

**Post Hearing Questions for the Record  
Submitted to Mary Beth Maxwell  
Principal Deputy Assistant Secretary for Policy, U.S. Department of Labor  
From: Senator Lamar Alexander**

*“Examining the Use of Agency Regulatory Guidance”  
September 23, 2015*

**Subcommittee on Regulatory Affairs and Federal Management**

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**Questions from Senator Lankford**

*On the Decision to Initiate Guidance and Relevant Controls*

- 1. Please describe how officials in your department make the determination that a guidance document is appropriate rather than going through the rulemaking process.**
  - a. Do you consider those controls over the process to be sufficient?**

**Answer:** The Department of Labor uses guidance to help our regulated communities understand their rights and responsibilities in accordance with the statutes we administer and enforce and the regulations that interpret them. The Department makes every effort to develop regulations that clearly articulate stakeholders’ rights and responsibilities. These binding regulations are developed consistent with the Administrative Procedure Act’s notice and comment process. However, notice and comment rulemaking alone cannot address the myriad factual situations for which our regulated communities seek guidance. Employers, workers, job seekers, retirees, and their representatives and advocates regularly seek additional guidance from the Department. That guidance may address any number of factual situations that may arise, including interpreting new regulations; providing information on suggested practices; providing guidance on grant administration; clarifying policies in answer to stakeholder questions; or providing information on the Department’s current priorities and initiatives.

The Department develops guidance consistent with the APA and the Office of Management and Budget’s (OMB) 2007 Bulletin on Agency Good Guidance Practices. Any time we pursue a regulation or guidance, our component agencies consider these authorities and work closely with all other relevant components, as appropriate, to make these determinations.

- b. How do you determine if a guidance document is significant?**

**Answer:** The OMB Good Guidance Bulletin lays out clear guidelines for the Department to determine if a guidance document is significant. Significant guidance, according to the OMB Good Guidance Bulletin, is a guidance document that “may reasonably be anticipated to

- (1) have a \$100 million annual effect on the economy OR adversely affect certain aspects of the economy (a sector, 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."

Our component agencies consider this definition and work closely with all other relevant components, as appropriate, to make these determinations.

**c. Is it at the sole discretion of the agency to determine whether a guidance document requires OIRA review?**

**Answer:** Guidance documents are cleared and reviewed at an appropriate level as determined by the component agency and Department leadership based on a number of factors, including the form of the guidance, complexity, scope and level of interest.

In addition, draft guidance documents are often circulated for clearance among other agency components that have an equity in the document. Some guidance documents rise to a level that warrants interagency review as well. Significant guidance under the Good Guidance Bulletin is transmitted to OMB for formal interagency review.

**d. What analysis is conducted to ensure that the guidance will not have economically significant effects?**

**Answer:** The Department develops guidance consistent with the APA and the OMB Good Guidance Bulletin. The OMB Good Guidance Bulletin does not state that agencies should avoid issuing economically significant guidance, but rather lays out clear guidelines on the criteria and procedures for guidance documents that are economically significant. When developing economically significant interpretations, agencies consider these authorities in making a determination whether to promulgate such interpretations as significant guidance (pursuant to the OMB Good Guidance Bulletin) or notice-and-comment rulemaking (pursuant to the APA), in consultation with all other relevant components, as appropriate.

*On Adherence to OMB Guidelines for Guidance*

- 2. Given both the importance of guidance and concerns about its use, in 2007 OMB issued a Bulletin establishing policies for the development, issuance, and use of "significant" guidance documents. This included establishing departmental written procedures for the approval of significant guidance and maintaining a website to assist the public in locating significant guidance documents. It seems that when OMB's good guidance practices were issued there was a healthy Answer from the agencies, but that this has waned. Labor's experience finding its original 2007 procedures for significant guidance produced in Answer to that directive only at the end of GAO's audit further strengthens this argument. Some of GAO's findings about compliance with the bulletin**

**are worrisome, especially as significant guidance documents represent such a small subset of the universe of guidance being issued to the public. Can you speak to your respective agency efforts on the subject and what you think you could be doing better?**

**Answer:** The recent GAO report highlights areas where the Department has strong practices for developing guidance. GAO recognized that the Department has “consistently applied OMB Bulletin requirements for public access and feedback for significant guidance.”<sup>1</sup>

The Department decides the appropriate type of guidance based on what is required by the APA and OMB Good Guidance Bulletin. With respect to what the Department could be doing better, the Department has reviewed the GAO report in detail and has, among other things, committed to 1) reviewing and updating its written procedures for identifying and approving significant guidance, and 2) disseminating updated procedures to all DOL component agencies. The Department often voluntarily employs full notice-and-comment procedures when pursuing a project that would meet the OMB Good Guidance Bulletin’s definition of significant or economically significant guidance.

