most extraordinary guidance documents would be rash.⁵⁵ Making decisions on participation on a narrower basis allows for more learning about what works best, and it cabins the consequences of any decisions that do not turn out well. Consistent with this, ACUS Recommendation 2017-5 says an agency “may make decisions about the appropriate level of public participation document-by-document or by assigning certain procedures for public participation to general categories of documents.” It urges agencies to consider many of the various costs and benefits listed in the discussion above.⁵⁶

Further, broad mandates for notice and comment on guidance (even if only agency-wide rather than government-wide) risk two major unintended consequences. First, if there is an agency-wide procedural rule requiring notice and comment for a large category of guidance, and the agency lacks the resources to process all the comments it receives on all the documents, the agency may end up leaving many guidance documents in published “draft” form indefinitely, without officially adopting them. This has sometimes happened at FDA, for example, and elsewhere.⁵⁷ When regulated parties have incentives to comply with whatever they perceive to be the agency’s wishes (as described in Part II), those parties may take a draft guidance document to be a reflection of those wishes, and they may therefore follow its content, regardless of its draft status. This outcome defeats the purpose of notice and comment. And it can actually be even worse than that. It is possible that *most* of the guidance documents left indefinitely in draft are in that state because of the agency’s insufficient resources, while *some* remain indefinitely in draft because there is too much disagreement within the agency to reach a decision about which comments to accept. Regulated parties are well-advised to follow guidance that reflects the agency’s view but is held up due to lack of resources, but *not* to follow guidance that is held up because the agency cannot come to any agreed-upon view. Yet it may be difficult for regulated parties to tell what the reason is for the holdup of any particular draft. The result is that regulated parties are left guessing, which increases their decisionmaking costs and the risks they bear and un-levels the playing field among regulated competitors. To head off these problems, ACUS Recommendation 2017-5 urges that, if an agency adopts the FDA-like approach of providing for participation on a general category of documents, it “should consider

⁵⁵ The Office of Management and Budget’s Good Guidance Practices (cited in *supra* note 1), calling for pre-adoption public comment on “economically significant” guidance documents, appear to cover only a relatively tiny number of very extraordinary documents. See Parrillo Report, *supra* note 2, at 167-68.

⁵⁶ ACUS Recommendation 2017-5, *supra* note 2, at 61736-37 (paragraphs 9, 11).

⁵⁷ For full discussion of this phenomenon, see Parrillo Report, *supra* note 2, at 171-81.

whether resource limitations may cause some documents . . . to remain in draft for substantial periods of time,” and if so, it should either “(a) make clear to stakeholders which draft policy statements, if any, should be understood to reflect current agency thinking; or (b) provide in each draft policy statement that, at a certain time after publication, the document will automatically either be adopted or withdrawn.”⁵⁸

A second major unintended consequence that may arise from a broad mandate for notice and comment on guidance is that guidance may thereby become *so legitimate*—in the eyes of agency officials and/or stakeholders or political overseers—that it may come near to replacing legislative rulemaking altogether.⁵⁹ This would not necessarily be a bad outcome; some critics think legislative rulemaking’s process burdens have risen too high, and this would be a means of radically reducing them. I take no position on this question, but there is no doubt that it is a profound one. If we categorically adopt notice and comment for guidance on a broad basis, we may find that this profound question effectively gets decided without us thinking about it, unless we couple the participatory mandate with some safeguard to ensure that legislative rulemaking continues to be undertaken for some substantial fraction of the agency’s policies.

While I advise that decisions about notice and comment on guidance should have a scope no broader than an individual agency, I am not saying that such decisions should be left to the agency itself. Congressional overseers and the White House can put pressure on particular agencies with respect to their participation policies for guidance, or even their participation decisions regarding individual documents, as when congressional scrutiny (among other factors) caused FDA in 1997 to adopt an unusually participatory procedural framework for issuing guidance (later ratified by legislation), or when OMB successfully pressed EPA to take public comment on certain key guidance documents even though some EPA officials thought the agency should not.⁶⁰ The demands of congressional overseers and the White House play a salutary role on this subject, but those demands are most likely to be well-conceived when pitched at a workable level of specificity.

Thank you again for the opportunity to discuss this important subject. I look forward to the Committee’s questions.

⁵⁸ ACUS Recommendation 2017-5, *supra* note 2, at 61737 (paragraph 11).

⁵⁹ On this possibility, see Parrillo Report, *supra* note 2, at 181-84.

⁶⁰ *Id.* at 169, 185-86.

Chairman GOWDY. Thank you, Professor.
Mr. Narang.

STATEMENT OF AMIT NARANG

Mr. NARANG. Chairman Gowdy, Ranking Member Maloney, and members of this committee, thank you for the opportunity to testify today. I am Amit Narang, regulatory policy advocate of Public Citizen's Congress Watch.

Public Citizen is a national public interest organization with more than 400,000 members and supporters. For more than 40 years, we have successfully advocated for stronger health, safety, consumer protection, and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

Public health and safety regulation has been among the greatest public policy success stories in our country's history. Regulations have made our air far less polluted and our water much cleaner. They have made our food and drugs safer. They have made our workplaces less dangerous. They have made our financial system more stable. They have protected consumers from unsafe products and from predatory lending practices. They have made our cars safer. They have outlawed discrimination on the basis of race and gender and much more.

These regulations are now considered to be bedrock protections widely popular with the public. In short, our regulatory safeguards are to be celebrated and emulated. Yet there is much more progress to be made in addressing threats to the health, safety, environmental, and financial security of hardworking American families.

Unfortunately, President Trump and his administration are taking the country in exactly the opposite direction, embarking on a radical and unprecedented deregulatory agenda that is certainly pleasing corporate special interests by repealing regulatory protections at their behest, but at the expense of making everyday Americans less safe in countless ways.

One of the key drivers of this administration's attack on public protections is Executive Order 13771, the so-called two-for-one executive order, that requires agencies to get rid of existing regulations that protect the public in order to allow for new ones that protect the public. This executive order fundamentally conflicts with numerous statutes that Congress has passed to direct agencies to protect the public in a wide variety of areas, including food safety, consumer protection, environmental protection, auto safety, civil rights protections, and many more.

None of these laws require, much less permit, agencies to only protect the public up to the point that it imposes no new costs on corporate stakeholders. I urge this committee to monitor agency decisions under the executive order to ensure maximum transparency when agencies delay, block, or are otherwise unable to finalize regulatory protections due to the executive order.

Making matters worse, President Trump's claimed motivation for his deregulatory agenda, that it will create economic growth, has been proven flat-out false. In January of this year, Goldman Sachs issued a report that found, quote, "no evidence that employment or

capital spending accelerated more after the election in areas where regulatory burdens are higher,” end quote.

Likewise, in its most recent annual report to Congress on the costs and benefits of Federal regulations, OMB found that regulations over the last 10 years have provided the public with up to \$800 billion in net benefits.

Since the focus of this hearing is on transparency, I want to direct the committee’s attention to a number of deeply troubling instances where agencies are rolling back regulatory protections while actively seeking to avoid transparency.

The first example is the most urgent, as it relates to language in the budget proposal currently being considered for fiscal year 2018 that would exempt the EPA from complying with the Administrative Procedure Act when repealing the Clean Water Rule.

Any attempt to carve out the repeal of the Clean Water Rule from compliance with the EPA, as well as numerous other laws designed to provide transparency and accountability to the public, including the Freedom of Information Act, should be deeply troubling to all members of this committee and Congress, no matter their position on the Clean Water Rule.

More broadly, it sends the message to the public that Congress is willing to give agencies a free pass on transparency and public participation when it comes to deregulation but not when putting regulatory protections in place.

I urge members of this committee to demand the removal of this rider on a bipartisan basis.

Second, reports indicate that the Department of Labor deliberately withheld economic analysis it conducted for a rulemaking that potentially would transfer billions of dollars from the pockets of restaurant servers and workers to the pockets of employers, as Ranking Member Maloney noted.

What is even more unusual is that the rule was reviewed and cleared by the Office of Information and Regulatory Affairs, or OIRA. It is highly uncommon for OIRA to allow agencies to issue rules it has reviewed without any accompanying cost-benefit analysis.

I encourage the committee to scrutinize closely OIRA’s rule and the refusal to release the analysis, which certainly has called into question the integrity of the OIRA review process.

Finally, critical new guidance unanimously approved by the EEOC that would clarify workplace protections against sexual harassment, including based on sexual orientation, has been under review at OIRA since November, with no indication when the guidance will be finalized. With renewed attention on the prevalence of sexual harassment in the workplace, this guidance is needed now more than ever.

Beyond specific rules, agencies under the Trump administration continue to be evasive in disclosing the identities of the Regulatory Reform Task Force officers at agencies authorized to carry out President Trump’s deregulatory agenda. Given numerous reports of conflicts of interest, this lack of transparency only adds to suspicions of regulatory capture by corporate special interests and further undermines the public’s faith in government agencies acting in the public’s interest.

Transparency should not be a partisan issue, and there are opportunities to increase transparency in the regulatory process that deserve bipartisan support, both with respect to specific deregulatory actions taken under the Trump administration and broader reforms, such as making guidance documents more accessible to the public and ensuring that OIRA follows basic transparency provisions and requirements as stipulated in its governing executive orders.

Public Citizen stands ready to work with members of this committee that seek to improve the effectiveness and transparency of regulations that protect working families and consumers.

Thank you.

[The statement of Mr. Narang follows:]

Written Testimony of

Amit Narang
Regulatory Policy Advocate, Public Citizen

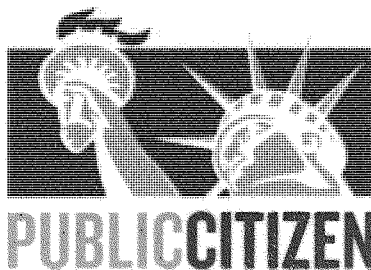
before the

The House Oversight and Government Reform Committee

on

“Shining Light on The Federal Regulatory Process”

March 14, 2018



Mr. Chairman and Members of the Committee,

Thank you for the opportunity to testify today on regulatory policy issues. I am Amit Narang, Regulatory Policy Advocate at Public Citizen. Public Citizen is a national public interest organization with more than 400,000 members and supporters. For 45 years, we have advocated with some considerable success for stronger health, safety, consumer protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest.

Public Citizen chairs the Coalition for Sensible Safeguards (CSS). CSS is an alliance of more than 75 consumer, small business, labor, scientific, research, good government, faith, community, health and environmental organizations joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all. Time constraints prevented the Coalition from reviewing my testimony in advance, and today I speak only on behalf of Public Citizen.

Over the last century, and up to the present, regulations have made our country stronger, better, safer, cleaner, healthier and more fair and just. Regulations have made our food supply safer; saved hundreds of thousands of lives by reducing smoking rates; improved air quality, saving hundreds of thousands of lives; protected children's brain development by phasing out leaded gasoline; saved consumers billions by facilitating price-lowering generic competition for pharmaceuticals; reduced toxic emissions into the air and water; empowered disabled persons by giving them improved access to public facilities and workplace opportunities; guaranteed a minimum wage, ended child labor and established limits on the length of the work week; saved the lives of thousands of workers every year; protected the elderly and vulnerable consumers from a wide array of unfair and deceptive advertising techniques; protected minorities and vulnerable populations from harassment and discrimination based on race, gender and sexual orientation and promoted equality under the law for such populations; ensured financial system stability (at least when appropriate rules were in place and enforced); made toys safer; saved tens of thousands of lives by making our cars safer; and much, much more.

In short, regulation is one of the greatest public policy success stories in terms of benefits to the public and is a testament to the power of Congress in protecting the public through passage of critical, foundational laws such as the Clean Air Act, the Clean Water Act, the Occupational Safety and Health Act, the Consumer Product Safety Act, the Civil Rights Act, various food safety laws, and many more. Strong and effective public health and safety regulations are a reflection of Congress' desire to protect everyday Americans through laws that are still among the most popular and cherished by the public.

Unfortunately, this Administration has sought to roll back regulatory safeguards in radical and unprecedented fashion. Public Citizen's report from last year, entitled "Sacrificing Public

Protections on the Altar of Deregulation,” presents a full accounting of hundreds of regulatory protections that were unilaterally withdrawn by agencies under the Trump Administration before completion based on detailed empirical analysis of data disclosed in the Spring Unified Regulatory Agenda of 2017.¹ In addition, Congress has resorted to the Congressional Review Act, which bypasses normal legislative procedures and accountability, in order to repeal 14 critical regulatory protections² in a variety of areas that were issued near the end of the previous Administration. Finally, agencies have begun the process of repealing rules finalized under the last Administration and delaying others indefinitely by categorizing them as “long term” actions in the most recent Unified Regulatory Agenda.³

President Trump’s Executive Order on regulations, 13771,⁴ is a key driver of deregulatory activity at all agencies. EO 13771 generally restricts agencies from issuing the most important and beneficial new regulations (i.e. significant regulations) unless agencies are able to first identify and remove at least two other existing regulations and which result in costs savings that fully offset costs imposed by new regulations. In other words, agencies are only allowed to protect the public to the extent that it imposes no new costs on corporate stakeholders. Further, the EO places pressure on agencies to ensure that any regulatory protections the agency seeks to adopt must be fashioned in a way that minimizes costs in order to comply with allocated regulatory budgets under the EO, rather than in a way that maximizes the effectiveness and benefits of the regulatory protection to the public. Agencies have already identified hundreds of crucial public protections as subject to EO 13771⁵ and, thus, required to be offset by deregulatory actions. Among those are new lead in drinking water standards, new gun control measures, new vehicle, truck, and train safety standards, dozens of new environmental protections including restrictions on toxic chemicals, safety standards for new tobacco products like e-cigarettes, numerous workplace safety protections, and updates to energy efficiency standards.

President Trump has justified his deregulatory agenda as a means to create economic growth. After one year, the evidence is clear that there has been no such economic growth. Both GDP and jobs figures show that there has been no greater economic growth under this Administration than there was under the last Administration.⁶ Goldman Sachs issued a report in January of 2017 that undermines any claims that deregulation under the Trump administration has led to job or economic growth. Goldman Sachs studied whether job growth and capital spending have been

¹ <https://www.citizen.org/sites/default/files/trump-withdrawn-regs-report.pdf>

² <https://rulesatrisk.org/>

³ <https://www.reginfo.gov/public/do/eAgendaMain>

⁴ <https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs>

⁵ In the most recent Unified Regulatory Agenda of Fall 2017, agencies have begun identifying regulatory actions listed on the Agenda as “regulatory,” “deregulatory,” or otherwise “exempt” for purposes of EO 13771.

⁶ https://www.washingtonpost.com/blogs/right-turn/wp/2018/02/13/president-trumps-deregulation-flop/?utm_term=.a97ce3cff3ae

stronger in sectors and companies that were more highly regulated before the most recent election. According to Goldman Sachs, “[W]e find no evidence that employment or capital spending accelerated more after the election in areas where regulatory burdens are higher.”⁷

In addition to regulations, guidance documents have played an essential role in ensuring that Americans receive the benefits of the aforementioned and other regulatory protections. As discussed more fully later in this testimony, agencies have relied on guidance documents to supplement critical public protections in a wide variety of areas by clarifying the technical details of regulations and their applications to particular situations. It is thus important to maintain the efficient and effective use of guidance documents as an essential tool in helping agencies protect the public. Due to the scope of this hearing, I will focus my testimony on guidance documents in particular and the incorrect perception that agencies issue guidance documents without adequate transparency to the public.

I. What Are Guidance Documents?

The term “guidance documents” does not appear anywhere in the Administrative Procedure Act (APA) but has generally come to be understood as encompassing a wide variety of agency actions that are not considered to be binding rules which typically undergo notice and public comment and are subject to other requirements under the APA. Examples of such actions include general agency interpretations of existing legislative rules, statements outlining how an agency intends to regulate an evolving policy area, training manuals written for internal agency staff, compliance guides directed to the general public, advisory opinions tailored to individual case facts, and memoranda from agency leaders providing direction to agency staff members. Thus, agencies use guidance documents not just to manage internal operations but also to communicate essential information to outside parties.

In certain circumstances, agencies do have the discretion to implement congressional mandates or clarify ambiguities in rulemakings through the use of guidance documents. In other circumstances, agencies are only authorized to implement congressional mandates through use of notice and comment rulemaking. The distinction between guidance documents and notice and comment rules is cemented in the APA which explicitly exempts interpretive rules, general statements of policy, and other agency actions that comprise guidance documents.

When agencies have the authority to do so, agencies may opt to issue guidance documents rather than notice and comment rules because doing so allows agencies to communicate its views on agency interpretations of legal authorities and policies to both regulated entities and the public in

⁷<http://www.aei.org/publication/whats-been-the-economic-impact-of-trumps-deregulation-push/>

a significantly more efficient and expeditious manner than under notice and comment rulemaking. Thus, guidance documents allow agencies to avoid devoting scarce time and resources to unnecessary rulemaking. On the other hand, guidance documents are not legally binding on the public which then restricts enforcement of potential non-compliance with guidance documents. Therefore, agencies must weigh the efficiency advantages that are inherent in guidance documents against the lack of legally binding effect when deciding to adopt guidance documents as opposed to notice and comment rules.

A. Guidance Documents Are Not Being Abused or Overused

Unfortunately, the usage of guidance documents has come under unwarranted criticism based on a mistaken belief that agencies deliberately use guidance documents to place binding requirements on regulated parties while evading rulemaking. In his comprehensive and insightful report for the Administrative Conference of the United States (ACUS),⁸ Professor Nicholas Parrillo states plainly that use of guidance that is then followed by regulated parties “is not because of any ‘intent’ on the part of the official to bind anyone.” Professor Parrillo is certainly correct in dispelling the notion that bad-faith intent on the agency’s part is driving the use of guidance documents. Rather, Professor Parrillo makes clear that structural factors in the regulatory process incentivize both regulators to use guidance in appropriate circumstances and regulated parties to follow and, in many cases, affirmatively seek issuance of guidance documents. Unfortunately, critics of perceived over usage of guidance documents by agencies continue to insist on the dispelled notion that agencies deliberately intend to evade rulemaking requirements by issuing guidance documents that bind regulated parties. Such allegations of agencies using guidance documents to flout rulemaking are soundly rejected by the available empirical evidence. The leading study is a 2010 study by Connor Raso in the *Yale Law Journal*⁹ examining whether federal agencies improperly issue guidance documents instead of legally binding notice and comment rules on a widespread basis. Raso tested this by identifying situations where agencies would in theory have a strong incentive to issue guidance rather than notice and comment rules such as at the end of presidential terms when agencies do not have enough time to complete notice and comment rulemaking or whether agencies issued more guidance documents under divided government in order to avoid congressional scrutiny. The study found no evidence that suggests agencies use guidance documents strategically to make important policy decisions outside the notice and comment process.

B. Guidance Documents Benefit the Public

The enormous variety of guidance documents across agencies makes it difficult to encapsulate the impacts and effects of guidance documents in a broad manner without significant nuance and context. Yet, there is no doubt that guidance documents provide Americans with enormous benefits similar to public health and safety regulations that undergo notice and comment. Below

⁸ <https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-draft-report.pdf>

⁹ Connor Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 *Yale L.J.* 782 (2010).

is a small and non-exhaustive sampling of guidance documents from different agencies that make clear how vital guidance documents are to protecting the public:

- **Opioid and Infectious Disease Guidance:** The Centers for Disease Control (CDC) recently issued guidance directing physicians to limit the prescription of opioid pain medication in an effort to combat the serious and growing epidemic of addiction to opioid pain medication that has resulted in fatal overdoses involving pain medication and illegal hard drugs in many parts of the country.¹⁰ The CDC has also recently issued Zika virus guidance that clarifies the dangerous health impacts of the Zika virus, particularly for pregnant women, and provides guidance for how to avoid contracting the virus.¹¹ The CDC had issued similar guidance for the Ebola virus last year.
- **Lead Guidance:** The Environmental Protection Agency (EPA) has issued numerous guidance documents related to the prevention of lead poisoning among the public and particularly children.¹² These include guidance to homeowners about the dangers of lead in paint and the options for lead abatement and guidance to real estate developers on how to conduct renovations in a safe manner to avoid lead poisoning as well as information on the presence of lead that should be disclosed to prospective homebuyers. EPA has also issued important guidance on the harmful presence of lead in drinking water including information on protecting schools and child care facilities from lead contamination as well as simple and clear fact sheets on the EPA's revisions to its regulations controlling lead in water.
- **Food Safety Guidance:** the Food and Drug Administration (FDA) has used guidance documents extensively to ensure the safety of foods sold in the U.S. and prevent tainted food outbreaks.¹³ Specifically, the FDA has provided clarity on what does and does not constitute "adulterated" foods and how to produce and transport food in a safe manner that avoids contamination. Examples of such guidance include the prevention of salmonella in eggs which leads to food poisoning and best manufacturing practices for infant formula to ensure its safety and quality.¹⁴
- **Airline Safety:** The Federal Aviation Administration (FAA) has used guidance documents to ensure both the safety of airplanes by clarifying manufacturing and operational requirements as well as the safety of passengers by prohibiting passengers from bringing dangerous items onto airplanes.¹⁵

¹⁰ <http://www.cdc.gov/drugoverdose/prescribing/guideline.html>

¹¹ <http://www.cdc.gov/zika/pdfs/clinicianppt.pdf>

¹² <https://www.epa.gov/lead/lead-policy-and-guidance>

¹³ <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/>

¹⁴ <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm384451.htm>

¹⁵ https://www.faa.gov/regulations_policies/

- **Oil and Pipeline Safety Guidance:** The Federal Railroad Administration (FRA) and the Pipeline Hazardous Materials and Safety Administration (PHMSA) jointly issued safety alerts in 2014 warning of the dangers of transporting volatile crude oil by rail and clarifying the need for companies transporting crude oil by rail to notify local authorities when crude oil trains were passing through their jurisdictions and the nature of the crude oil cargo being transported.¹⁶ These actions were taken amidst ongoing crude oil train derailments and explosions and came well before the finalization of regulations that imposed new oil train safety standards.
- **Wage and Hour Guidance:** the Department of Labor (DOL) provides guidance for employees regarding their rights under various labor laws and employers regarding their responsibilities under the law. This guidance is specific to industry sectors and includes guidance on prohibited employment for children and employee rights and benefits under the Family Medical Leave Act.¹⁷
- **Sexual Assault Guidance:** The Department of Education's Office of Civil Rights (OCR) has issued guidance documents to address the growing problem of sexual harassment and assault on college campuses.¹⁸ Title IX of the Education Amendments of 1972 empowers OCR to prohibit sex discrimination in federally funded educational institutions. OCR has routinely issued technical clarification and guidance to provide educational institutions with clarity of their obligations to students under title IX. Those include "equitable" proceedings with respect to allegations of sexual harassment or assault and findings under a clear preponderance of the evidence standard. Unfortunately, the Department of Education has decided to rescind this guidance under the Trump Administration, thereby providing less clarity to educational institutions seeking to police and combat growing instances of sexual harassment on campus.

Agencies have also relied on guidance documents to protect the right of minorities and other vulnerable populations that have historically been subject to discrimination. The following are examples of guidance documents that have promoted racial, gender, and sexual orientation equality:

- **Employment Discrimination Guidance:** the Equal Employment Opportunity Commission (EEOC) issues only guidance interpreting title VII of the Civil Rights Act of 1964 because it is barred by Congress from issuing substantive regulations which implement title VII.¹⁹ Thus, guidance documents are crucial to the EEOC's mission of preventing discrimination in hiring practices and in the workplace.²⁰

¹⁶ <https://www.transportation.gov/briefing-room/emergency-order>

¹⁷ <https://www.dol.gov/whd/fact-sheets-index.htm>

¹⁸ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>

¹⁹ 42 USC § 2000e-12

²⁰ https://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm

- **Disability Discrimination Guidance:** The Department of Justice (DOJ) has issued guidance related to the Americans with Disabilities Act (ADA) in order to clarify the rights of persons with disabilities and to prevent discrimination against such persons based on their disabilities. In 2010, DOJ issued comprehensive guidance that provided standards for state and local governments to ensure disabled access to public facilities, such as wheelchair access.²¹
- **Sexual Orientation Discrimination Guidance:** A number of agencies, including the EEOC, the Department of Education, and the Department of Housing and Urban Development, issue guidance to prevent discrimination in education, housing, and employment based on sexual orientation. Most recently, the DOJ and the Department of Education jointly issued guidance under title IX of the Education Amendments of 1972²² requesting that public education institutions, including higher education institutions, allow transgendered students to use restroom facilities of their preference in order to protect both the personal safety and the civil rights of transgendered students.²³ The Department of Education has also released guidance that aids educational institutions in combatting bullying on the basis of sexual orientation.²⁴ Unfortunately, the Department of Education has rescinded guidance on protection of transgendered students, thereby potentially undermining fundamental civil rights protections for those students.

C. Guidance Documents Benefit Business

One of the primary purposes of guidance documents is to address regulatory uncertainty among businesses as to an agency's interpretation and application of a specific law or regulation. Often times, businesses explicitly request such guidance and rely on an agency's ability to quickly and fully provide such guidance. Within this category, there are certain guidance documents that are issued exclusively for the benefit of businesses and other regulated entities. Any "one-size-fits-all" changes to the guidance document process will make it harder for agencies to issue the following types of guidance documents that are designed to benefit business and industry stakeholders:

- **No Action Letters:** Many agencies use No Action Letters (NAL) to clarify for businesses whether a particular activity violates an agency's regulation. In other words, these letters provide a "safe harbor" for businesses by ensuring that businesses will not be punished when engaging in an activity that could potentially run afoul of a regulation. The Securities and Exchange Commission (SEC) issues many NALs and is the prototypical example. NALs are usually directly requested by businesses that have a strong interest in agencies responding to their requests on an expedited basis. Courts have held that SEC NALs are essentially guidance

²¹ <https://www.ada.gov/regs2010/2010ADASTandards/Guidance2010ADASTandards.htm>

²² 20 U.S.C. §§ 1681–1688 (1972).

²³ <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

²⁴ <http://www.ed.gov/news/press-releases/bullying-students-disabilities-addressed-guidance-america%E2%80%99s-schools>

documents that are exempt from notice and comment requirements. While NALs are directed at individual parties or businesses, the SEC and other agencies make the NALs publicly available on their website and thus NALs have the effect of encouraging other businesses to take advantage of the “safe harbor” to engage in the same activity. In this way, NALs are used to set broad policy without notice and comment. Recently, the Consumer Financial Protection Bureau (CFPB) instituted a NAL process in order to allow innovative and consumer-friendly financial products to be marketed without the possibility of an adverse CFPB enforcement action. CFPB decided that NALs would not be subject to notice and comment because that would “unnecessarily discourage NAL applications and delay the NAL process.”

- **Small Business Compliance Guides:** Congress has required agencies to issue guidance to reduce compliance costs for businesses, and small businesses in particular. Agencies routinely issue “compliance guides” when finalizing a regulation in order to provide regulated parties with a clear and easy to understand manual for how to comply with the new regulation. While these guides have proven helpful for businesses, there is a lack of awareness that such compliance guides exist in the first place due to a lack of agency resources to promote awareness of compliance guides.

D. Trump Administration Usage of Guidance Documents

Despite rhetoric from Trump Administration officials denouncing agency use of guidance documents and claims of alleged overuse of guidance documents by the previous Administration,²⁵ agencies under the Trump Administration have already issued hundreds of guidance documents and, in all likelihood, will continue to do so. For example, Treasury recently issued a notice²⁶ alerting the public that it intends to issue guidance clarifying the application of the so-called “carried-interest” provisions of the recently enacted tax law to private equity and hedge fund managers, many of whom have claimed that Treasury does not have the authority to issue guidance to clarify what are essentially legislative drafting errors that can only be corrected by Congress. The EPA has issued guidance revoking the so-called “once in always in” policy that could incentivize major industrial pollution sources to reverse the progress made in reducing air pollution under the Clean Air Act.²⁷ The Department of Justice recently issued lengthy guidance²⁸ pursuant to Executive Order 13798 stipulating existing protections for religious liberty under Federal laws. Attorney General Jeff Sessions has directed DOJ officials to adhere to the guidance. The Department of Health and Human Services has issued guidance permitting states to refuse Medicaid reimbursement for Planned Parenthood for preventative health services.²⁹ This week, the Department of Education issued guidance that asserts the primacy of

²⁵ <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>

²⁶ <https://www.wsj.com/articles/treasury-issues-tax-guidance-limiting-carried-interest-provision-1519921428>

²⁷ <https://www.vox.com/energy-and-environment/2018/1/26/16936104/epa-trump-toxic-air-pollution>

²⁸ <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-guidance-federal-law-protections-religious-liberty>

²⁹ <https://www.politico.com/story/2018/02/12/trump-hhs-planned-parenthood-policy-338084>

federal authority in preempting state authority to regulate student loan servicers, thereby incentivizing loan servicers to ignore strong state standards preventing such servicers from taking advantage of students with loans or debt.³⁰

E. The Dangers of Guidance Document Reforms

While the available empirical evidence demonstrates that there is no abuse of guidance documents in order to evade the notice and comment rulemaking process, it is impossible to ignore the strong incentive agencies have to avoid what has become an increasingly inefficient and dysfunctional rulemaking process across regulatory sectors and at virtually every agency.³¹ If the Committee believes that agencies should be taking action through notice and comment rulemaking rather than through guidance documents, the solution is to make the notice comment process more efficient and streamlined rather than forcing guidance documents into the notice and comment framework reserved for rulemaking. Turning non-binding guidance documents essentially into rules subject to notice and comment as well as other procedural requirements, such as OIRA review, will do nothing to cure the delays and inefficiencies inherent in the current regulatory process. It will only expand those delays to more agency actions that are designed to address regulatory uncertainty in an expedited manner.

F. Making Guidance Documents More Accessible to the Public

There is a mistaken perception that there is currently inadequate transparency with respect to guidance documents. Under the Freedom of Information Act,³² agencies are generally required to make guidance documents available to the public. Thus, while agencies do typically comply with this requirement, the way in which agencies disseminate guidance documents to the public varies according to each agency. In most cases, it is incorrect to assume that agencies are deliberately withholding guidance documents from the public. Nonetheless, there is certainly room for improvement in making guidance documents more accessible to the public in a fashion that is standardized across agencies. Such an effort would increase public awareness of, and accessibility to, guidance documents and should be supported on a bipartisan basis.

One key difficulty in drafting legislative proposals to standardize accessibility of guidance documents across agencies is the fundamental problem of clearly defining the guidance documents that would be subject to new accessibility requirements. As mentioned previously, there is no current commonly accepted definition of guidance document which certainly should not be surprising given the numerous types of agency actions and pronouncements that can be characterized as a guidance documents. Attempts to define guidance documents in legislative proposals and previous Executive Orders clearly manifest the difficulty of doing so. For

³⁰ <https://www.wsj.com/articles/trump-administration-tells-states-to-stop-regulating-federal-student-loans-1520640480?mod=searchresults&page=2&pos=5>

³¹ <http://www.citizen.org/unsafedelaysreport>

³² 5 U.S.C. 552(a)(1)(D), 552(a)(2)(B).

example, EO 13771 subjects a category of guidance documents, “significant” guidance documents, to the requirements under the EO.³³ The EO defines this category by parroting language from the definition of “significant” regulation under EO 12866³⁴ and then stipulating what *is not* a significant guidance document by reference to numerous agency actions and pronouncements that do not constitute “significant” guidance documents for purposes of the EO. It is telling that one of the most visible attempts to define guidance documents did so by referencing what should not be considered a guidance documents rather than setting forth a clear and simple definition of what is a guidance document.

Congress must be thoughtful and deliberate in setting forth a definition of guidance document under any legislative proposal seeking to make those documents more accessible to the public. Specifically, it would be unwise for such a proposal to contain any definition that is too narrow or highly prescriptive. There is no need to define guidance in problematic ways in order to achieve accessibility and transparency aims. In order to maintain bipartisan support for making guidance documents more accessible to the public, Congress should be very careful in defining guidance documents appropriately.

II. Lack of Transparency in the Regulatory Process under the Trump Administration

In the following section, I detail a number of troubling instances where Congress is seeking to reduce, rather than increase, transparency with respect to deregulatory measures as well as instances in which the Trump Administration has taken deregulatory actions that have raised significant transparency concerns.

A. Exempting the Repeal of the Clean Water Rule from the APA

Congress is currently considering potential omnibus legislation that would fund the government for fiscal year 2018. Tucked into one of the appropriations bills that funds the EPA is a stunning ideological policy rider that would wholly exempt the repeal of the Clean Water rule from compliance with the APA,³⁵ as well as potentially other procedural and substantive requirements under other applicable laws including the Clean Water Act.

The result would be to free the EPA from the fundamental requirements of transparency, reasoned decision-making based on evidence, and public participation required by the APA. In other words, Congress is authorizing the EPA to repeal the Clean Water rule in the least transparent fashion possible thereby foreclosing any opportunity for the public to provide the

³³ <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>

³⁴ https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf

³⁵ Sec. 108, Energy and Water Development and Related Agencies Appropriations Act, 2018 (H.R. 3266).

agency with feedback, and in a manner that may potentially insulate the EPA from legal challenges to the repeal. The supporters of this rider appear to be willing to sacrifice basic transparency requirements and good government accountability measures in order to obtain their preferred policy outcome. This is unacceptable.

The committee's concern with the current lack of transparency in the regulatory process must begin with this proposed ideological rider that seeks to exempt the repeal of the Clean Water rule from compliance with the APA and other statutes governing EPA authority to ensure that our nation's waterways are free of dangerous pollution and toxins. It is imperative that members of this committee who support preserving transparency in the regulatory process, regardless of whether the action being taken is regulatory or deregulatory in nature, urge appropriators and budget negotiators to remove this provision that shrouds the repeal of the Clean Water rule in secrecy.

B. Intentional Suppression of Economic Analysis in the Department Of Labor's Tip Wage Rule

Last month, news reporting revealed that the Department of Labor (DOL) deliberately withheld economic data³⁶ showing that rolling back the tip wage rule would result in significant economic costs to hardworking Americans across the country that rely on tips to make sure they and their families are able to make ends meet. According to the reporting, the Department of Labor conducted an economic analysis to determine the economic impact of rolling back the tip wage rule promulgated under the Obama administration which would have protected tips earned by restaurant workers. Allegedly, the analysis showed clearly that rolling back the rule would result in the transfer of potentially billions of dollars in tips from restaurant workers to restaurant owners and employers. After repeated attempts to refashion the analysis to lower the expected transfer of tip income, Secretary Acosta allegedly directed DOL staff to publish the proposed rule without any economic analysis. The rule was subsequently proposed in the Federal Register without any accompanying economic analysis.