*On PSM: recognized and generally accepted good engineering practices*

- 3. In 2009, OSHA issued interpretive guidance defining RAGAGEP as “the basis for engineering, operation, or maintenance activities [that] are themselves based on established codes, standards, published technical reports or recommended practices or similar documents...” The June 5 OSHA Memorandum significantly narrows the 2009 definition of RAGAGEP to include “both ‘recognized and generally accepted’ and ‘good engineering’ practices.” The Memorandum lists “primary sources of RAGAGEP” and requires regulated parties to comply with those listed standards. “If an employer deviates from ‘shall’ or ‘shall not’ requirements in the employer’s adopted RAGAGEP (or applicable RAGAGEP if the employer has not specified RAGAGEP), OSHA will presume a violation.”**

**Was RAGAGEP intended to be a performance-based standard with inherent flexibility for regulated parties to choose among industry best practices that were most appropriate for their businesses?**

**Answer:** Yes. The employer selects the RAGAGEP with which it will comply. This is explained in “Background” on page 2, second paragraph of the Memorandum.

- a. If RAGAGEP was intended to act as a flexible enforcement standard, doesn’t the June 5 guidance memo effectively convert RAGAGEP to a specification standard—a standard that prescribes process— by explicitly requiring**

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<sup>1</sup> U.S. Government Accountability Office: *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices* (April 2015) (GAO Report) at 33.

**compliance with an enumerated set of practices and adding additional legal obligations?**

**Answer:** No. The PSM standard, a regulation adopted through notice-and-comment rulemaking, permits employers to select the particular RAGAGEP they will follow. The Memorandum lists some sources of RAGAGEP from which employers may choose, and gives some examples of materials that may qualify as RAGAGEP. However, neither the sources nor the examples listed are mandatory or exhaustive. Nothing in the Memorandum requires regulated parties to choose a particular source or standard as the basis for RAGAGEP. Inspectors enforce against the PSM standard and any potential enforcement action would be taken based on non-compliance with the PSM standard.

- b. If a court were to review a challenge to an OSHA citation where a regulated party followed its own reasonable internal procedures in lieu of compliance with mandatory language in RAGAGEP and was cited for doing so, would the Department rely on the June 5 memorandum as authority to enforce the citation? At what level within the agency was the determination to issue this policy as guidance made?**

**Answer:** Decisions about whether rulemaking or guidance is appropriate are made carefully by each agency within the Department in consultation with all other relevant components, as appropriate. The June 5 Memorandum does not establish substantive rights or obligations; it explains the Department's view on the meaning of binding statutes and regulations. As previously noted, neither the sources nor the examples listed in the Memorandum are mandatory or exhaustive. Thus, nothing in the Memorandum requires regulated parties to choose a particular source or standard as the basis for RAGAGEP.

- c. Who was the highest-level official aware of this determination?**

**Answer:** This Memorandum was cleared and reviewed at an appropriate level as determined by the OSHA and Department leadership.

- d. What led OSHA to determine that the RAGAGEP guidance was not significant?**

**Answer:** The Memorandum documents in writing long-standing enforcement practices within OSHA. It does not change OSHA enforcement policy; hence the Memorandum did not meet the definition of significant in the OMB Good Guidance Bulletin.

- e. What analysis of costs was completed to determine that the guidance would not have \$100 million dollars in effects?**

**Answer:** The Memorandum documents long-standing enforcement practices within OSHA. It does not change OSHA enforcement policy; hence, the Department concluded that the Memorandum imposes no additional costs on the regulated community.