DOL's deliberate withholding of relevant data during a rulemaking process fundamentally undermines the integrity of that rulemaking process. Equally troubling is the fact that the Office of Information and Regulatory Affairs (OIRA) reviewed the proposed rule before it was published and allowed the rule to be published without any economic analysis, thereby significantly undermining the integrity of its regulatory review process. As stipulated by Executive Order 12866, OIRA typically reviews "significant" or "economically significant" rulemakings from Executive agencies before such rulemakings are proposed or finalized by the issuing agency in order to determine that the rulemaking is grounded in credible data and analysis, including economic analysis, and to allow for interagency review of the proposed or final rulemaking. Thus, it is highly unusual for a rule that is reviewed and cleared by OIRA to

³⁶ <https://bna.news.bna.com/daily-labor-report/labor-dept-ditches-data-showing-bosses-could-skim-waiters-tips>

contain no economic or cost-benefit analysis when published. Indeed, the current Administrator of OIRA noted in her confirmation hearing OIRA's role in "ensuring that administrative agencies...base their decisions on the best possible economic and technical analysis " and promised to "ensure the continuity of OIRA's principles...and maintain the integrity of the process."³⁷

Robust congressional oversight and accountability will be critical to getting to the bottom of what happened here. Public Citizen applauds the members of the House Education and Workforce committee who have sought answers and accountability from DOL.³⁸ Members of this committee should request the same accountability and answers from OIRA. In the interest of transparency, OIRA must make available to the public any economic analysis it reviewed that was ultimately not included in the proposed rule and the basis upon which it authorized DOL to publish the proposed rule without the economic analysis (or analyses) it had conducted.

If DOL finalizes the current rule under consideration, it is likely to be overturned and thrown out as "arbitrary and capricious" if challenged in court. Under the APA, the primary law governing agency compliance with the rulemaking process, agencies are required to "consider all relevant factors" when conducting a rulemaking and ensure that the agency provides a "rational basis" for the agency action based on the rulemaking record. In this case, it is clear that DOL did not consider all relevant factors and instead DOL actively sought to exclude relevant data from the rulemaking record in order to avoid undermining the rational and legal basis for their action rolling back the tip wage rule. Courts are likely to find that this rollback is anything but the product of "reasoned decision-making," as required under the APA, and that the suppression of relevant data resulted in a rulemaking that is "arbitrary and capricious" due to the agency's abuse of discretion. These violations of the APA are certainly serious enough to prevent courts from granting DOL chevron deference. Instead, courts are likely to throw out this rule as unlawful under the APA.

If there is a silver lining here, it is that DOL's deliberate concealment of the economic data not only substantially weakens the policy and legal justifications for rolling back the tip wage rule, but it substantially strengthens the justification for keeping the tip wage rule that DOL issued under the previous administration. The economic data clearly shows that the tip wage rule protects the economic security of hardworking Americans and their families. Rolling back the rule will simply take hard earned money from the pocket books of tipped workers. This is exactly why the Department of Labor and Trump Administration sought to conceal the economic data. It is time for Congress to hold DoL accountable for keeping the public in the dark and ensure that DoL gets back to doing its job of protecting hard-working Americans.

³⁷ Rao, N., United States Senate Homeland Security and Government Affairs Committee (June 7, 2017) (<http://www.hsgac.senate.gov/download/testimony-rao-2017-06-06>)

³⁸ <https://democrats-edworkforce.house.gov/media/press-releases/scott-and-dem-leadership-hold-forum-on-administrations-harmful-proposed-tip-rule>

C. Office of Management and Budget Report to Congress on the Costs and Benefits of Federal Regulations

Federal health, safety, and environmental regulations are one of the best investments that our government can make according to cost-benefit figures compiled by OMB on a yearly basis and submitted to Congress under the “Regulatory Right to Know Act.” The report details the costs and benefits of those rules where agencies were able to fully monetize costs and benefits over the preceding ten fiscal years. Every year the report has been issued by OMB, the report has shown that the public health, safety, and environmental benefits of the regulations issued that fiscal year have substantially exceeded the costs to regulated companies and corporations.³⁹

The OMB draft report for 2017, which covers rules issued in fiscal year 2016, once again found benefits of those rules dramatically exceeding the costs. The draft report showed that rules with monetized costs and benefits issued under President Obama’s last year in office provided the public with 6 dollars of benefits for once one dollar in compliance costs for regulated entities. This is a rate of return on investment that more than fully justifies any compliance costs associated with health, safety, and environmental regulations.

The Committee should note that this year’s draft report missed the deadline for submission to Congress by approximately two months. While the report was supposed to be submitted to Congress, at least in draft form, by the end of the calendar year 2017, OMB ended up submitting the report at the end of February 2018. In addition, OMB released the report late on a Friday evening and without any accompanying statement or press release that would draw attention to the report. Public Citizen believes the report provides important information to the public and should be disseminated in a way that maximizes accessibility and awareness by the public.

D. Lack of Transparency With Respect to Regulatory Guidance

There have been a number of troubling developments regarding both the rescission of guidance in less than transparent fashion as well as delay in issuing guidance that is critical to protecting the public without making the reasons for such delay transparent to the public.

I want to focus the Committee on one important area of much-needed oversight with respect to a draft guidance document⁴⁰ from the Equal Employment Opportunity Commission (EEOC) that was sent to OIRA for review in November of 2017 after unanimous approval by the commission and still is under review with no clear indication as to when it will be released to the EEOC for final publication.⁴¹ The guidance clarifies the application of laws administered by the EEOC in preventing both sexual and sexual orientation –based harassment. This is a much-needed resource for employers at a moment when renewed public attention on sexual harassment,

³⁹ <https://www.whitehouse.gov/omb/information-regulatory-affairs/reports/>

⁴¹ <http://thehill.com/regulation/administration/373938-harassment-guidance-for-employers-awaits-approval-from-white-house>

including based on sexual orientation, has focused on ways that government action can combat harassment in the workplace.

It is disappointing to see OIRA continue to review this guidance much longer than the 90 days generally allowed under EO 12866 for OIRA regulatory review. OIRA has made no public indication as to why it has not yet completed its review of the guidance or on what basis it asserted authority to review the guidance in the first place. Because existing OIRA authority to review guidance is quite narrow as compared to regulatory review, OIRA's review of guidance is far more selective and thus indicative of potential concern and opposition to the guidance by OIRA, the Administration, or both. In general, Public Citizen encourages OIRA to make clear when it invokes the authority to review guidance, on what substantive or procedural basis OIRA has sought to review the guidance including any concerns OIRA may have with the guidance, and strictly follow the review periods laid out in EO 12866 in conducting and concluding its review of guidance.

III. Reform Measures to Increase Transparency under the Trump Administration:

There are several areas that present opportunities for the Trump Administration and Congress to increase transparency on both regulatory and deregulatory actions. While the regulatory process is already subject to multiple requirements for reasoned decision making and transparency, certain gaps in transparency persist in the regulatory process.

A. Lack of Transparency at OIRA

A series of GAO reports, beginning in 2003,⁴² have documented numerous transparency concerns regarding the regulatory review process at OIRA. In multiple reports, GAO has found that OIRA does not comply with many of the most important transparency provisions in Executive Order 12866, the primary Executive Order governing OIRA's regulatory review process. OIRA has thus far been unwilling to adopt recommendations that have been made repeatedly by GAO, most recently in 2016, to improve the transparency of its regulatory review process.

The most crucial reform, in terms of creating transparency at OIRA that is on par with the Executive agencies it oversees, would be for OIRA to disclose the substance of the changes it makes to draft proposed and final rules submitted to them for review. One of the virtues of the notice-and-comment rulemaking process by which agencies adopt significant regulations is its inherent transparency. Agency justifications for its decisions regarding the substance of the rule, including its response to comments and agency studies or analyses of the rule, form the transparent basis for adopting the rule. The *Federal Register*, where agencies publish their

⁴² Government Accountability Office, *OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929

regulatory actions and accompanying analyses, is the cornerstone of transparency in the regulatory process.

By contrast, almost none of the substantive changes that OIRA makes to draft agency rules during its review are required to be disclosed to the public.⁴³ Irrespective of the number and importance of those changes, the public only gets to see the version of the rule in the *Federal Register* with those changes already incorporated. In practical terms, this means that OIRA is able to escape accountability for any changes to a regulation it reviews. This certainly makes it difficult to assert that the OIRA review process improves regulations since OIRA does not show its work. In the rare instance where the agency issuing the rule discloses requested changes and edits during the OIRA review process, attribution of the changes is not disclosed meaning the public is unclear whether OIRA requested the changes or potentially another agency that submitted comments during the interagency review process.

B. Lack of Transparency under EO 13777

In order to implement EO 13771, President Trump issued EO 13777⁴⁴ which largely assigned duties and responsibilities to newly created “regulatory reform task forces” which would oversee implementation of EO 13771 at each agency. While EO 13777 gives considerable authority to these task force officers, one stunning omission is any requirement to disclose the identity of the task force officers themselves. Furthermore, many agencies have been resistant to disclosing the identity of these officers, despite EO 13777 having been issued over a year ago. It is critical that the public know which agency officials are carrying out the deregulatory agendas at each agency and that the public have confidence such officials are not taking action that present a conflict of interest by benefitting those that formerly employed such officials.

C. Lack of Transparency Regarding How Deregulation Benefits President Trump, White House Officials, or Top Agency Officials

Recently, there has been increased interest in revisiting an agreement between the Internal Revenue Service and OIRA that would result in IRS submitting greater number of regulatory actions to OIRA for regulatory review. When the GAO studied the issue, it included statements from a former OIRA Administrator that indicate one of the rationales for excluding OIRA review of IRS rules was to “insulate the Executive Office of the President from the charge that it might use OMB’s review of IRS for political purposes.”⁴⁵

There are a significant number of instances in addition to the one above where deregulatory actions taken by this Administration could potentially directly benefit the President himself or

⁴³ Rules promulgated under the Clean Air Act by the Environmental Protection Agency do require that substantive changes made by OIRA to draft proposed and final rules be disclosed.

⁴⁴ <https://www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda>

⁴⁵ Government Accountability Office, Treasury and OMB Need to Reevaluate Long-standing Exemptions of Tax Regulations and Guidance, GAO-16-720, at pg. 26.

top officials in his Administration. Last year, Public Citizen released a report⁴⁶ with Rep. Cicilline that outlined over a dozen examples ranging from the repeal of the Clean water rule potentially benefiting golf courses owned by President Trump's business holdings to DOL's tip wage rule potentially benefitting casinos or restaurants owned by or affiliated with President Trump.

In order to make such potential conflicts of interest transparent to the public, Rep. Cicilline introduced the DRAIN the Swamp Act (H.R. 4014) which would require agencies to analyze the potential direct benefits of any significant regulatory action, including repeals, to President Trump and top government officials. Public Citizen encourages members of Congress to support H.R. 4014 in order to provide the public with a clearer picture as to how members of the Administration, including the President, are benefitting from deregulatory actions that they direct.

⁴⁶ <https://www.citizenvox.org/2017/10/11/deregulating-dollars-trumps-anti-regulation-agenda-boost-pocketbook/>

Chairman GOWDY. Thank you.

The gentleman from Tennessee, Judge Duncan, is recognized.

Mr. DUNCAN. Well, thank you very much, Mr. Chairman.

About a year and a half ago, I read about a new book by a prominent Boston lawyer who was educated at Princeton and Harvard, and he wrote this. He said, quote: "The average professional in this country wakes up in the morning, goes to work, comes home, eats dinner, and then goes to sleep, unaware that he or she has likely committed several Federal crimes that day. Why? The answer lies in the very nature of modern Federal criminal laws, which have exploded in number but also have become impossibly broad and vague," unquote.

And while that quote pertains to Federal criminal laws, it really applies all over the scope of Federal regulation. They have exploded in number, to such an extent that the staff has provided us with an article from the Competitive Enterprise Institute entitled "Ten Thousand Commandments," and they estimate in this article that the annual cost, the yearly cost of Federal regulatory activity is costing our economy as much as \$2 trillion a year.

And what I've noticed over the years is that the more heavily regulated any industry becomes, it ends up in the hands of a few big giants. And I know the Congress, several years ago, passed the Dodd-Frank law. Before we passed that law, the five largest banks had 22 percent of total deposits in this country; now they've got 45 percent. And there have been hundreds of small banks and credit unions that either have gone out of business or have been forced to merge or have been bought out.

And so we passed a law aiming at the big giants, but we hurt the little guys. And it seems that applies in almost every industry.

Ms. HARNED, have you noticed that same trend?

Ms. HARNED. Absolutely. I've seen it my whole career, including before I was at NFIB. We represented at my food and drug law firm a small-business owner, actually a couple, that were targeted by the DEA. And it was through that process—at the time, they were trying to get at, you know, the meth lab issue, which is an important one. But you saw, through the regulations, through all of that, a more consolidated part of that industry.

Later, you saw it in grocery stores when it came to WIC programs. And I've seen it in—you can really see it in so many industries. And Dodd-Frank is a perfect example. It was the community banks that were getting closed, not the big ones.

And so there's a reason for this. The small-business owner is the one doing the regulatory compliance. They do not have legions of attorneys to scour the regulations of the Federal Register, much less the guidance documents we're here talking about today.

Mr. DUNCAN. When the FDA was small and far less bureaucratic than today, many years ago, we had very many small companies in the drug business. Now the drug business is in the hands of a few big giants.

Mr. Noe, I saw you shaking your head up and down. Have you seen this in your industry?

Mr. NOE. Sir, I think it's an across-the-board issue. And you've even heard, you know, some of the leaders of the largest banks talking about how Dodd-Frank created a moat to help them keep

competitors out. So there can be a very unfortunate effect where, you know, larger entities can try to use regulations as a barrier to entry to create a competitive advantage vis-a-vis smaller entities. I think that's true across the board.

Mr. DUNCAN. I notice also in some of the material we've been provided that fewer than 200—that the committee requested information on more than 12,000 guidance documents. Fewer than 200 guidance documents were submitted to the Government Accountability Office, as required by the Congressional Review Act.

Ms. Nguyen, do you think it's accurate to say that the Congressional Review Act is being ignored by most of the agencies?

Ms. NGUYEN. Based on our recent work, we found that non-compliance with CRA does exist for the periods that we reviewed, so during the transition periods as well as nontransition periods. So what it means is that the most common deficiency that we found includes the provision for agencies to provide Congress with adequate time to review regulations.

Mr. DUNCAN. Well, I can tell you, I was a lawyer and a judge before I came to Congress, and yet there's so many laws and rules and regulations on the books in this country today, I don't think they've even designed a computer that can keep up with all of them, much less a human being.

And as this article that I—this book I quoted from, I think it's accurate to say that almost everybody in this room has violated several Federal laws, rules, and regulations. They didn't mean to, they didn't know they were. But with this explosion of laws, rules, and regulations, it's happening all across this country today, and it's a very sad thing.

I yield back.

Mr. MEADOWS. [presiding.] I thank the gentleman from Tennessee.

The chair recognizes the gentlewoman from New York, Mrs. Maloney, for 5 minutes.

Mrs. MALONEY. Okay. Thank you, Mr. Chairman.

In 2016, the Obama administration's Department of Health and Human Services sent a guidance letter informing States that it's against the law to terminate Medicaid providers, particularly family-planning providers like Planned Parenthood, for ideological reasons.

This guidance came at a time when some States were aggressively trying to ban and defund Planned Parenthood simply because they provide family-planning services as well. They based their efforts on unsubstantiated allegations made by David Daleiden, who circulated misleading and heavily doctored videos in 2015.

I would point out that our very committee conducted an exhaustive investigation of these claims, and we concluded, on a bipartisan basis, that his allegations were completely false. Even our former chairman, Representative Chaffetz, went on national television to tell the world that we here on this committee found no evidence that they broke the law. He sat right here in this chair, and he said he found—he, quote, “found no wrongdoing,” end quote.

Yet some States and outside advocacy groups continue to cite these discredited claims as a rationale for continuing to target Planned Parenthood to this day.

In January, the Trump administration rescinded the Obama-era guidance in a follow-on guidance letter to State Medicaid directors.

Last month, Ranking Member Cummings sent a letter to the Department of Health and Human Services raising the concerns after a whistleblower provided documents showing that an extreme anti-choice group known as Alliance Defending Freedom was behind this rescission. The whistleblower provided a draft guidance letter written by the group, and it appears that HHS rescinded the Obama guidance at the urging of this group.

So I'd like to ask Mr. Narang, in your view, is it a best practice to consult secretly with one outside group while not consulting at all with other groups that would be affected by agency guidance?

Mr. NARANG. I do think that sounds like an improper use of guidance in this instance. And it is troubling to me that it potentially was adopted at the behest of one particular individual or group.

Mrs. MALONEY. And should HHS have conducted additional informal outreach to other stakeholders, such as Planned Parenthood, as well?

Mr. NARANG. I do think that it would have been more appropriate to also include Planned Parenthood in guidance that would directly potentially affect them.

Mrs. MALONEY. And, Mr. Narang, what other steps should HHS have taken?

Mr. NARANG. Well, as I was saying, I do agree that it would be an improvement to make guidance more accessible, which can be termed more transparent, but I think the key is making it more accessible to the public. So this type of guidance, it would have been helpful, clearly, to make it accessible to the public, potentially in draft form.

Mrs. MALONEY. Okay.

And, Professor Parrillo, you wrote a report on these issues that was the basis for the Administrative Conference's best practices guide. Would you agree that it is generally not a best practice to consult secretly with one outside group while not consulting at all with other groups that would be affected?

Mr. PARRILLO. Ms. Maloney, there are a variety of means for agencies to take stakeholder input on guidance.

One of them is targeted outreach, in which there's not a public announcement that the guidance is being considered, but, rather, the agency selects certain stakeholders to talk to. This has the—

Mrs. MALONEY. Since my time is limited, could I just specifically ask, what would have been the best practice in this situation?

Mr. PARRILLO. In the case of targeted outreach, I think agencies would typically get diverse points of view, multiple sides.

Mrs. MALONEY. Okay.

The Obama guidance document clarified the law. It stated what the Social Security Act and accompanying regulations require.

So, Mr. Narang, despite what the Trump administration may be trying to do, it cannot contravene Federal law, correct?

Mr. NARANG. Well, that's true. And it will likely end up in court if that's the case.

Mrs. MALONEY. So, at this point in time, under the law, States still may not refuse to provide Planned Parenthood with funding just because they have ideological disagreements with them. Is that right, Mr. Narang?

Mr. NARANG. Guidance documents are nonbinding.

Mrs. MALONEY. Okay.

My time is almost up, but I'd just like to close by saying it's good to hear that, at least at this point in time, States cannot refuse to pay Planned Parenthood for Medicaid services lawfully provided.

Thank you.

Mr. MEADOWS. The gentlewoman's time has expired.

So, Mr. Narang, I want to make sure that that last comment—so you're saying guidance documents are nonbinding. That's your official testimony here today?

Mr. NARANG. That's not just my official testimony; it is the very nature of guidance documents.

Mr. MEADOWS. All right.

The gentleman from Ohio is recognized for 5 minutes, Mr. Jordan.

Mr. JORDAN. I thank the chairman.

I first want to start by just saying the assertions made by the gentlelady from New York—I couldn't disagree more.

First of all, remember, those videos that were produced, the day after the first video came out, Cecile Richards issued an apology. Last time I checked, you don't apologize unless you've done something wrong.

And the group who said that they were heavily edited and changed, guess who that group was? Fusion GPS. We know how much you can trust them. Fusion—the same organization that was paid by the Clinton campaign, the DNC, to put together this dossier, “salacious and unverified.” Not my words; former FBI Director James Comey's words under oath in front of a congressional committee. That's who said those tapes were heavily edited. You can't trust that. I mean, that was just ridiculous.

Mr. Noe, let me get back to the subject at hand. So let me summarize—I think I'm summarizing, and then I want your response.

So, when I look at what GAO reported and the work that the oversight staff has done in this area, it seems to me you could say some agencies are actually just skirting the whole rulemaking process altogether, trying to get around it. Some are actually exempt. The IRS has this memorandum of understanding that they don't even really have to follow the rulemaking, the CRA process. And then a whole bunch of them use the guidance rules versus actually going through the formal process. In fact, I think it was, like, 90 percent of the rules issued are actually guidance. Like, 12,000 was what the staff determined, the committee staff determined.

So you have all that going on, but yet we still have this CRA Act where Congress can get rid of some of these and we can get rid of them. And we've done 16 in 1 year.

So is that kind of an accurate sort of overall assessment? Some are skirting it. Some don't even have to follow them, they're exempt, namely the Internal Revenue Service. And then those that do go through any kind of rulemaking process, it's largely guidance and not the actual formal rule itself. Is that accurate, Mr. Noe?

Mr. NOE. Congressman Jordan, yes, it is.

I was the lead Senate counsel in the Congressional Review Act, and I can tell you it was Congress' intent that all the covered rules would be submitted. And they haven't been. And that's something everybody should be concerned about.

I mean, I think the good news here is that it's very easy for the agencies to comply. We all have email. It's easy to send your rule to Congress. And they haven't done it.

And, unfortunately, this pattern of Congress imposing procedures for the purposes of transparency and accountability on the agencies—and as soon as they get hold of that mandate, they often make Swiss cheese out of it.

Mr. JORDAN. Why is the IRS exempt?

I mean, one of the findings the committee staff and GAO found was only 1 of more than 200 tax regulations issued was determined by the IRS to be significant, which I find interesting. My guess is taxpayers might think more than 1 out of 200 is actually significant, but somehow the agency felt like only 1 was significant.

So why are they exempt? Why do they get the special deal? It seems to me that's the one agency you'd want to make sure they're doing things exactly by the book and as transparent as possible, particularly in light of their history, recent history.

Mr. NOE. I guess it seems that they're exempt because they say so.

I used to work at the Office of Management and Budget reviewing rules. There is a memorandum of understanding about what rules should come over from the IRS. They have driven a Mack truck through that.

And I would just refer you to the Wall Street Journal piece written by former Clinton OIRA Administrator Sally Katzen and former Bush OIRA Administrator Susan Dudley that points out that that should come to an end.

Mr. JORDAN. And it seems to me, in light of their recent history, an organization with the power and influence that the IRS has and exercises over Americans' lives, their history of specifically targeting conservative groups—they did it in a systematic way, they did it for a sustained period of time, they did it—it seems to me all the more reason to have them follow the rulemaking process and be subject to OIRA as we move forward.

Mr. NOE. Yeah, I'm hopeful—

Mr. JORDAN. Do you think we need legislation to do that, to overturn this memorandum? Or what?

Mr. NOE. You know, I think maybe calling them up here and asking them—

Mr. JORDAN. Oh, we're more than willing to do that. Yeah.

Mr. NOE. —to answer to that.

One reason I say maybe if Congress were to step in here is, honestly, I think, you know, they've had years to comply with these executive directives and they have made Swiss cheese out of them. So I think they either need to come to an understanding with you all—

Mr. JORDAN. I think the chairman and I would be happy to call them back.

Mr. NOE. —they're going to comply or else they're going to face legislation.

Mr. JORDAN. We'll probably bring you back, too, and talk about it when we have the IRS in here as well.

But thank you, Mr. Noe.

Thank you, Mr. Chairman. I yield back.

Mr. MEADOWS. I thank the gentleman's recommendation for a followup hearing with some of the individuals. I can assure you that not only will we have a hearing but we will go ahead and follow up. And any recommendations for other potential witnesses who abuse the system would be welcome for this committee.

The chair recognizes the gentlewoman from the District of Columbia, Ms. Norton, for 5 minutes.

Ms. NORTON. Thank you, Mr. Chairman.

Early in the Trump administration, there emerged a rule that—so-called two-to-one rule—we'll repeal two regulations for every new regulation. And I'm concerned with whether or not this rule violates the Administrative Procedure Act.

Now, one can understand that a new administration might well want to overturn some regulations that they regard as burdensome or otherwise. That is perfectly rational. But the APA, the Administrative Procedure Act, requires a rational basis for all parts of rule-making.

Now, sacrificing two for one does not seem to me to be a rational basis. Pass one rule that helps protect the air we breathe; get rid of another rule that protects the water we drink. I'm not even sure how one would proceed.

Ms. Nguyen, do you think there could be an APA concern here, a procedural concern, with the two-for-one rule?

Ms. NGUYEN. GAO does not take a legal position—

Ms. NORTON. I didn't ask you for your legal position. Do you think there could be an APA—and surely you know about that—concern with a blanket two-for-one rule?

Mr. CRAMER. I'm Robert Cramer from the General—

Ms. NORTON. Please sit down at the table so you may be heard.

Mr. CRAMER. Okay.

I think the question you're posing is a legal question, whether there is a violation of some provision of the APA as a result of this executive order. We haven't considered that, so we can't, then, express an opinion at this—

Ms. NORTON. Do you think it is appropriate for you to consider that? I can understand you may not have done so. I am asking you, is it appropriate for you to do so, given the regulations that have been overturned and the two-for-one rule.

Mr. CRAMER. When we receive requests from Members of Congress for opinions—

Ms. NORTON. I am asking for an opinion now. And I ask you to write the chairman of the committee your opinion on whether the two-for-one rule is in keeping with the Administrative Procedure Act.

Mr. Parrillo, do you have a view, at this point, on that?

Mr. PARRILLO. I have not studied the issue enough to give an opinion.

The argument that a challenger would make would be that a particular rescission of a rule is arbitrary or capricious, because the reason for it was in order to make room for this other rule that is not sufficiently related.

On the other hand, there is, for example, some D.C. Circuit precedent to suggest that as long as the rescission of a rule can be justified on the official record, then political pressure regarding the choice that an agency makes between different possible regulatory choices, each of which could be justified in themselves, that that is not untoward.

Now, this is a controversial issue, in terms of whether this D.C. Circuit precedent is a good idea, but that is to give you an idea of the arguments on both sides.

Ms. NORTON. Mr. Narang, there is a court suit, and I understand standing has been an issue, but, perhaps, you could tell us the basis for an attack on the two-for-one rule.

Mr. NARANG. Well, I think this is a very good question. And, as much as I would like to answer it, unfortunately, I am not able to, due to our pending litigation challenging the executive order as unconstitutional. It has not been resolved on the basis of standing just yet. The court has—

Ms. NORTON. What do you argue in court?

Mr. NARANG. We are arguing that the executive order fundamentally violates certain clauses in the Constitution, namely, the take care clause that the President takes care that laws are faithfully executed.

If I could take a minute to talk about the real world impacts of this executive order and illustrate it. It is going to make it very difficult, if not impossible, I believe, for agencies to issue the most important beneficial regulations to the public.

Let's take the lead and drinking water standard rule. I think we can all agree it is much-needed and it will be enormously beneficial. It will likely be quite costly, as well, and it is necessary for the EPA to offset those costs. We are talking about offsets that are not that available to agencies.

Over the course of the last year, the administration said that they have only about \$560 million in regulatory offsets. If the lead and drinking water rule costs more than \$560 million, but provides massive benefits that outweigh the costs, they still will not be able to issue the rule, and that is the deregulatory offsets for all agencies, just for one rule. It really is going to be very difficult to protect the public with this executive order in place.

Ms. NORTON. Thank you very much.

Chairman GOWDY. The gentlelady yields back.

The gentleman from North Carolina.

Mr. MEADOWS. Thank you, Mr. Chairman.

Ms. Nguyen, let me come to you, because the gentleman at the end of the table, Mr. Narang, said that guidance is nonbinding.

In your expertise, would you suggest that the agency's view all guidance as nonbinding?

Ms. NGUYEN. Regarding our past work looking at guidance, guidance is typically nonbinding. But for the IRS, we found that they consider their guidance to be authoritative because their examiners

are bound by the statutes and what they are able to do. We don't have a particular recommendation in that——

Mr. MEADOWS. So is there a statute that would say that the IRS guidance should be binding and all other agencies should not? Is there a statute that says that? Not an interpretation, but a statute.

Mr. CRAMER. If I may answer.

Mr. MEADOWS. Sure.

Mr. CRAMER. No, there is no statute.

Mr. MEADOWS. There is no statute, so there is no law that would suggest that the IRS guidance should be treated differently than other agencies, is that correct? Is that your sworn testimony?

Ms. NGUYEN. It is important to know why the IRS, many of their——

Mr. MEADOWS. I don't want you to opine.

Is there a law that would suggest that the IRS guidance should be treated differently than guidance from other agencies, yes or no?

Ms. NGUYEN. There is no statute.

Mr. MEADOWS. Okay. So if there is guidance, that they continue to put out, that has the effect of law, would you suggest, and I will let your counsel answer this, would you suggest that they are actually infringing on the legislative process of Congress if, indeed, they are putting forth guidelines and rules that have the effect of law, but yet are not warranted by statute?

Mr. CRAMER. If the IRS——

Mr. MEADOWS. I need you to speak into the mic

Mr. CRAMER. If the IRS is issuing guidance that is binding on the regulated community, the public, that would be a violation of the APA——

Mr. MEADOWS. Okay. And I agree with you. And so let me tell you the problem that I have here. Because they have issued a number of different guidances, and we have a letter before the GAO right now, as it relates to what I call the silent returns and the fact of the implementation of the Affordable Care Act. And so as we are asking you—and I understand you only have two reviewers that review this for the entire GAO, is that correct?

Mr. CRAMER. Actually, we don't have a dedicated staff to these.

Mr. MEADOWS. So it is even worse than two reviewers, okay.

So as we go with this, here is my concern. If the IRS is able to do rules and regulations at the pace of 9 to 10 rules a day, and our action, under the Congressional Review Act, would require a laborious month, two month, three month process to overturn that, do you see how Congress would be at a disadvantage of them encroaching in on our legislative jurisdiction?

Mr. CRAMER. Certainly. The Congressional Review Act was intended to give Congress the ability to oversee agency rulemaking and to place a check on old rulemaking.

Mr. MEADOWS. So would you also, would the GAO also, and, as I say, we have a request there, indicate that if, indeed, the IRS has not followed a statute that would give them the ability to write guidance, then they do not have really a legal basis for that guidance, other than a memo of understanding, how could it be binding on the American taxpayer if, indeed, there is not a statute that would support their guidance and rulemaking?

Mr. CRAMER. If a person affected by the guidance challenged that in court, a court could rule on whether it is binding.

Mr. MEADOWS. So are you suggesting, since I am affected by that, are you suggesting that we should file a lawsuit against the IRS, instead of just actually overturning or giving Congress the ability to overturn that?

I guess here is my concern, and I will cut to the chase on this long, laborious line of questioning. We have a request into GAO. GAO is wanting us to check with the IRS and the Department of the Treasury to have them opine on whether they believe that their guidance actually is mandated. And you are telling me today, with this testimony, that they believe that they are in compliance.

Why would we ask the very agency, of whom they believe is doing it correctly, to opine on whether they are doing it correctly or not? Why would it not be a GAO decision to say that this has the operation of rules and laws and is subject to the Congressional Review Act?

And I will yield back to the chairman, and if he gives you time to answer that, that is certainly within his purview.

Chairman GOWDY. I did find the gentleman's line of questioning to be long, but not laborious, so I would allow time for an answer in the fullest way you want to give it.

Mr. CRAMER. I will be happy to answer the question.

We have been asked to give an opinion on whether a specific IRS action is a rule for purposes of the Congressional Review Act.

As part of our standard procedure, whenever we are asked questions of that nature, we do reach out to the agency because we need to hear their views on the law and come to an understanding of why it is that they did what they did, at least in their view. It is kind of like a judge, when he has to decide a case, has to get, from both sides, their view on the law.

That is the process we are following. We are just trying to get the full picture, legally, so that we can, hopefully, make the right decision.

Chairman GOWDY. I want to thank the gentleman from North Carolina, who has become as much of an expert as any Member of Congress can be, in this important, but difficult and challenging subject matter area. So I thank Mr. Meadows.

The gentleman from Iowa is recognized.

Mr. BLUM. Thank you, Chairman Gowdy, and thank you to our panelists for being here today.

I am not a lawyer. I am a career small business person. And a wise person once said the following, and it has stuck with me ever since: The complex favors the large.

And someone mentioned earlier in their testimony that regulations end up building moats around large businesses. In fact, over the last 8 years, regulations have driven industry consolidation. Call me old-fashioned, but I think industry market forces should drive consolidation, if there is any, not regulations.

I looked the number up. Under President Obama's administration, we added 20,642 new regulations on the books. I mean, we are called "regulation Nation," and yet we want our businesses to compete globally and provide good-paying jobs with good-paying

benefits. Of course we all want that. But we have a 600-pound sack of regulations on every business' back.

Regulations have driven consolidation in the banking industry with Dodd-Frank; healthcare industry with the ACA Act; agriculture, I am from Iowa. I don't know about you, but I don't think it is good for our country, and it is not good for our citizens to have five companies controlling our financial sector, five companies controlling our food supply, and five companies providing our healthcare.

We have a lot of lawyers in Congress, probably too many actually, with all due respect. We need more people who have met a payroll. Most folks have never met a payroll. I have met a payroll for over 20 years.

So I would like to ask Ms. Harned—that is the correct way to pronounce that, I hope—you are with NFIB, what type of impact does this have on small businesses, all the regulations?

Ms. HARNED. Right. So we have done numerous surveys on this, because regulations have been a perennial problem for small-business owners. And, honestly, it is always the top three problems, second only—or third only to taxes and health insurance, regardless of if it is good or bad, as far as how many are coming out of the regulatory state.

Complying with regulations is a problem for small-business owners because 72 percent of those employers that have ten or fewer employees are the regulatory compliance officer. They are reading the rule and they are trying to figure out how to comply with it.

What are they not doing? They are not managing their business. They are not growing it, they are not managing staff, and they are not trying to get new customers. And that, we think, is not helpful for the economy. And, honestly, that is very much, I think, why you will see, especially in these heavily regulated areas, more consolidation.

Mr. BLUM. Two trillion dollars, somebody mentioned earlier, it costs the economy every year.

In small businesses, could they pay their employees more or could they offer better healthcare to their employees if they weren't paying all these costs? We don't want no regulations, okay. We just want a happy medium, happy balance. If they had less regulations, could they help their employees out more?

Ms. HARNED. Absolutely. All of the research that has been done on this has shown that the disproportionate burden is real cost, I think. One study recently, \$10,000 per employee for small employers to comply with regulation. When you consider the fact that our members at NFIB, on average, net \$50,000 to \$75,000 a year, they are not counting their gold coins. This is real dollars that they can't afford to spend.

Mr. BLUM. Counting their bit coins or their gold coins?

Mr. Noe, the same question to you.

Mr. NOE. I think this is a basic problem. I think what makes our country great is that it is a free market democracy, and that starts with the free market and all the benefits it can deliver in terms of wealth creation, economic security, jobs, and all the other benefits.

Certainly if there are market failures, there should be addressed things like emissions, environmental health, and safety standards that I feel so strongly about. Those are all important issues that should be addressed by a regulatory system, but we ought to do it in a rational way.

I think there should be a congressional requirement that all regulations should do more good than harm.

Mr. BLUM. Mr. Narang, 20,000, not that we are counting, 20,642 new regulations in the Obama administration. How much is enough? How much is enough? How much do you think businesses can handle before we don't have any businesses?