**f. Did OSHA discuss the content of this guidance with OIRA?**

**Answer:** As part of the development and implementation of the Executive Order (EO) 13650 “Improving Chemical Facility Safety and Security,” OSHA held robust interagency consultations about Process Safety Management policies in general, including with OIRA.

*On PSM: retail exemption*

- 4. On July 22, 2015, OSHA issued a memorandum revising OSHA’s interpretation of the exemption of retail facilities from coverage of the Process Safety Management of Highly Hazardous Chemicals (PSM) standard. Previously, facilities were exempted from PSM if more than 50 percent of their sales were to end users. The July 22 guidance revised the exemption to include only facilities using a North American Industry Classification System (NAICS) applicable to sector 44 and 45 (governing retail trade sectors), excluding sector 42 (wholesale) from the exemption. Please explain why OSHA chose to alter its retail exemption policy through guidance rather than the rulemaking process.**

**Answer:** The memo was not subject to the APA notice- and-comment procedures. Nonetheless, OSHA was committed to seeking stakeholder views and, as such, published the proposed revised interpretation in a Request for Information (RFI) to obtain stakeholder input, and considered the comments received in response to the RFI before issuing the retail facilities memorandum.

- a. OSHA estimated that compliance costs associated with implementation of this regulation would total around \$2,160 per facility. How did OSHA arrive at this estimate? [The Agricultural Retailers Association estimates costs of compliance to total \$27,500 per facility.]**

**Answer:** The cost analysis, as discussed in OSHA’s responses to public comments on its new interpretation of the term “retail facilities” in the PSM Standard, is available at <https://www.osha.gov/chemicalexecutiveorder/RetailExemptionRFICommentResponse.pdf>, OSHA evaluated a number of factors, including that affected facilities are already required to be in compliance with the EPA’s Risk Management Program (RMP) rule, the requirements of which would mean that the additional costs of compliance with PSM standard for retail facilities are modest -- an estimated one-quarter of what it would cost for a new facility to come into compliance with the PSM standard.

- b. Have you received any complaints on this guidance? If so, could you describe the nature of the complaints?**
- i. If yes: Why were these complaints not provided in Labor’s Answer to Senator Alexander and my letter to the agency on use of guidance?**

**Answer:** The Department’s response to Senator Alexander and Senator Lankford provided copies of all responsive complaints that were received from July 24, 2007, through the date of the Senators’ May 7, 2015, letter. On September 16, 2015, the Agricultural Retailers Association and Fertilizer Institute filed a petition in the U.S. Court of Appeals for the D.C.

Circuit challenging the revised interpretation concerning the retail exemption. That pleading is docketed 15-326 in the Court of Appeals and is publicly available.

**c. At what level within the agency was the determination to issue this policy as guidance made?**

**Answer:** The Department has a strong record of both following the regulatory and statutory requirements and going beyond those when we think stakeholders would benefit. Decisions about whether rulemaking or guidance is appropriate are made carefully by each agency within the Department in consultation with all other relevant components, as appropriate. In this case, OSHA issued this guidance after carefully considering the APA and Good Guidance Bulletin requirements, as appropriate.

**d. Who was the highest-level official aware of this determination?**

**Answer:** This memo was cleared and reviewed at an appropriate level as determined by the OSHA and Department leadership.

**e. Did OSHA determine that the retail exemption guidance was not significant? If so, what led them to this determination?**

**Answer:** The memorandum constituted an interpretation that was not subject to the APA notice-and-comment procedures. Nonetheless, OSHA was committed to seeking stakeholder views and, as such, published the proposed revised interpretation in a Request for Information (RFI) to provide for robust stakeholder input, and considered the input received in response to the RFI before issuing the retail facilities memorandum.

**f. What analysis of costs was completed to determine that the guidance would not have \$100 million dollars in effects?**

**Answer:** See response to 4(a) above.

**g. If OSHA determined that the guidance was not economically significant, did it consider it to be “new or novel”?**

**Answer:** See response to 4(e), above.

**h. Did OSHA discuss the content of this guidance with OIRA?**

**Answer:** As part of the development and implementation of the Executive Order (EO) 13650 “Improving Chemical Facility Safety and Security,” OSHA held robust interagency consultations about Process Safety Management policies. This guidance was shared with that interagency group, including OIRA.

**5. On June 5, 2015, OSHA issued a memorandum titled “Process Safety Management of Highly Hazardous Chemicals and Covered Concentrations of Listed Appendix A**

**Chemicals.” PSM’s Appendix A does not specify specific concentration percentages for certain chemicals, and historically OSHA applied a “commercial grade” standard to these thresholds, which exempted chemicals with “a typical maximum concentration... that is commercially available and shipped.” The memorandum revises the “commercial grade standard” to include any of these chemicals whose total weight is at one percent or greater. Please explain why OSHA chose to alter its chemical concentration policy through guidance rather than the rulemaking process.**

**Answer:** The memorandum constituted a clarification of discretion that was not subject to the APA notice- and-comment procedures. The memo advises how the agency anticipates exercising prospectively its discretion to enforce the PSM standard where a chemical that is listed in Appendix A without a specific concentration level is present in a mixture. The standard itself contains no exemption from coverage for these chemicals based on their concentration level. Under the clarification set out in the memo, however, OSHA would not exercise enforcement discretion where an Appendix A chemical is present in a mixture at a concentration less than 1%. The agency published the proposed enforcement policy in a Request for Information (RFI) and considered the comments received in Answer to the RFI before issuing the concentrations memo.

- a. Regulated parties have stated that this revision will force many more processes and businesses to comply with OSHA’s PSM requirements. Did OSHA anticipate its memoranda greatly expanding the number of regulated parties under its jurisdiction? If so, why did OSHA choose not to provide these parties with the opportunity to comment?**

**Answer:** OSHA afforded all stakeholders an opportunity to comment on the policy by including it in the RFI, and received comments reflecting a range of views that it considered before issuing the Memorandum.

- b. Did OSHA estimate the costs of compliance with this rule?**

**Answer:** As an exercise in enforcement discretion, an estimate of the cost of compliance was not required. OSHA was also acting to bring its commercial concentrations policy in-line with EPA’s longstanding policy.

- c. Did OSHA determine that the retail exemption guidance was not significant? If so, what led them to this determination?**
  - i. What analysis of costs was completed to determine that the guidance would not have \$100 million dollars in effects?**

**Answer:** To the extent that this question concerns the June 15, 2015, memorandum, “Process Safety Management of Highly Hazardous Chemicals and Covered Concentrations of Listed Appendix A Chemicals,” which is the general subject of Question 5, see response to 5(b) above.

- ii. If OSHA determined that the guidance was not economically significant, did it consider it to be “new or novel”?**

**Answer:** To the extent that this question concerns the June 15, 2015, memorandum, “Process Safety Management of Highly Hazardous Chemicals and Covered Concentrations of Listed Appendix A Chemicals,” which is the general subject of Question 5, see response to 5, above.

**d. Did OSHA discuss the content of this guidance with OIRA?**

**Answer:** See response to 3(f), above.

**e. Have you received any complaints on this guidance? If so, could you describe the nature of the complaints?**

**i. If yes: Why were these complaints not provided in Labor’s Answer to Senator Alexander and my letter to the agency on use of guidance?**

**Answer:** The Department’s response to Senator Alexander and Senator Lankford provided copies of all responsive complaints from July 24, 2007, through the date of the Senators May 7, 2015, letter. On August 6, 2015, the American Chemistry Council and other parties filed a pleading in the U.S. Court of Appeals for the D.C. Circuit concerning the PSM rule. That pleading is docketed as 15-1252 in the Court of Appeals and is publicly available.

**f. At what level within the agency was the determination to issue this policy as guidance made?**

**Answer:** Decisions about whether rulemaking or guidance is appropriate are made carefully by each agency within the Department in consultation with all other relevant components, as appropriate. In this case, OSHA issued this guidance after considering the APA and the Good Guidance Bulletin requirements, as appropriate.

**g. Who was the highest-level official aware of this determination?**

**Answer:** This memo was cleared and reviewed at an appropriate level as determined by the OSHA and Department leadership.