Mr. NARANG. At Public Citizen, I have met many individuals that have lost loved ones due to a lack of effective strong regulations that have had children have asthma due to being sited close to polluting sources. It is very important to hear from all voices in this debate, and so it is critical to hear from small-business owners and small business representatives. But I think it is just as critical to hear from the folks, the average Americans, that benefit from regulations on a daily basis. We all benefit from regulations on a daily basis.

Mr. BLUM. Can we keep adding 20,000 regulations every two terms, two administrations, can we keep doing that?

Mr. NARANG. I have many stories to share where there was a lack of adequate and effective regulation.

Mr. BLUM. Is that the exception or the rule?

Mr. NARANG. I don't think it is the exception.

Mr. BLUM. You don't think so?

Mr. NARANG. Well, let me say this. As much as it is my honor and pleasure to testify here today, I really would encourage this committee to hear from folks we talk to at Public Citizen, and other organizations that work with us, that benefit from regulations and that have been dramatically harmed by a lack of adequate and strong regulations.

Mr. BLUM. I yield back my time, Mr. Chairman, that I do not have.

Chairman GOWDY. The gentleman from Iowa yields back.

The gentleman from Alabama is recognized.

Mr. PALMER. Thank you, Mr. Chairman.

I want to begin with the lady from the GAO, Ms. Nguyen.

In your written testimony, you talked about regularly evaluating whether issued guidance is effective and up to date. Does the GAO have any estimate of the percentages that were not considered effective and up to date of the regulations?

Ms. NGUYEN. We haven't done work to determine the extent to which how much is done.

I want to share an example of an agency who does have procedures in place to review whether or not guidance is current. DOL, for example, has this process in place. And through this process, DOL was able to reduce 85 percent of its guidance for a subagency.

Mr. PALMER. I appreciate that. I am a big fan of the GAO, by the way. I think you guys do great work, but I try to utilize your work so the questions that I am asking is in a context of how do we improve a situation. And so when you have requirements—these are requirements imposed on the agencies and they don't

comply. I mean it is great to point out that one does, but they all should—are there any penalties, any remedies applied for those who fail to comply?

Ms. NGUYEN. As noted in our report, we have made recommendations to agencies to improve their adherence to OMB requirements for significant rules guidance, and also to adhere to internal controls for nonsignificant guidance.

Mr. PALMER. I appreciate that, and I hate to cut you off, but I have only got a few minutes left.

That is part of the problem we see time and time again. It is the same thing with improper payments. There are laws actually passed by the Obama administration, signed by the President, that requires agencies to report the improper payments, but they don't. The GAO writes a report and has recommendations, but there is no enforcement. That is a huge issue. I mean, what good does it do to have these requirements if nobody complies?

Ms. NGUYEN. GAO does not have enforcement authority, although we do have a good record of agencies implementing our recommendations. Generally, we have close to an 80 percent implementation of recommendations, and we believe this is the case because of the quality of our work.

Mr. PALMER. Okay. I want to make sure you understand. I am not assigning this responsibility to the GAO. I am simply pointing out, this is a public hearing, for the public to understand, that we don't require the agencies to comply with the guidelines that we give them. Eighty percent might be a B-minus. I think we owe it to the taxpayers to be an A-plus. We owe it to the people trying to create jobs to be an A-plus.

And on another point here, under the Congressional Review Act, the agencies are required to submit new regulations for congressional review. Do you have any idea how many regulations that were not submitted to Congress for review?

Mr. CRAMER. If I may, I will handle that question. We do track everything that we receive. So if asked whether we have received a particular rule or set of rules, we can check our database to see.

We do not know, at this point, for example, in 2017, whether there were rules that were not submitted to GAO. We don't keep track of that information on a daily basis, simply because what we do track is what we do get.

Mr. PALMER. Well, it is a problem, because in your recommendations and in what you found, you point out that, for the most part, they don't comply, and that there is an economic impact of these regulations that really Congress never has the opportunity to respond to.

And I just think, Mr. Chairman, that is an issue that we have got to address. Like I said, I don't attribute that to the GAO. That is our responsibility.

Professor Parrillo, I am a member of the article I project, which is made up of a bicameral group of members seeking to strengthen Congress by reclaiming its constitutional legislative powers that are now being improperly exercised by the executive branch, which this previous line of question kind of leads into this.

Congress, as a body, has ceded most of its lawmaking authority to the executive branch by writing vague laws. They give Federal

agencies wide latitude to interpret the law in a way that fits their agenda. It has been said that the most dangerous words in any piece of legislation are “the Secretary shall determine.”

How many of these problems being considered today could be prevented if Congress wasn’t in the business of writing them?

Chairman GOWDY. Professor Parrillo, the gentleman’s time is expired, but you may answer his question.

Mr. PALMER. Thank you, Mr. Chairman.

Mr. PARRILLO. I do think Congress has a demonstrated capacity to make choices and put details in legislation. Several of the environmental statutes. The 1990 overhaul of the Clean Air Act, for example, really do cabin agency discretion in significant ways.

I would note that there is some academic scholarship indicating that the more staff a legislature has, the more it is capable of writing relatively detailed statutes and cabin agency discretion. This is a set of conclusions arising from a comparative study of the different State legislatures. That legislatures that have more staff tend to delegate to the bureaucracy less. That is possibly one thing to consider.

Mr. PALMER. Mr. Chairman, I would like to make a statement, for the record.

There were 12,000 guidance documents identified in response to the committee’s request, and only 189 were submitted to Congress and the GAO in accordance with the Congressional Review Act. I yield back.

Chairman GOWDY. The gentleman from Alabama yields back.

I will go last.

Ms. NGUYEN, I am one of those too many lawyers my colleagues make reference to from time to time. I am not a subject matter expert here, or anywhere else. But I suspect lots of people that are following this issue, and maybe they are watching the hearing, aren’t subject matter experts either. So I get that all of you are experts and the vernacular just rolls off your tongue. But for lots of people, they don’t know what a midnight regulation is, they don’t know what the CRA is, they don’t know what a guidance document is.

So, with respect to midnight regulations, how, if at all, does it impact the CRA?

Ms. NGUYEN. The midnight rulemaking is defined by the mandate that, in terms of our review, it is defined by a specific period between September 23 and January 20. So we were asked, mandated, to look at the midnight rulemaking. It is referred to that because of that period.

And in terms of the CRA, as I noted, we found that compliance with CRA for the transition period, in comparison to the nontransition period, is they are about the same.

The trend that is important to note is that compliance with the CRA has increased over time.

Chairman GOWDY. Could you tell us which agencies had the highest rate of noncompliance?

Ms. NGUYEN. The two agencies that have the highest rate of noncompliance are HHS and DOT, and EPA has the lowest noncompliance rate.

Chairman GOWDY. What justification or explanation were offered by the two with the highest rate of noncompliance?

Ms. NGUYEN. Because of the breadth and scope of our work, we were asked to look at noncompliance—the compliance with mid-night rulemaking over the course of 20 years for various procedural requirements. So, therefore, we did not have the opportunity to inquire with those agencies.

Mr. CRAMER. If I may add, we are taking steps to notify those agencies of their noncompliance, to call to their attention their obligations under the Congressional Review Act.

Chairman GOWDY. So you think it is a matter of oversight rather than intentionality?

Mr. CRAMER. I wouldn't want to speculate that on that. I don't know. We haven't looked at that question.

Chairman GOWDY. Is there a correlation between noncompliance and economically significant regulations?

Ms. NGUYEN. Our study shows that economically significant regulations have a noncompliance rate of about 25 percent, and 15 percent for significant rules.

Chairman GOWDY. All right. For those who have never heard the term before, what is a guidance document?

Ms. NGUYEN. Guidance are used by agencies to provide timely information to agencies. And agencies also use them to convey how they plan to interpret regulations. Guidance generally are not legally binding.

Chairman GOWDY. Whenever you use works like generally, it makes we wonder that there is an exception to that.

Ms. NGUYEN. The exception is what we discussed earlier with the notion that the IRS views their guidance to be authoritative.

Chairman GOWDY. If I heard Professor Parrillo correctly, there is no legal force—lay the IRS aside—there is no legal force attached to guidance documents. Are there any legal presumptions attached to it? Excepting that it doesn't have force of law, are there certain presumptions attached to guidance documents?

Ms. NGUYEN. I cannot speak about the presumption issue. That is really from the perspective of the regulated parties.

Chairman GOWDY. Can I ask your lawyer, is there a legal presumption attached in any way with guidance documents?

Here is what is vexing me. When I hear the professor say—and I am sure he is right—that it is not intended to have the force of law or for everyone to conform their conduct that they still want to go on a case-by-case basis—whenever I hear the phrase case by case, that is just Latin for no guidance. There is no uniformity. If you are going to go case by case, which is what I think is what I understood him to say, then what is the purpose and/or legal effect of guidance documents?

Mr. CRAMER. I believe that guidance documents, by definition, are not legally binding on the regulated community. There have been complaints over the years, however, from the regulated community, that at times agencies are imposing binding requirements on the regulated community through guidance, rather than going through a rulemaking procedure. And I think that is the underlying complaint behind the use of guidance.

Not where it is used for the purposes for which it is intended, but rather to impose binding requirements that should really be going through a rule making process.

Mr. MEADOWS. Will the gentleman yield for a follow-up question to your point?

Chairman GOWDY. Certainly.

Mr. MEADOWS. The Chairman is spot on, and he is in a line of questioning that, quite frankly, is at the very heart of this hearing. Is guidance typically—and where he is going with this is, does it have any other meaningful effect, either through previous jurisprudence or lawsuits where guidance has been used in a way that connotes a rule or a regulation instead of just guidance?

Mr. CRAMER. I think it would be fair to say that there have been complaints that guidance has been used to impose requirements that should not have been imposed unless they went through a rule making process.

Mr. MEADOWS. I yield back. Thank you, Mr. Chairman.

Chairman GOWDY. Well, let me ask one other question.

Is there a colorable claim or cause of action if the assertion is that this discretion referenced by Professor Parrillo, was applied disparately to this group versus that group? Is that a cause of action? Is that a colorable claim from a litigation standpoint that this exercise of discretion was used disparately?

Mr. CRAMER. I think actually Professor Parrillo might be best qualified to answer that question.

Chairman GOWDY. I am sure he has written a law review article on it. He may direct us to it.

Mr. PARRILLO. On the question of whether, as I understand your question, whether inconsistency between individual cases would be subject to a judicial challenge, if the context were enforcement, then, no. Because under *Heckler v. Cheney*, at least one off enforcement decisions or decisions not to enforce—or to enforce in the first place—are not subject to judicial review.

If we move beyond the context of enforcement and we talk about agency adjudication, such as permanent or something like that, then if an agency does not follow the reasoning that it used for a prior individual decision and gives no explanation of why it didn't follow that reasoning, then that would be subject to a judicial challenge. So it varies by the type of individual proceeding we are talking about.

Chairman GOWDY. Thank you.

The gentleman from Wisconsin.

Mr. GROTHMAN. I have all sorts of questions, but at the beginning I would like to yield to my good friend, Congressman Palmer.

Mr. PALMER. I thank the gentleman. Just very quickly on that point about 12,000 guidance documents and only 189 were submitted.

There is no place on the GAO form for meaningfully reporting guidance. Don't you think that it would help matters to have that on the form?

And, Mr. Chairman, I would like to enter this into the record.

Mr. CRAMER. GAO has issued a number of opinions on whether guidance documents are rules for purposes of the Congressional Review Act. It is up to the agencies to decide when they are issuing

guidance whether they have an obligation to comply with respect to the Congressional Review Act, with respect to that particular guidance document, does it meet the definition of a rule under the APA.

We call them all rules. And when we are asked to consider whether a particular guidance document is a rule for purposes of the Congressional Review Act, at the end of the day, it is a rule.

Mr. PALMER. I don't want to take up the gentleman's time. I just think you ought to add that on your form. It might help get a better response.

I thank the gentleman, and I yield back.

Mr. GROTHMAN. Just a general question. I am going back 25 years to my day as a lawyer. And at the time—at least I used to do with the IRS—guidances were kind of treated as law. And that is why they made the guidances, right? If you brazenly disobeyed the guidances, you were kind of risking the wrath of the IRS, don't you think that is accurate?

Mr. CRAMER. I think that is one of the complaints that regulated community.

Mr. GROTHMAN. Why else would they issue the guidances?

Mr. CRAMER. Guidance does serve a lot of useful functions to communicate regulated public, who, in many cases, would like to know what the agency is thinking about a particular issue.

Mr. GROTHMAN. Right, right. That is exactly the point.

If you issue a guidance, it is for a purpose, right? The purpose is to tell the public—be it a business or an attorney or whatever—how the agency will interpret an ambiguity. And if you brazenly go against the guidance—you can do it and hope you are not caught. That is fine. I wasn't afraid to do that. But the reason the guidance is out there is you can expect, if you don't follow the guidance, that if you get caught, you are going to be challenged in some fashion, isn't that true? I am sure that is true of other agencies as well, right?

Mr. CRAMER. That certainly may be the case.

Mr. GROTHMAN. Of course it is the case. Why do you say it may be the case? Of course it is the case. Why else issue the guidance, right? Does anybody else have a comment on that?

Isn't that, of course, what the guidance does? It means the agency is going to interpret an ambiguity in a law in such a such a way, and if you brazenly disobey the guidance, then you are going to wind up challenged in some fashion, maybe a win in court? It is true it isn't legally binding. But it does say you could wind up in court, doesn't it?

Mr. PARRILLO. If I may answer that question?

Mr. GROTHMAN. Sure.

Mr. PARRILLO. So, yes, if the agency is empowered to proceed case by case, in other words, only on the basis of precedence from prior individual proceedings, then, in any future proceeding, it can exercise discretion and interpret law as it sees best constrained just by this prior precedence. And so the guidance is a way of saying this is what we are planning to do in the absence of some argument from the regulated party that we should do things differently. And if it is guidance, they have to answer that argument.

Mr. GROTHMAN. Right. But why else issue the thing, right.

And I guess the question is, right now, as I understand it, in general, maybe always, there is no public participation on guidance, and that is the benefit of a rule as opposed to guidance. In a rule, if the agency is doing something dumb, maybe, or offensive, it will come out because you have to have some public input. In guidance, there is no public input. Do you think there should be a little space for public input on guidance?

Ms. HARNED. May I take that?

Mr. GROTHMAN. Sure.

Ms. HARNED. Yes. I really appreciate the question, because NFIB absolutely thinks that there needs to be some space for comment. Does it have to go through the whole notice and comment, like a rulemaking? No.

But the idea that small-business owners and other members of the regulated community even know what these are is an issue, much less getting to say, hey, this is how this is going to impact me. As a practical matter, yes, we think that would be a good practice.

Mr. NOE. Congressman, could I jump into, just from my experience having been at the White House Office of Management and Budget drafting the Good Guidance Bulletin they have, we were very responsive to the agencies that you don't want to ossify the guidance process, because there are a lot of potential benefits to guidance, if they are done right. And we agreed.

So we just said, for the most significant guidance that might have a potential to lead to an economic impact, but, we were very clear, it is something that reasonably could be anticipated to lead to an impact, not cause it directly, because, of course, guidances are supposed to not be legally binding, but the agencies made beyond Swiss cheese out of that. In fact, it is so bad, the report that the GAO did in 2015 showed that the agency said—this is four major departments of the government with 25 agencies—we have zero, so we have zero guidance that should be subject to pre-adoption notice and comment.

That is where we are, and that is why I am saying the White House Office of Management and Budget should amp up that guidance. You all ought to think about legislating a requirement that there be good guidance practices. You have already done it for one agency.

In 2000, Congress, by statute, required the FDA to do a regulation to set good guidance practices. This is an agency that deals with life and death issues, and they have operated—my understanding is that people are generally happy with the way that works, and I don't see any reason other agencies shouldn't be able to operate at that level.

Mr. GROTHMAN. Thank you.

Mr. NARANG. Could I respond very quickly?

Mr. GROTHMAN. We would love to have you respond.

Mr. NARANG. Thank you, Congressman.

Let me just say that if Congress does impose procedural requirements on guidance documents, like notice and comment, or on a subset of guidance documents, that approximate what we have with APA notice and comment rulemaking, then I think it is an open question, maybe right now an academic question, but an open

question as to whether we should then be giving the agencies the option to make those guidance documents binding.

What is the point of an agency going through a robust guidance document process that looks like rulemaking if they are going to have a nonbinding document?

I think the more realistic outcome would be that they not issue guidance.

Mr. GROTHMAN. Well, I am just going to respond, you know, there are times where guidance is good because you have got to come up with something on a dime to interpret a law that Congress passed, or explain the way an agency is going to treat things, and that is fair. If you are not going to go all the way through the administrative rule process, you don't want it to become the force of law, if it is something less than that, see.

But I do think there are times, thinking back 25 years, in which you had guidances that sometimes made, when I was a lawyer, that guidances made absolutely no sense, or you wonder who in the world thought up this.

And I would think if there was a little bit of input from the private sector community and maybe woken up some bureaucrat over at, because I primarily dealt with the IRS, but there are other agencies too, would have woke them up and said, yeah, man, I didn't think of that.

Okay, so you can't go through the whole process because you want to turn something around quick, but enough that your bureaucracies can understand how this guidance looks from the other side of the mirror.

Mr. PARRILLO. May I respond on that point?

Chairman GOWDY. Well, let me just say, I have been uncharacteristically liberal. We have been over 3 minutes over his time. I will let you respond. Can you give us the Reader's Digest version in your response?