**6. Many companies impacted by the changes outlined in the chemical concentrations memorandum are Small Business Administration (SBA)-defined small businesses. The Small Business Regulatory Enforcement and Fairness Act requires that OSHA receive input from affected small businesses through the SBA's Office of Advocacy before proposed rules are published. By sidestepping the rulemaking process, these businesses will not be able to participate in an SBA review panel or receive compliance assistance. Given the significant impact on small business, how do you justify not allowing them a place in the process?**

**Answer:** OSHA solicited comment on the change in enforcement policy from all stakeholders through the RFI, and considered these comments before issuing the concentrations memo. In addition, OSHA’s state-run consultation programs are available to assist small and medium size businesses in complying with these requirements.

*On Labor's Plans for Rulemaking on PSM Standards*

- 7. In Answer to Executive Order 13650, OSHA posted a Request for Information in the Federal Register in December 2013 asking for input on changes to the PSM standards and enforcement policies. These included adding a definition of RAGAGEP to the PSM Standard as well as changing PSM enforcement policies for the Retail Facilities Exemption and Chemical Concentrations. At that time did OSHA intend to conduct rulemaking to make these changes to the standards?**

**Answer:** OSHA never intended to conduct rulemaking to issue the Retail Exemption and Chemical Concentration memos. The RFI states specifically that OSHA was considering changing its enforcement policies on these topics. With respect to the definition of RAGAGEP, OSHA issued the memo at issue to explain and memorialize its existing policy on determining what practices constitute RAGAGEP. As it moves forward on the PSM regulatory process, which will be conducted consistent with the APA and EO 12866, OSHA is also considering many ways in which it might clarify the standard.

- a. What changed that you decided to address these three issues through guidance interpretations?**

**Answer:** OSHA never intended to conduct rulemaking to issue the RAGAGEP interpretive guidance, or the Retail Exemption and Chemical Concentration memos.

- b. GAO has found that OSHA rulemaking takes, on average, seven years. Did the length and effort of rulemaking play a role in the determination to address the issues through guidance?**

**Answer:** Rulemaking was not legally required for the guidance and two memoranda. OSHA determined that guidance was the better, and more timely, vehicle through which to protect workers and communities.

- c. Even if it was determined that the guidance memoranda were appropriately issued, did you take into account the lack of predictability for industry that this would cause?**

**Answer:** The Department addressed predictability concerns by ensuring that industry stakeholders had notice of potential changes -- both through the changes in the retail exemption and Appendix A commercial concentrations interpretation being listed in Executive Order 13650 in August 2013, as well as in the subsequent report to the President issued in 2014, in addition to changes discussed in OSHA's PSM RFI. We also addressed potential disruption to the industry by allowing for a one-year enforcement phase-in for the retail exemption.

*On a checklist to decide to proceed with guidance*

- 8. OSHA’s procedures for non-policy issuances include a checklist “to be used to determine whether a proposed issuance is appropriate for release as a non-policy issuance.” It asks the drafter to answer whether the new issuance would “establish new policy or procedure.” If the answer is yes, it directs the drafter to stop and prepare for publication in the Federal Register or for issuance as an OSHA policy issuance, called OSHA Directives. OSHA’s publicly available procedures for OSHA Directives do not contain such a checklist. Does OSHA have a similar checklist for its directives?**

**Answer:** The APA and the OMB Good Guidance Bulletin lay out clear guidelines. Any time OSHA pursues a directive, they work closely with all relevant components as appropriate to make these determinations.

*On Conferring with Regulated Entities*

- 9. We’ve had several hearings now with agencies, and our staff has spoken to many agency officials on regulatory issues. One thing we hear over and over is that agencies are having frequent conversations with those affected by their regulations and work closely with them to get their thoughts and input on their regulatory programs. However, I then hear over and over from regulated communities that they aren’t being heard or they were unaware of new guidance or requirements. Please explain where the disconnect lies.**

**Answer:** The Department believes that stakeholder engagement is important – from small businesses to workers, job seekers, and trainees. The Department is constantly looking for ways to hear from and respond to the needs of our stakeholders. We utilize an array of formal and informal mechanisms to inform what guidance is necessary and useful and the content of that guidance. It is important to use different methods to ensure that we are not just listening to Washington insiders – we want to be sure that we are hearing from workers and employers who are actually living with our programs. The Department listens to and considers all input from our stakeholders ranging from calls and letters from the public; constituent concerns from Members of Congress; Answers to Requests for Information; and advisory committee reports. In doing this outreach, the Department takes a proactive approach by going into the field to hold listening sessions with stakeholders and participates in other events at the local level. The Department has a local presence in communities across the country, and the field staffs take seriously their roles as members of their communities.

Our goal is to ensure broad dissemination of guidance to ensure all parties of interest are aware of and have access to it. We tailor our communication strategies to the specific audiences and stakeholders. For example, when we issue a new regulation, we may create a landing page on our website in order to provide all relevant resources in one place. When guidance is particularly time-sensitive – like an OSHA blog post on fireworks safety published for the Fourth of July – we often use email blasts to inform the public, including the Department’s newsletter, which reaches over 450,000 subscribers, or other agency-specific mailing lists of stakeholders. We often conduct webinars and town halls for stakeholders and work with trade associations and other interested groups to reach their members. Still other guidance documents are primarily

printed out and used as handouts for small businesses and workers at outreach events attended by field staff.

The Department continues to play an active role in keeping stakeholders engaged on guidance and will continue to work with component agencies to identify other ways to engage stakeholders.

*On Adherence to OMB Guidelines for Guidance*

**10. Given both the importance of guidance and concerns about its use, in 2007 OMB issued a Bulletin establishing policies for the development, issuance, and use of “significant” guidance documents. This included establishing departmental written procedures for the approval of significant guidance and maintaining a website to assist the public in locating significant guidance documents. It seems that when OMB’s good guidance practices were issued there was a healthy Answer from the agencies, but that this has waned. Labor’s experience finding its original 2007 procedures for significant guidance produced in Answer to that directive only at the end of GAO’s audit further strengthens this argument. Some of GAO’s findings about compliance with the bulletin are worrisome, especially as significant guidance documents represent such a small subset of the universe of guidance being issued to the public. Can you speak to your agency’s efforts on the subject and what you think you could be doing better?**

**Answer:** The recent GAO report highlights areas where the Department has strong practices for developing guidance. GAO recognized that the Department has “consistently applied OMB Good Guidance Bulletin requirements for public access and feedback for significant guidance.”<sup>2</sup>

The Department has committed to reviewing and updating its written procedures for approval of significant guidance, and to disseminate updated procedures to all DOL component agencies.

*On Maintaining Up-to-Date Information for the Public*

**11. When it comes to guidance, a frequently raised issue is the amount of it and that it is hard to find. For example, a Task Force on Federal Regulations of Higher Education last year found that the Department of Education issues official guidance to amend or clarify its rules at a rate of more than one document per work day. What actions could Labor take to ensure that agencies to invest the time in ensuring that websites ensure that relevant guidance is easy to find, accessible, and up-to-date?**

**Answer:** The Department’s major component agencies have established websites providing information to their respective regulated communities about the statutes they enforce and about guidance that they have issued. The Department is committed to working with component agencies to identify and, where appropriate, implement website improvements and customer

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<sup>2</sup> *Id.*

satisfaction metrics to help ensure that the public can more easily access and comment upon guidance documents. As a start, the Department plans to launch a new web portal that will help the public find guidance documents published by each of our component agencies.

*On Progress Made in Answer to GAO's Report*

**12. In Answer to GAO's recommendations, Labor stated in its production to the subcommittee that they have committed to (1) reviewing and updating written procedures for approval of significant guidance documents, (2) strengthening component agency's processes for guidance, and (3) working with component agencies to identify and implement improvements to websites and customer satisfaction metrics for each access to and comment on guidance documents. It stated that shortly after the publication of GAO's report, the Department convened an internal working group to share best practices and ensure more consistent application of internal control standards. Labor stated in its letter to myself and Senator Alexander that it had convened an "internal working group of senior policymakers" across component agencies to address GAO's recommendations to strengthen guidance practices and make them more consistent. Please elaborate on the actions of the working group to date, and any additional actions Labor plans to take to further strengthen these processes.**

**Answer:** The Department is implementing all three of GAO's recommendations. The recent GAO report highlights areas where the Department has strong practices for developing guidance. But there is still room for improvement, and we have concurred with the GAO's three recommendations concerning the Department's guidance processes.<sup>3</sup>

First, the Department has begun reviewing and updating our written procedures for the approval of significant guidance documents. We are actively engaged in that process.