Mr. PARRILLO. There are some agencies that voluntarily undertake notice and comments for precisely the reasons that you just suggested. EPA does this on a substantial number of guidance documents, the National Organic Program at the USDA, other agencies much less so.

As Mr. Noe mentioned, the FDA is required by statute to take notice and comments on a large category of its guidance documents. A lot of people are quite happy with that. The difficulty they run into is that they will sometimes leave a document in draft for quite a long time because they don't have the resources to process all of the comments.

Chairman GOWDY. The gentleman from Wisconsin yields back.

I want to thank all of our witnesses for not just your expertise on a really important subject matter, but also your comity with each other and with the members of the committee.

With that, the hearing record will remain open for two weeks for any member to submit written opening statements or questions for the record.

If there is no further business, without objection, the committee will stand adjourned.

[Whereupon, at 11:44 a.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD



Office of Inspections
Office of Inspector General
U.S. General Services Administration

Evaluation of GSA Nondisclosure Policy

JE18-002
March 8, 2018

JE18-002

Introduction

The Office of Inspector General (OIG), Office of Inspections reviewed allegations regarding a new General Services Administration (GSA) nondisclosure policy concerning employee communications with Congress. Our review included whether GSA implemented such a policy, and if so, whether the policy violated the Whistleblower Protection Enhancement Act (WPEA) or other laws, regulations, or GSA policy.¹

From February 20, 2015 to July 24, 2017, GSA had a published policy governing congressional and intergovernmental communications. In February 2017, GSA began implementing a series of additional unpublished policies that effectively amended GSA's published policy governing communications with Congress.

On July 24, 2017, GSA issued a new published policy governing congressional and intergovernmental communications that remains in effect today. The current published policy, however, does not reflect aspects of GSA's prior unpublished policies that remained in practice as of December 2017. The current published policy also does not reference White House policy statements regarding communications with Congress, which GSA officials state are also part of GSA's policy.

The GSA policies we reviewed include:

- GSA Order ADM 1040.2, *Congressional and Intergovernmental Inquiries and Relations*, in effect February 20, 2015 until its cancellation on July 24, 2017;
- a series of unpublished policies implemented by GSA from February to May 2017, further restricting communications by GSA employees with Members of Congress or congressional staff other than committee chairmen;²
- an unpublished policy GSA implemented based on written guidance the White House Office of Legislative Affairs provided to GSA in May 2017; and
- GSA Order ADM 1040.3, *Congressional and Intergovernmental Inquiries and Relations*, in effect July 24, 2017, to the present.

All of the above GSA policies operate as nondisclosure policies, and none contain the whistleblower protection language that the WPEA requires be included in federal government nondisclosure policies. The WPEA's whistleblower protection language serves the important purpose of alerting federal employees that any nondisclosure policies, forms, or agreements imposed by the federal government do "not override employee rights and obligations created by

¹ The WPEA was enacted as Pub. L. No. 112-199, 126 Stat. 1465 (2012).

² For purposes of this report, a "Member" refers to any Member of the Senate or the House of Representatives, Delegate to the House of Representatives, the Resident Commissioner from Puerto Rico, or the Vice President acting other than in the capacity of a committee chairman. See 5 U.S.C. § 2106 (2012). "Chairmen" refer to those Members acting in the capacity of a duly appointed chair of a congressional committee under the rules of the Senate and House of Representatives.

JE18-002

existing statute or Executive Order relating to classified information, communications with Congress, the reporting of violations to an inspector general (IG), or whistleblower protection.”³

GSA did not comply with its own internal policymaking directive in implementing its unpublished policies governing congressional communications from February to July 2017. GSA’s failure to follow its established process for creating and implementing new policies led to inconsistent awareness and interpretation of the policies. Finally, GSA’s current written policy governing congressional and intergovernmental relations and inquiries is ambiguous and should be clarified to avoid confusion on the part of GSA employees, Members of Congress, and potential whistleblowers.

Our report makes two recommendations to address the issues identified during the evaluation.

Background

The Whistleblower Protection Enhancement Act (WPEA)

Congress enacted the WPEA in 2012 to strengthen federal government whistleblower rights and protections.⁴ The WPEA requires all federal government “nondisclosure policies, forms, and agreements” implemented on or after the WPEA’s effective date to include specific language clarifying that the policy, form, or agreement in question does not impact statutory whistleblower protections.⁵ In particular, the WPEA mandates that all such federal government nondisclosure policies, forms, and agreements include the following statement:

These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are

³ S. REP. NO. 112-155, at 16(2012), *reprinted in* 2012 U.S.C.C.A.N. 589, 604.

⁴ See H.R. REP. 112-508(I), at 5, 2012 WL 1962907, at *5 (2012) (“Whistleblowers are crucial in helping to expose waste, fraud, abuse, mismanagement and criminal activity across the Federal government. Their disclosures can save billions of dollars, and even human lives. It is vital that Congress encourage – not discourage – these well-intentioned individuals from coming forward. To accomplish that, prospective whistleblowers must be protected from reprisal.”); S. REP. NO. 112-155, at 1 (2012), *reprinted in* 2012 U.S.C.C.A.N. 589, 589 (“The Whistleblower Protection Enhancement Act of 2012 will strengthen the rights of and protections for federal whistleblowers so that they can more effectively help root out waste, fraud, and abuse in the federal government.”).

⁵ Pub. L. No. 112-199, § 115(a)(1), 126 Stat. at 1473 (codified as 5 U.S.C. § 2302 statutory note). Section 115(a)(3)(B) of the WPEA governs nondisclosure policies, forms, or agreements in effect prior to the effective date of the WPEA. WPEA, Pub. L. No. 112-199, § 115(a)(3), 126 Stat. at 1465. All of the GSA policies reviewed in this evaluation were implemented after WPEA’s effective date.

JE18-002

controlling.⁶

As the WPEA mandates that the required whistleblower protection language be included in “any” nondisclosure policy, form, or agreement, regardless of type, the WPEA effectively requires that such policies, forms, and agreements be made in writing.

Section 104 of the WPEA defines the implementation or enforcement of any nondisclosure policy, form, or agreement as a “personnel action,” and makes it a prohibited personnel practice to implement or enforce “any nondisclosure policy, form, or agreement” that does not contain the required whistleblower protection language.⁷ During the time period reviewed, the governing appropriations acts also contained provisions stating that “[n]o funds appropriated in this or any other Act may be used to implement or enforce ... any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain” the language mandated by the WPEA.⁸

The U.S. Office of Special Counsel is responsible for protecting federal employees and applicants from reprisal for whistleblowing and for assisting agencies in educating the federal workforce about whistleblower rights and protections. The U.S. Office of Special Counsel has advised executive departments and agencies that the statement mandated by the WPEA “should be incorporated into every non-disclosure policy, form, or agreement used by an agency.”⁹ GSA’s internal whistleblower protection website likewise provides that the required whistleblower protection language “applies to, and must be included in, non-disclosure policies, forms, or agreements of the Federal government with current or former employees.”

GSA Policies Governing Congressional Inquiries during the Period Reviewed

From February 2015 to the present, GSA implemented a series of published and unpublished policies governing communications by GSA employees to Congress and other intergovernmental entities.

⁶ 5 U.S.C. § 2302 statutory note (2012).

⁷ 5 U.S.C. §§ 2302(a)(2)(A)(xi), 2302(b)(13).

⁸ Consolidated Appropriations Act, 2017, Div. E, Financial Services and General Government Appropriations Act, Title VII, § 744, Pub. L. No. 115-31, 131 Stat. 135, 389 (May 5, 2017); Consolidated Appropriations Act, 2016, Div. E, Financial Services and Government Appropriations Act, Title VII, § 744, Pub. L. No. 114-113, 129 Stat. 2242, 2485 (December 18, 2015); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Div. E, Financial Services and General Government Appropriations Act, 2015, Title VI, § 747, 128 Stat. 2130, 2392 (December 16, 2014). The relevant provision of the Consolidated Appropriations Act of 2016 remained in effect through a series of continuing resolutions and legislation until the Consolidated Appropriations Act of 2017 was signed into law.

⁹ Memorandum from Special Counsel Carolyn Lerner for Executive Departments and Agencies on the Whistleblower Protection Enhancement Act of 2012 and Non-Disclosure Policies, Forms, and Agreements, at 2 (March 14, 2013), available at <https://osc.gov/Pages/PPP-Resources.aspx>. See also Memorandum from Special Counsel Henry J. Kerner for Executive Departments and Agencies on Non-Disclosure Policies, Forms, or Agreements (February 1, 2018), available at <https://osc.gov/Resources/NDA%20Memo%20Update.pdf>.

JE18-002

1. GSA Order ADM 1040.2, *Congressional and Intergovernmental Inquiries and Relations* (February 20, 2015)

GSA Order ADM 1040.2 outlined the agency's written policy for handling congressional and intergovernmental inquiries and relations in effect from February 20, 2015 until its cancellation on July 24, 2017. The order informed employees that "GSA must speak with one voice." To this end, the order "sets out procedures all GSA employees must follow in providing information about GSA policies and positions to Congress, State, local, tribal, and foreign governments."¹⁰ The order required that GSA employees immediately forward all congressional communications they received, "whether by correspondence, telephone calls, email, fax, or any other media," to GSA's Associate Administrator for Congressional and Intergovernmental Affairs (OCIA Associate Administrator) for coordination by the Office of Congressional and Intergovernmental Affairs (OCIA). The order provided that "OCIA will be responsible for coordinating all responses back to Congress to ensure they are accurate, timely, helpful, and consistent with the views of the Agency and the Administration."¹¹ The order did not carve out an exception for whistleblower communications.

The order also set forth GSA's general policy that "GSA employees must obtain approval from the [OCIA] Associate Administrator ... or his/her designee before responding to inquiries from Congress for the Administrator's or other official GSA position on legislation or other substantive issues to ensure accurate and up-to-date information is provided."¹² The order defined "Congressional inquiries" to include those from Members of Congress, their personal and leadership staff, congressional committee staff and others, such as the Congressional Budget Office and Congressional Research Service.¹³

The order was intended to ensure, among other things, that "the Administrator's and Administration's positions and policies are conveyed to Congress ... accurately, clearly, promptly, professionally, and consistently" and that the Administrator be kept "informed of all agency-related matters of interest to Congress"¹⁴

2. Unpublished implemented policies from February to May 2017 governing communications with Congress

In February 2017, GSA began to deviate from its prior practices for responding to congressional inquiries, based on oral guidance and direction from the White House. GSA's Senior White

¹⁰ GSA Order ADM 1040.2, *Congressional and Intergovernmental Inquiries and Relations* (February 20, 2015), at § 3.

¹¹ *Id.* at § 5a(1).

¹² *Id.* at § 4. The order provided for limited exceptions for some senior GSA officials and provided that the Associate Administrator may grant conditional waivers on a case-by-case basis. *Id.* at § 7.

¹³ *Id.*

¹⁴ *Id.* at § 1.a.

JE18-002

House Advisor and Acting General Counsel serving at the time, orally communicated the initial changes to others at GSA. Initially, the new policy prohibited responding to “oversight” or “investigative” congressional inquiries made by Members other than Chairmen. GSA officials told us the policy was based on the conclusion that individual Members do not have oversight or investigative authority, and that only the Senate and House as a whole, or congressional committees, have this authority.

The Senior White House Advisor and Acting General Counsel communicated the new policy to GSA officials involved in coordinating communications with Congress, including personnel in the Administrator’s Office, the OCIA, the Office of Administrative Services, and the Office of General Counsel (OGC). Some of these officials then orally communicated the new policy to their subordinates. GSA personnel told us they heard about the new policy at different times and in different settings, ranging from small in-person meetings to telephone calls and hallway conversations.

Acting Administrator Timothy Horne, Acting Deputy Administrator Anthony Costa, and several other senior GSA leaders stated that the new policy was a change from GSA’s prior practice. GSA officials stated that the prior practice had been to process all congressional inquiries for a substantive response, while sometimes providing a redacted response or more limited information to Members than would be provided to Chairmen. GSA officials identified information protected from disclosure under the Privacy Act or the Procurement Integrity Act as examples of the type of information that would have been disclosed to Chairmen but not to other Members under GSA’s prior practice.¹⁵

GSA officials stated that the new policy changed over time. Initially the new policy was not to respond at all to oversight or investigative inquiries or requests from Members other than Chairmen. Some GSA officials estimated that this policy lasted approximately a month, during which the agency provided no responses to individual Member inquiries. Other GSA officials stated that the policy did not apply to inquiries made on behalf of a Member’s constituents or to inquiries relating to services GSA provided to Congress, such as furnishing office space, as these were not deemed to be oversight-related.

GSA modified the policy in March 2017 to permit the disclosure of publicly available information, or information that would be subject to release to any requester under the Freedom of Information Act (FOIA), in response to Member inquiries deemed to be oversight or

¹⁵ The Department of Justice Office of Legal Counsel (OLC) has advised that the Privacy Act generally prohibits the disclosure of protected Privacy Act information to individual Members, except for those authorized to act on behalf of a Congressional committee such as committee chairs. *Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members*, 25 Op. O.L.C. 289 (2001). Similarly, the Procurement Integrity Act prohibits the disclosure of competitively sensitive procurement information on pending federal procurements, but contains an exception for disclosure to Congress or a committee or subcommittee of Congress. 41 U.S.C. § 2102, 2107(5) (2012).

JE18-002

investigative in nature. According to GSA's Chief of Staff, GSA made this change based on additional guidance from the White House.¹⁶

With this change in policy, GSA also modified its procedures for processing congressional inquiries. In responding to congressional inquiries, OCIA first made an assessment as to whether the inquiry constituted an oversight or investigative inquiry. For inquiries by Members or congressional staff that OCIA categorized as oversight or investigative in nature, OCIA then considered whether it could respond to the request with documents already publicly available. If not, OCIA referred the inquiry to GSA's FOIA office, which processed the inquiry to identify any responsive records that would be subject to release under FOIA.¹⁷ The FOIA office then conveyed the results of that processing to OCIA, and identified the inquiries for which the FOIA office had found responsive documents. OCIA then resumed control of the rest of the congressional coordination process. OGC also advised on compliance with the new policy during the course of their legal review of proposed responses to congressional inquiries.

The FOIA process involves a search of existing agency records to identify responsive records subject to public release and it is not well equipped to respond to some types of congressional inquiries, such as requests for narrative responses to questions. In such cases, GSA would not provide a complete response.

Shortly after they modified the policy, GSA officials also determined that requests made under the so-called "Seven Member Rule" would be processed as individual requests on the part of each requesting Member. The Seven Member Rule refers to a statute providing that, on the request of any seven Members of the House Committee on Government Operations (now known as the House Committee on Oversight and Government Reform), or any five Members of the Senate Committee on Governmental Affairs (now known as the Senate Committee on Homeland Security and Governmental Affairs), an Executive agency "shall submit any information requested of it relating to any matter within the jurisdiction of the committee."¹⁸

The treatment of requests made under the Seven Member Rule became an issue after eight Members of the House Committee on Oversight and Government Reform requested documents from GSA in a February 8, 2017, letter invoking the Seven Member Rule.¹⁹ GSA had recently provided documents in response to a previous request invoking the Seven Member Rule statute

¹⁶ The GSA Senior White House Advisor became the GSA Chief of Staff on March 26, 2017.

¹⁷ Prior to the implementation of this new policy, the FOIA division had not been involved in the processing of congressional inquiries, although the OCIA and FOIA offices would sometimes coordinate on overlapping congressional and FOIA requests.

¹⁸ 5 U.S.C. § 2954 (2012).

¹⁹ The February 8, 2017, request sought unredacted documents pertaining to the Trump Old Post Office ground lease that GSA had previously declined to produce in response to a request by four Representatives.

JE18-002

on January 3, 2017.²⁰ However, GSA officials told us that the Department of Justice Office of Legal Counsel (OLC) instructed GSA not to provide any documents in response to the February 8, 2017, Seven Member Rule request. These officials understood from OLC that under the Department of Justice's long-standing interpretation the statute applied only to a limited set of old reports that were relevant during the 1920s and that the Seven Member Rule statute was now effectively obsolete. After discussing the matter with OLC, GSA decided to process Seven Member Rule requests as individual Member requests and to obtain OLC concurrence before releasing responses to such requests.²¹

GSA's decision to process individual Member and Seven Member Rule inquiries through its FOIA office meant that the agency effectively handled such requests as FOIA requests without officially designating them as such. As a result, FOIA procedural safeguards may not apply to Member requests. A private citizen unhappy with an agency's response to a FOIA request has the right to challenge the agency's determinations on releasability through both an administrative appeal and judicial remedies. The GSA officials we interviewed said they did not know whether the agency's response to a Member request processed through GSA's FOIA office would be subject to the FOIA appeal process, as that issue had not yet come up.

In at least one instance, GSA did not provide documentation to Minority congressional leaders despite being expressly requested to do so by a Chairman. Representative Jason Chaffetz, then serving as Chairman of the U.S. House Committee on Oversight and Government Reform, sent two congressional requests to GSA, dated February 9, 2017 and February 16, 2017 respectively, on behalf of that Committee.²² Both Chairman requests stated, "When producing documents to the Committee, please deliver production sets to the Majority staff in Room 2157 of the Rayburn House Office Building and the Minority staff in Room 2471 of the Rayburn House Office Building." The instructions on the Committee's document requests likewise directed GSA to deliver two sets of the documents to be produced, "one set to the Majority Staff and one set to the Minority Staff."

²⁰ The January 3, 2017, response pertained to a December 22, 2016, request that sought information related to the Trump Old Post Office ground lease.