Second, the Department is taking steps to strengthen component agencies' application of internal controls of guidance. In recognition of the breadth of our component agencies' responsibilities, the Department has not generally employed a single, one-size-fits-all process for developing and reviewing guidance. Shortly after the publication of the GAO report, the Department began creating best practices guidance based on the vast expertise of our career senior leaders in order to promote a more consistent application of internal control standards in the guidance production process. This group meets regularly to share their experiences and best practices on a variety of topics, including the development of guidance.

Finally, the Department has committed to working with component agencies to identify and, where appropriate, implement website improvements and customer satisfaction metrics to help ensure that the public can more easily access and comment upon guidance documents.

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<sup>3</sup> *Id.* at p.104.

**13. Labor’s written statement mentioned considering a web portal to allow the public to access guidance. The Small Business Administration (SBA) provides business guides by industry to provide information to the public about how to comply with all the laws and regulations that affect them. Could that be a model for Labor’s web portal, rather than asking the public to know which sub-agency has regulations that might apply to them?**

**Answer:** The Department appreciates the recommendation.

### **Questions from Senator Alexander**

**1. The Government Accountability Office (GAO) found that OSHA officials did not involve regulated parties in developing guidance with the exception of educational guidance, such as hazard alerts. GAO recognizes that involving regulated parties in the development of guidance can be helpful. Will OSHA commit to involving the public more in the development of guidance documents?**

**Answer:** OSHA seeks input from regulated parties as appropriate to the type of guidance being prepared. For example, with respect to the PSM guidance documents issued over the summer, OSHA requested information from stakeholders on these issues in a December 2013 Federal Register Request For Information, and interested parties had ample opportunity and did comment at that time on the issues covered by the guidance documents.

**2. In DOL’s August 6, 2015, Answer letter to me about DOL’s use of guidance it stated that DOL uses guidance “to educate affected parties about [DOL’s] views *on the responsibilities* those parties have under the relevant laws.” (emphasis added). How are responsibilities under the law different than legal requirements which should go through notice and comment rulemaking?**

**Answer:** The Department of Labor is charged with administering and enforcing more than 180 laws. Guidance is one tool for responding to stakeholder questions or other current challenges. Guidance does not itself represent new requirements or obligations – which occur either through statutes or through regulations that derive from notice-and-comment rulemaking. Instead, guidance translates the requirements set out by laws and regulations into useful information about compliance that is accessible to diverse groups of stakeholders for the sake of transparency and to assist stakeholder compliance.

**3. In those instances where an objection has been made to DOL issuing guidance instead of a rulemaking, will you commit to conducting a rulemaking?**

**Answer:** The Department will continue to comply with all requirements under the APA, the OMB Good Guidance Bulletin, and other applicable requirements in the issuance of guidance.

**4. GAO found that agencies sometimes issue guidance in Answer to directives from senior management or in Answer to administration priorities. When those directives come**

**down, how does DOL evaluate whether a regulation should be issued instead of guidance?**

**Answer:** The APA and the OMB Good Guidance Bulletin lay out clear guidelines. Anytime we pursue a regulation or guidance, we consider these authorities, in consultations with all relevant components, as appropriate, to make those determinations.

**5. Has DOL ever penalized a regulated party for not following guidance, or based on its enforcement guidance or memos?**

**Answer:** The conduct of regulated parties is governed by statutes and their implementing regulations, and the Department's penalties are based on violations of those binding authorities.

**a. If yes, please list the date, entity penalized, and the penalty.**

**6. Has DOL ever threatened to penalize a regulated party for not following guidance, or based on its enforcement guidance or memos?**

**Answer:** Statutes and their implementing regulations bind regulated parties. It is DOL's policy to use guidance to timely advise the regulated community as to DOL's views. As noted above, any penalties assessed by DOL are based on violations of a statute or regulation.