²¹ A November 2, 2017, federal suit brought by 17 Democratic Members of the U.S. House of Representatives Committee on Oversight and Government Reform against Acting Administrator Horne alleges that GSA denied the plaintiffs' Seven Member Rule request, as well as two subsequent letters invoking the Seven Member Rule statute, in a letter dated July 17, 2017, which stated that "the Executive Branch's longstanding policy has been to engage in the established process for accommodating congressional requests for information only when those requests come from a committee, subcommittee, or chairman authorized to conduct oversight." (*Elijah E. Cummings, et al, v. Timothy O. Horne*, No. 1:17-CV-02308 (D.D.C. filed November 2, 2017) (Complaint ¶¶ 4, 21-27).

²² The first request asked GSA to describe its plans to address a specific clause (37.19) found in the Trump Old Post Office, LLC ground lease agreement and to provide all guidelines and policies that GSA utilized in administering its outlease program. The second requested information and documents regarding GSA's efforts to address recommendations made by the Government Accountability Office regarding GSA's building portfolio and the Federal Buildings Fund.

JE18-002

Despite these instructions, OCIA officials stated that they did not send the responses to Minority staff members as directed and “assumed they [Minority staff] received this information as part of the internal committee staff distribution.” A GSA Senior Advisor to the Administrator, notified the GSA White House Liaison and the GSA Senior White House Advisor, on February 28, 2017 that “I will have [OCIA] take off the cc to Cummings [Congressman Elijah Cummings, Ranking Member]” for the congressional request dated February 16, 2017. The GSA Senior Advisor to the Administrator then communicated this guidance to the Acting Associate Administrator for OCIA.

3. Unpublished policy based on written White House guidance in May 2017

Until May 2017, GSA officials communicated all information regarding GSA’s new treatment of Member inquiries orally and did not reduce GSA’s unpublished policies to writing. GSA officials told us that this was because GSA expected more definitive guidance from the White House or OLC before formalizing the policy.

On May 19, 2017, the White House Office of Legislative Affairs provided the OCIA Associate Administrator with written guidance on responding to letters from Members of Congress.²³ Senior GSA officials, including Administrator Emily Murphy (who was then serving as Senior Advisor to Acting Administrator Horne), told us they understood this to be the more definitive guidance that GSA officials had been expecting.²⁴ According to these officials, the guidance was consistent with what GSA had already put into place. Under GSA’s policy, GSA only would provide publicly available facts and publicly accessible records to Member inquiries that were oversight in nature.

The following week, Acting Administrator Horne testified before a congressional subcommittee that GSA “has instituted a new policy that matters of oversight need to be requested by the Committee Chair.”²⁵ Horne testified that the policy had already been implemented, though it was not yet in writing, and that GSA was “working on formalizing the policy.”²⁶ Horne described GSA’s practice under the new policy as follows:

However, if it’s an oversight matter not requested by the Committee chair, we’ll respond to the letter saying that we can’t provide ... if it’s information that’s not

²³ The GSA Senior Advisor to the Administrator became the OCIA Associate Administrator on April 30, 2017. The guidance provided to GSA was marked as a “Presidential record” excluded from public disclosure under the Presidential Records Act.

²⁴ Administrator Murphy served as the White House Liaison from January to April 2017 and Senior Advisor from April to December 2017. She was sworn in as Administrator on December 12, 2017.

²⁵ See Testimony of GSA Acting Administrator Hon. Tim Horne before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Financial Services, at 1:15:40-51 (May 24, 2017), available at <https://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394879>.

²⁶ *Id.* at 1:15:54-1:16:04.

JE18-002

public information, information that would need to be redacted then we will redact the information -- we will provide public information but for matters of oversight the request needs to come from the Committee chair.²⁷

Horne confirmed that the policy extended to requests made under the Seven Member Rule statute.²⁸

On July 12, 2017, Horne testified before another congressional subcommittee that he had “been given an overall general policy of the Administration that for matters of oversight, that those requests need to come from the Chair.”²⁹ He also testified that GSA had “received a policy that says on matters of oversight we will respond to committee requests, not individual Member requests.”³⁰

4. GSA Order ADM 1040.3 *Congressional and Intergovernmental Inquiries and Relations* (July 24, 2017)

On July 24, 2017, GSA issued GSA Order ADM 1040.3, which revised and replaced GSA’s February 2015 order. Like its predecessor, GSA Order ADM 1040.3 “sets out procedures all GSA employees must follow in providing information about GSA policies and positions to Congress, State, local, tribal, and foreign governments.” The order also admonishes that “GSA must speak with one voice,” requires that employees forward all congressional communications they receive to the OCIA Associate Administrator, and requires that OCIA coordinate all responses to Congress.³¹

The new written order largely tracks the language of the prior order, with two changes of significance for purposes of this review. First, in describing OCIA’s responsibility for coordinating responses to Congress, GSA ADM 1040.3 adds a reference to a published opinion issued by OLC on May 1, 2017.³² The new GSA Order states:

²⁷ *Id.* at 1:18:56-1:19:23.

²⁸ Responding to a question as to why GSA had not responded to an outstanding request made under the Seven Member Rule, Horne responded, “It’s the policy of the Administration that for matters of oversight GSA will respond to the Committee chair.” *Id.* at 1:18:32-41.

²⁹ Testimony of GSA Acting Administrator Hon. Tim Horne before the U.S. House Committee on Transportation and Infrastructure, Subcommittee on Economic Development, Public Buildings, and Emergency Management, at 1:39:50-1:40:00 (July 12, 2017), available at <https://transportation.house.gov/calendar/eventsingle.aspx?EventID=401734>.

³⁰ *Id.* at 2:12:20-2:12:39.

³¹ GSA Order ADM 1040.3 *Congressional and Intergovernmental Inquiries and Relations* (July 24, 2017), at §§3, 5(a)(1).

³² The referenced OLC opinion is available at <https://www.justice.gov/olc/opinions-main>.

JE18-002

The Office of Congressional and Intergovernmental Affairs (OCIA) will be responsible for coordinating all responses back to Congress to ensure they are accurate, timely, helpful, and consistent with the views of the Agency and the Administration *as outlined in the Department of Justice Office of Legal Counsel opinion "Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch," dated May 1, 2017.*³³

We discuss this OLC opinion in Finding 3 below. Second, GSA ADM 1040.3 adds a new provision entitled "Whistleblower Protection" which states:

This Order does not abrogate or interfere with any rights or protections extended to GSA employees by the Whistleblower Protection Act of 1989 (WPA) as amended by the Whistleblower Protection Enhancement Act of 2012 (WPEA).³⁴

The order does not contain the whistleblower protection language provided in the WPEA.

The order also does not address the continuing applicability of GSA's prior unpublished policy as described by Acting Administrator Horne in congressional testimony less than two weeks before the new order was issued. The continued application of the unpublished policy was evident on August 2, 2017, when the GSA Public Buildings Service Acting Commissioner testified before the Senate Committee on Environment and Public Works. In response to a question whether he would commit to fully responding to questions from any member of the Committee regarding the procurement process for a new FBI headquarters, the Acting Commissioner stated "GSA will respond to questions from the Chair, yes."³⁵ When asked if GSA would respond only to the Chair, the Acting Commissioner replied that "GSA's response will be in line with the current Administration's policy on responding to oversight questions."

Findings

Finding 1: GSA policies regarding communications with Congress operate as nondisclosure policies under the WPEA but do not include the WPEA's whistleblower protection language.

The WPEA requires all federal government "nondisclosure policies, forms, and agreements" implemented after its effective date to include specific language clarifying that the policy, form, or agreement in question does not impact statutory whistleblower protections.

³³ GSA Order ADM 1040.3 *Congressional and Intergovernmental Inquiries and Relations* (July 24, 2017), at § 5(a)(1) (new language in italics).

³⁴ *Id.* at § 7.

³⁵ Testimony of GSA Acting Commissioner, Public Buildings Service, Michael Gelber before the U.S. Senate Committee on Environment and Public Works, at 00:55:10-00:55:50 (August 2, 2017), available at <https://www.epw.senate.gov/public/index.cfm/hearings?ID=3C2544C2-0031-4813-8230-A7143EE5D6D2>.

JE18-002

The Senate report described the history and purpose of these provisions:

In 1988, Senator Grassley sponsored an amendment to the Treasury, Postal and General Government Appropriations bill, which is referred to as the “anti-gag” provision. This provision has been included in appropriations legislation every year since then. The annual anti-gag provision states that no appropriated funds may be used to implement or enforce agency non-disclosure policies or agreements unless there is a specific, express statement informing employees that the disclosure restrictions do not override their right to disclose waste, fraud, and abuse under the WPA, to communicate with Congress under the Lloyd-La Follette Act, and to make appropriate disclosures under other particular laws specified in the statement.

S. 743 would institutionalize the anti-gag provision by codifying it and making it enforceable. Specifically, section 115 of the bill would require every nondisclosure policy, form, or agreement of the U.S. Government to contain specific language set forth in the legislation informing employees of their rights. This required language will alert employees that the nondisclosure policy, form, or agreement does not override employee rights and obligations created by existing statute or Executive Order relating to classified information, communications with Congress, the reporting of violations to an inspector general (IG), or whistleblower protection.³⁶

Each of the GSA policies outlined above operate as a deterrence to GSA employees who wish to report waste, fraud, and abuse in GSA programs to Congress. The Office of Special Counsel has determined that a supervisor’s email to employees “not to communicate with Inspector General auditors, stating that ‘We need to have one voice’” was “a nondisclosure policy in violation of the WPEA.”³⁷ Both GSA Order ADM 1040.2 and 1040.3 caution employees that

³⁶ S. REP. NO. 112-155, at 16 (2012), *reprinted in* 2012 U.S.C.C.A.N. 589, 604; *see also id.* at 45, 2012 U.S.C.C.A.N. at 633 (“Section 115(a) requires all federal nondisclosure policies, forms, and agreements to contain specified language preserving employee obligations, rights, and liabilities created by existing statute and Executive Order with respect to disclosure of information.”); H. REP. NO. 112-508(I), 2012 WL 1962907, at *9 (Section 115 “[c]odifies and gives a remedy for the anti-gag statute from overriding whistleblower rights. Specifically, the bill would require every nondisclosure policy, form, or agreement of the Government to contain specific language informing employees of their rights.”).

The Senate Report, S. Rep. No. 112-155, at 16 n. 64 (2012), *reprinted in* 2012 U.S.C.C.A.N. at 604, notes that the Lloyd-La Follette Act is codified at 5 U.S.C. § 7211 (2012), which provides: “The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.” For purposes of Title 5, “Member of Congress” means the Vice President, a member of the Senate or the House of Representatives, a Delegate to the House of Representatives, and the Resident Commissioner from Puerto Rico.” 5 U.S.C. § 2106 (2012).

³⁷ *See* Press Release, U.S. Office of Special Counsel, OSC’s Enforcement of the Anti-Gag Order Provision in Whistleblower Law (January 25, 2017), *available at* <https://osc.gov/News/pr17-03.pdf>.

JE18-002

“GSA must speak with one voice.” Moreover, both orders require employees to report all communications they receive from Congress, and to coordinate their responses through OCIA. Employees understandably may be deterred from reporting waste, fraud, or abuse to Congress if agency policy requires them to immediately forward to the OCIA Associate Administrator any congressional inquiries they receive and to coordinate their responses through OCIA.

Several of the GSA officials we interviewed stated that whistleblowers were not considered in the implementation of the series of unpublished policies from February to July of 2017, and that GSA did not intend that any of the policies discourage or otherwise impact whistleblowers. However, given that the written policies state that “GSA must speak with one voice,” and direct employees to forward all congressional inquiries to and coordinate any response with OCIA, the absence of the WPEA language in these policies increases the potential for employee confusion about the impact of the policies on whistleblower protections and may chill the willingness of potential whistleblowers to come forward. As discussed in Finding 2, the risk of confusion is even greater with respect to the unpublished policies.

GSA should have included the WPEA’s “anti-gag” whistleblower protection language in each of its policies, to ensure the policies made clear that they did not affect the protections afforded to federal government whistleblowers. Agency officials have agreed that the policies need clarification on this point. Acting Administrator Horne testified before Congress that while the unpublished policy then in place at GSA would not preclude GSA employees from having whistleblower-type conversations with congressional representatives, “we do need to clarify the policy.”³⁸ Similarly, Acting Deputy Administrator Costa stated that GSA Order 1040.2 was perhaps “not so clear” with respect to its application to whistleblower activity. The inclusion in GSA’s new Order 1040.3 of a brief statement on whistleblower protection is a step in the right direction. However, even this statement is insufficient because it does not track the more detailed anti-gag language mandated by the WPEA.

In response to our report, GSA accepts our first recommendation and reports it has initiated the formal clearance process to amend GSA Order ADM 1040.3 in order to include the WPEA’s mandatory anti-gag provision. GSA’s inclusion of this language will notify employees that the order does not impact their whistleblower rights and protections. (See Appendix.)

GSA, however, disagrees with the OIG’s interpretation of the WPEA that ADM 1040.3, as written, operates as a nondisclosure policy. Instead, GSA asserts that the scope of the WPEA’s anti-gag rule can be read as limited to two commonly used government nondisclosure

³⁸ The Acting Administrator stated, “the new policy would apply to matters of oversight and ... we would manage that through our correspondence system, so ... there is nothing that would preclude any member of GSA from having any conversation, whistleblower-type conversations, with any Member. The issue is that the Administration policy says that oversight issues need to come from the Committee Chair [W]e do need to clarify the policy.” Testimony of GSA Acting Administrator Hon. Tim Horne before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Financial Services, at 1:17:16-50 (May 24, 2017), available at <https://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394879>.

JE18-002

agreements for classified national security information access, settlement agreements with nondisclosure provisions, and “policies related to these types of items.” GSA points to § 115(a) of the WPEA, codified as 5 U.S.C. § 2302 note, which provides: “Each agreement in Standard Forms 312 and 4414 of the Government and any other nondisclosure policy, form, or agreement of the Government shall contain” the language found in § 2302(b)(13). We do not believe that the language relied upon by GSA supports such a narrow interpretation. The Supreme Court rejected the type of statutory analysis GSA makes when the Court considered analogous language in *Ali v. Federal Bureau of Prisons*, 552 U.S. 214 (2008). Nothing in the overall statutory context of the WPEA suggests that the two listed national security nondisclosure agreements were the exclusive focus of its anti-gag provision or that Congress was unconcerned about other types of nondisclosure policies, forms, and agreements.³⁹ Instead, the requirements of the WPEA extend to those widely used forms “and any other nondisclosure policy, form, or agreement of the Government.”⁴⁰ As the Court concluded with the statutory language at issue in *Ali*, such “unmodified, all-encompassing” language is best read as “what it literally says.”⁴¹

The agency also asserts that ADM 1040.3 is “no different from” OMB Circular A-19 which “does not contain” the WPEA’s anti-gag rule language. However, as the agency acknowledges, A-19 addresses coordination between OMB and executive agencies. A-19, most recently revised in 1979, does not address which employees may or may not make disclosures to Congress. While an agency is entitled to have policies to ensure that communications of official agency positions are cleared through designated officials, as discussed in our report we found that GSA used language that inhibits whistleblowers from reporting their concerns to Congress.

Finding 2: GSA’s implementation of unpublished policies between February and July 2017 did not comply with GSA’s internal directive for creating and implementing new policy, leading to opportunities for confusion, misinterpretation, and inconsistent application.

GSA did not follow its own policy for establishing internal directives when it implemented its unpublished policies governing communications with Congress. GSA Order OAS P 1832.1A, *The GSA Internal Directives System* (October 10, 2014), establishes “a single, uniform system of authoritative issuances used to convey organization functions, policies, responsibilities, and required procedures.” The internal directives system provides for the orderly processing, internal review, approval, and dissemination of directives. Order OAS P 1832.1A sets out a clearance process that includes reviews by the primary office involved in drafting the directive and a review by the Executive Secretariat and additional stakeholders, including a required legal

³⁹ *Ali v. Fed. Bur. of Prisons*, 552 U.S. at 226 (interpreting the phrase “by any officer of customs or excise or any other law enforcement officer” in the Federal Tort Claims Act, 28 U.S.C. § 2680(c) (2012)).

⁴⁰ 5 U.S.C. § 2302 note (emphasis added).

⁴¹ *Id.*, at 214, 227-28; see also *id.* at 220 (“Congress’ use of ‘any’ to modify ‘other law enforcement officer’ is most naturally read to mean law enforcement officers of whatever kind”).

JE18-002

review by OGC. This process requires concurrence of all parties before the policy is finalized in writing.

In implementing changes to its policy governing congressional communications from February to July 2017, GSA did not publish the terms of the policy, and instead orally communicated the terms of the policy to a limited number of GSA employees, who in turn orally communicated the policy to others. The unpublished policy also evolved over time.

As a result, interpretation of the new policy varied from one GSA official to another. We interviewed 13 GSA officials from the Office of the Administrator, OGC, OCIA, Office of Administrative Services, and Public Buildings Service. One of the GSA officials, an OCIA Congressional Liaison Specialist who served as the Acting Associate Administrator for OCIA from January to April 2017, stated that there was not a new policy but that OCIA had received oral “instructions” that GSA needed to be thoughtful and prioritize requests from Chairmen. Another GSA official, the former OGC Regional Counsel for the National Capital Region, said she could only recall receiving “direction,” not a new policy, on providing responses to congressional requests. However, the remaining 11 GSA officials told us there was a new oral policy, and variably described the policy as:

- not to respond to Minority party Members of Congress (1);
- not to respond to anyone but committee chairs (2);
- not to respond to anyone but committee chairs, but only in oversight matters (6);
- provide unredacted information to committee chairs only (1); or
- only provide Minority party Members of Congress information that would be released to the general public (1).

The GSA officials also provided various responses as to when the policy was actually in effect. Several GSA officials stated that there was uncertainty and confusion about the terms and scope of the policy, particularly in its early stages. Murphy described initially receiving multiple questions about the policy and requesting further clarification from the GSA Acting General Counsel about it. Some GSA officials also said they were not certain they were always familiar with the most current version of the policy, given that it was often evolving.

We have not been able to identify the full impact of the potentially inconsistent interpretation and application of the GSA policies reviewed because of limitations in GSA’s recordkeeping. OCIA officials stated that they only tracked formal congressional inquiries. The Associate Administrator for OCIA told us that OCIA did not maintain records of phone calls or informal requests from congressional members or their staff, and did not keep notes of GSA briefings to Congress.

GSA employees stated that its unpublished policies were based on the conclusion that the law did not require GSA to respond to oversight or investigative inquiries other than those coming from Chairmen. GSA provided no precise definition for what constituted an oversight or investigative congressional inquiry. Different GSA officials and documents referenced the following categories of information as potentially outside the scope of oversight or investigatory

JE18-002

inquiries: information on legislation, requests related to confirmation proceedings, project-related issues, “general program information,” and requests for “technical assistance.” Murphy stated that GSA clarified the policy at some point to permit responses to oversight inquiries by subcommittee chairs, and Horne stated that the policy did not apply if a Chairman stated that he or she wanted GSA to respond to a request from a particular Member. Despite these reported refinements the GSA Public Buildings Service Acting Commissioner understood the policy simply to be not to respond to requests from Minority members of Congress. He also stated that the policy appeared to be inconsistently applied.

To the extent that GSA employees, including potential whistleblowers, received differing information, there was no written document that they could consult to confirm the official terms of the policy. This remained the case even after GSA received written guidance from the White House Office of Legislative Affairs in May 2017. GSA did not incorporate the terms of that guidance into any internally published GSA order, policy, guidance, or other document that GSA employees could consult. The only written policy in place at the time governing GSA congressional inquiries was GSA Order ADM 1040.2, which did not address the terms of GSA’s unpublished policies.

GSA’s management displayed apparent confusion concerning the policy when two congressional hearings held on the same day produced contradictory testimony about the policy. On July 12, 2017, before a subcommittee of the U. S. House Transportation and Infrastructure Committee, Acting Administrator Horne reiterated his previous testimony regarding the nondisclosure policy stating, “...the Administration’s policy is to respond on matters of oversight ... to requests from the chairman.” However, in a separate hearing held later on that same day, both Alan Thomas, Commissioner of the GSA Federal Acquisition Service, and Robert Cook, Deputy Commissioner and Director of Technology Transformation Services, stated they were not aware of the nondisclosure policy attested to by Horne.⁴² Further, when Mr. Cook was questioned if he would commit to responding to requests from members of Congress, Mr. Cook responded that the Technology Transformation Services would respond regardless of “where the request came from” which contradicted the policy relayed by Horne just a few hours earlier.

Finding 3: GSA Order ADM 1040.3 is ambiguous and lacks transparency as to what GSA’s current congressional communications policy is.

GSA Order ADM 1040.3 makes two changes of significance for this review to the prior GSA Order ADM 1040.2. First, the order adds a “Whistleblower Protection” provision that differs from the language in the WPEA. Second, the order adds new language that creates uncertainty over GSA’s actual practices and its adherence to Administration policy. The earlier order provided that congressional responses be “accurate, timely, helpful, and consistent with the

⁴² Hearing before the U.S. House Committee on Oversight and Government Reform, Subcommittees on Government Operations and Information Technology. Testimony of Mr. Alan Thomas and Mr. Robert Cook.

JE18-002

views of the Agency and the Administration.”⁴³ The new order adds: “as outlined in the Department of Justice Office of Legal Counsel opinion, ‘Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch,’ dated May 1, 2017.”⁴⁴

It is not clear from the order itself, or from a review of the referenced May 1, 2017, OLC opinion, what GSA’s policy is with regard to individual Member requests. The OLC opinion concluded that individual Members “do not have the authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee.”⁴⁵ The opinion also recognized that Executive Branch agencies have discretion in deciding whether and how to respond to inquiries from individual Members, and have historically followed a “general policy of providing only documents and information that are already public or would be available to the public through the Freedom of Information Act, 5 U.S.C. § 552.”⁴⁶ GSA’s unpublished policies with regard to individual Member requests comported with the historical practice described in the OLC opinion. However, the new order does not explicitly adopt that practice as GSA’s policy.

Further confusing the issue, just days before the issuance of GSA Order ADM 1040.3, the Director of the White House Office of Legislative Affairs stated that the May 1, 2017, OLC opinion did not set forth the current Administration’s policy. On June 7, 2017, Senator Charles E. Grassley, Chairman of the U.S. Senate Committee on the Judiciary, wrote to the President objecting to the conclusions reached in the May 1, 2017, OLC opinion and urging the White House to rescind the opinion.⁴⁷ The White House Director of Legislative Affairs responded in a letter dated July 20, 2017, that the May 1, 2017, OLC opinion constituted legal advice and “was

⁴³ GSA Order ADM 1040.2, *Congressional and Intergovernmental Inquiries and Relations*, § 5.a.(1) (February 20, 2015).

⁴⁴ GSA Order ADM 1040.3, *Congressional and Intergovernmental Inquiries and Relations*, § 5.a.(1) (July 24, 2017) (emphasis added), available at <https://www.justice.gov/olc/opinions>.

⁴⁵ See *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, Op. O.L.C., at 1 (May 1, 2017) (hereinafter “the May 1, 2017, OLC opinion”).

⁴⁶ *Id.* at 3.

⁴⁷ Letter from Chairman Charles Grassley to the Hon. Donald J. Trump (June 7, 2017), available at <https://www.grassley.senate.gov/news/news-releases/grassley-calls-president-rescind-olc-opinion-shielding-bureaucrats-scrutiny>. Chairman Grassley contended that the OLC opinion “erroneously rejects any notion that individual members of Congress who may not chair a relevant committee need to obtain information from the Executive Branch in order to carry out their Constitutional duties,” and urged the Executive Branch to “work to cooperate in good faith with all congressional requests to the fullest extent possible.” *Id.* at 2, 6.

JE18-002

not intended to provide, and did not purport to provide, a statement of Administration policy.”⁴⁸
The letter further stated:

The Administration’s policy is to respect the rights of all individual Members, regardless of party affiliation, to request information about Executive Branch policies and programs. The Administration will use its best efforts to be as timely and responsive as possible in answering such requests consistent with the need to prioritize requests from congressional Committees, with applicable resource constraints, and with any legitimate confidentiality or other institutional interest of the Executive Branch. Moreover, this policy will also apply to other matters on which individual Members may have an interest, whether it be considering possible legislation, evaluating nominees for confirmation, or providing service to constituents.⁴⁹

The OCIA Associate Administrator and an OCIA Congressional Liaison Specialist told us that GSA has fully adopted the Administration’s positions outlined in the July 20, 2017, White House letter. These officials also stated that OCIA continues to process most Member requests that it deems oversight in nature through GSA’s FOIA office, and that OCIA limits its responses accordingly. They stated that there are exceptions to FOIA processing, such as requests or inquiries where a “yes” or “no” answer, an easily accessible answer, or a narrative response is deemed appropriate and there is no need for further FOIA processing. The Congressional Liaison Specialist stated that GSA applies this same process to requests made under the Seven Member Rule statute, though GSA has not yet provided any responses processed through the FOIA office to any Seven Member Rule requests.

Based on the above, GSA appears to be following its unpublished policy concerning the processing of individual Member oversight requests as FOIA inquiries. However, GSA’s order does not state this, and does not contain the full anti-gag language prescribed by the WPEA. Clarifying GSA’s current policy, and including the WPEA’s whistleblower protection language, would provide GSA employees with a written document that clearly informs them of the official terms of the policy. Including the language prescribed by the WPEA would also assure employees that GSA’s policy does not supersede, conflict with, or otherwise alter existing employee whistleblower and congressional communication protections. Such clarification would

⁴⁸ See Letter from White House Director of Legislative Affairs Marc Short to Chairman Charles Grassley, at 2 (July 20, 2017) (hereinafter the “July 20, 2017, White House letter”), available at <https://www.grassley.senate.gov/news/news-releases/grassley-wins-commitments-cooperation-administration-oversight-requests>. It is not clear whether GSA was aware of the July 20, 2017, White House letter when it adopted GSA Order ADM 1040.3 on July 24, 2017. While the letter was dated July 20, 2017, it was not made public by Chairman Grassley’s office until July 28, 2017. See Press Release, Office of Sen. Charles Grassley, *Grassley Wins Commitments of Cooperation from Administration on Oversight Requests* (July 28, 2017).

⁴⁹ *Id.* at 2.

JE18-002

promote transparency and minimize the potential for confusion, misinterpretation, and inconsistent application.

In response to our report, the agency stated that it commits to responding to requests from individual Members “to the fullest extent allowable under the law” but qualifies that request by referring to unspecified longstanding policies. (See Appendix.)

Conclusion

From 2015 through 2017, GSA implemented a series of published and unpublished policies governing responses to congressional inquiries. These policies should have contained, but did not contain, the whistleblower protection language that the WPEA requires be included in nondisclosure policies. GSA’s failure to include the required language increases the risk of confusion and may chill the willingness of potential whistleblowers to come forward.

GSA’s use of unpublished policies did not comply with internal directives and created opportunities for confusion, misinterpretation, and inconsistent application among its officials and employees. GSA officials informed of the policies described different interpretations of the policies and the time periods in which they were in place. Other GSA employees, including some senior GSA officials, were either not informed of the policies or learned of them only second-hand.

Finally, GSA’s current policy with respect to congressional inquiries lacks transparency, despite GSA’s issuance of a new published order in July 2017. GSA officials in OCIA stated that at least some aspects of the prior unpublished policy are still in place, yet the current order does not clarify whether GSA is continuing its prohibition of employees from responding to individual Member inquiries deemed to be oversight or investigative in nature, or limiting the response to such inquiries to agency records identified through GSA’s FOIA process.

Recommendations

GSA’s leadership should:

1. Include the anti-gag provision required by the Whistleblower Protection Enhancement Act of 2012 in GSA’s order on congressional and intergovernmental inquiries and relations.
2. Clarify GSA’s policy on communications with Members of Congress in GSA’s order on congressional and intergovernmental inquiries and relations.

JE18-002

Objectives, Scope, and Methodology

This evaluation was conducted by the Office of Inspections to determine whether GSA implemented a nondisclosure policy regarding employee communications with Congress and if so, whether the policy violates the Whistleblower Protection Enhancement Act or other laws, regulations, or GSA policy. To accomplish our objectives, we:

- Researched laws, rules, regulations, and other federal guidance on employee and agency communications with Congress;
- Reviewed GSA policies, orders, and procedures related to the management of responses to congressional inquiries;
- Reviewed relevant audits and inspections conducted by GSA OIG, GAO, and other federal agencies;
- Interviewed agency management and staff from the OCIA, OGC, FOIA office, and Administrator's Office
- Reviewed OCIA correspondence records; and
- Reviewed email documentation for OCIA, OGC, and the Administrator's Office staff.

Our evaluation was conducted from May through December 2017, in accordance with the Council of the Inspectors General on Integrity and Efficiency *Quality Standards for Inspection and Evaluation* (January 2012).

JE18-002

Appendix: Management Comments



Office of Congressional and Intergovernmental Affairs

March 2, 2018

MEMORANDUM FOR PATRICIA D. SHEEHAN
ASSISTANT INSPECTOR GENERAL FOR INSPECTIONS (JE)

FROM: P. BRENNAN HART, III
ASSOCIATE ADMINISTRATOR
OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL
AFFAIRS (S)

SUBJECT: *Evaluation of GSA Nondisclosure Policy Draft Report (JEF-010-000)*

The U. S. General Services Administration (GSA) and the Office of Inspector General (OIG) share the goal of fostering an environment where it is safe to report waste, fraud, or mismanagement. With this in mind, GSA appreciates the OIG review and two recommendations regarding the GSA policy governing official congressional communications, ADM 1040.3 (the GSA Order). GSA is committed to being as forthcoming as possible with regard to congressional oversight requests and individual Member requests for information.

Regarding the first recommendation, GSA firmly recognizes the importance of protection for whistleblowers and the valuable role that whistleblowers play in bolstering oversight. GSA consistently supports employees' rights in this area through whistleblower trainings and circulating information stating whistleblower rights, processes, and assurances of legal protection. Respectfully, GSA disagrees with OIG's interpretation of the Whistleblower Protection Enhancement Act of 2012 (P.L. 112-199) (WPEA) and its conclusion that the GSA Order constitutes a "nondisclosure policy" under the statute. Notwithstanding that disagreement, GSA amended the GSA Order to include the paragraph referenced in 5 U.S.C. § 2302(b)(13), as recommended by the OIG, and has initiated the formal clearance process for the amended Order.

There is nothing in the WPEA or its legislative history that defines "nondisclosure policy" for the purposes of 5 U.S.C. § 2302(b)(13). A reasonable person can interpret the requirements of that provision as limited to items like specific nondisclosure agreements (e.g., Standard Forms 312 and 4414), settlement agreements with a nondisclosure provision, or policies related to these types of items. For example, WPEA section 115(a), "Nondisclosure policies, forms, and agreements," contains a government-wide prohibition on the use of nondisclosure agreements without the whistleblower protection statement found in 5 U.S.C. § 2302(b)(13) and specifically enumerates Standard Forms 312 and 4414 as subject to the prohibition.

Unlike those examples of nondisclosure policies, the GSA Order states a procedure to ensure that all official responses to congressionally initiated requests are vetted to provide the agency's

1800 F Street, NW
Washington, DC
www.gsa.gov

JE18-002

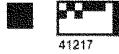
official position on particular matters. This centralization of congressional interaction ensures both uniformity and consistency of message, which minimizes confusion on behalf of agency personnel, Members and staff in Congress, and the public. Previous GSA orders on the topic detail similar requirements for Office of Congressional and Intergovernmental Affairs involvement. While the GSA Order does not detail every step or consideration in a response, it ensures there is a single office with the appropriate authority and discretion to properly present the official agency position on any matter of congressional inquiry. In that respect, the GSA Order is no different from the Office of Management and Budget's (OMB) Circular A-19 Legislative Coordination and Clearance, which requires prior coordination by agencies with OMB on various interactions with Members of Congress and does not contain the language found in 5 U.S.C. § 2302(b)(13) regarding whistleblower rights.

Ultimately, what differentiates the GSA Order from a nondisclosure policy is that a whistleblower's communications with Congress are not official agency positions and are therefore outside the scope of the GSA Order. This is consistent with the definition of "disclosure" in 5 U.S.C. § 2302(a)(2)(D), which specifically exempts "a communication concerning policy decisions that lawfully exercise discretionary authority." However, it is always worthwhile to remind employees of their whistleblower rights and, therefore, as stated above, GSA has replaced the general reference to whistleblower rights in the GSA Order with the specific language contained in the statute.

With respect to the second recommendation, the OIG evaluation stated there was uncertainty in the GSA Order on GSA's policy of responding to individual Members of Congress. For clarity, GSA has updated the Order and removed the reference to the Office of Legal Counsel's May 1, 2017, opinion. GSA will continue to use its best efforts to be timely in responding to requests from all Members of Congress. As White House Director of Legislative Affairs, Marc Short, stated in his July 20, 2017, letter to Chairman Chuck Grassley, "... the Executive Branch should voluntarily release information to individual Members where possible." The OIG evaluation also commented that Members of Congress (non-chairmen) who submit requests for records are often treated like requesters under the Freedom of Information Act (FOIA). GSA recognizes the important role of congressional oversight and routinely provides information through document productions and briefings upon request to Members on a variety of topics in efforts to maintain transparency. GSA's actions are consistent with longstanding Executive Branch policy through numerous administrations.¹ GSA will continue to respond to congressional requests to the fullest extent allowable under the law and consistent with longstanding agency and Executive Branch policies.

GSA appreciates its partnership with the legislative branch and looks forward to continued opportunities to work with Congress—Committees and individual Members.

¹ *Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members*, 25 Op. O.L.C. 289 (2001). See also, *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, 41 Op. O.L.C. 1 (2017). See also, Alissa M. Dolan et al., Cong. Research Serv., RL30240, *Cong. Oversight Manual* 56 (2014).



Submission of Federal Rules Under the Congressional Review Act

☐ President of the Senate ☐ Speaker of the House of Representatives ☐ GAO

Please fill the circles electronically or with black pen or #2 pencil.

1. Name of Department or Agency

2. Subdivision or Office

3. Rule Title

4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable)

5. Major Rule ☐ Non-major Rule ☐

6. Final Rule ☐ Other ☐ _____

7. With respect to this rule, did your agency solicit public comments? Yes ☐ No ☐ N/A ☐

8. Priority of Regulation (fill in one)

☐ Economically Significant; or
Significant; or
Substantive, Nonsignificant

☐ Routine and Frequent or
Informational/Administrative/Other
*(Do not complete the other side
of this form if filled in above.)*

9. Effective Date (if applicable)

10. Is a concise Summary of the Rule provided? Yes ☐ No ☐

Submitted by: _____ (signature)

Name: _____

Title: _____

For Congressional Use Only:

Date Received: _____

Committee of Jurisdiction: _____

11/09/99