**a. If yes, please list the date, entity penalized, and the penalty.**

### **Questions from Senator Daines**

**1. There appear to be very few requirements in place to govern the issuance of interpretive rules. In regards to the DOL Administrator's Interpretation No. 2015-1, which shifts the basis by which employers classify workers as either contractors or employees from a control exertion test to an economic dependence test, did DOL open-up this interpretive rule for public comment? Was there any level of stakeholder input prior to issuance? Without an official public comment period, how did DOL gain comfort with the real-world impacts of your interpretive rules?**

**Answer:** As an initial matter, the Administrator's Interpretation 2015-1 (AI), *The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors* did not shift the basis for such classification. When drafting the Fair Labor Standards Act (FLSA) more than 75 years ago, Congress rejected the "control exertion" test. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947). Instead, the FLSA defined "employ" broadly as including "to suffer or permit to work," 29 U.S.C. 203(g), which clearly covered more workers as employees than the common law control test. See *U.S. v. Rosenwasser*, 323 U.S. 360, 362-63 (1945). United States Supreme Court cases have noted the FLSA's broader economic realities test for decades, and have recognized that the "suffer or permit" standard was specifically designed to ensure as broad of a scope of statutory coverage as possible. See *Rosenwasser*, 323 U.S. at 362-63 ("A broader or more comprehensive

coverage of employees . . . would be difficult to frame.”); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (“employ” is defined with “striking breadth”). The AI collects and analyzes the statutes and judicial decisions and authorities on this issue and provides additional detail on the Department’s long standing position concerning the proper classification of employees, which is in turn based on well-established federal case law, and does not impose any new obligations on employers or represent a change in the Department’s statutory interpretation or policy.

As to stakeholder input, the Department continually seeks opportunities to obtain input from and provide information to the regulated community, in a variety of forms. In the past year, the Wage and Hour Division (WHD) staff met with employer representatives, including but not limited to the Chamber of Commerce and HR Policy Association, in addition to advocacy and stakeholder organizations and the agency’s enforcement staff, to solicit their ideas about where WHD guidance and compliance assistance is most needed. WHD issues AIs when it determines that further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate. AIs set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue.

WHD issued AI 2015-1 to provide the public with additional compliance assistance. AI 2015-1 is consistent with the WHD’s previously available guidance on misclassification of employees as independent contractors.

**Post Hearing Questions for the Record  
Submitted to Amy McIntosh  
Deputy Assistant Secretary Delegated Duties of Assistant Secretary,  
Office of Planning, Evaluation, and Policy Development  
U.S. Department of Education  
From: Senator Lamar Alexander**

***“Examining the Use of Agency Regulatory Guidance”  
September 23, 2015***

**Subcommittee on Regulatory Affairs and Federal Management**

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Questions from Senator Alexander

1. The Department of Education has told the Government Accountability Office (GAO) and me, in its July 7, 2015, response letter about its use of guidance, that it sometimes issues guidance after issuing a regulation to restate the regulation in plainer language. Why doesn't the Department try to write the regulation in the plainest language possible so guidance is not needed?
  - a. Will you help the Department write regulations in the plainest language possible to help cut down on guidance?

Regulations are based on authorizing legislation and subject to requirements of the legislation, the Administrative Procedure Act, and case law that often impacts the manner in which regulation is drafted.

When drafting regulations, we strive to do so using language that is simple and easy to understand. The Department already incorporates plain-language drafting during internal trainings conducted by the Office of the General Counsel's Division of Regulatory Services on regulation drafting.

The Department recognizes our constituents may need clarification on an issue in ways that are best accomplished through guidance. For example, the diverse group of stakeholders we work with, students, parents, teachers, States, schools and school districts, institutions of higher education, advocates, and the general public, may not always need all of the information presented in the final regulations and appreciate outreach from the Department, including through guidance documents, which distill the main takeaways and requirements of the regulations in a manner that is valuable and targeted for different stakeholders.

2. GAO found that agencies sometimes issue guidance in response to directives from senior management or in response to administration priorities. When those directives come down, how does the Department of Education evaluate whether a regulation should be issued instead of guidance?

Decisions to issue new guidance or regulations within the Department go through a discussion and consultation process to ensure appropriate feedback and collaboration between internal

relevant offices. In these discussions, if it becomes clear a legally binding rule is needed to meet agency goals, the Department will engage in rulemaking rather than issuing guidance.

3. In those instances where an objection has been made to the Department of Education issuing guidance instead of a rulemaking, will you commit to conducting a rulemaking?

The Department regularly receives feedback from stakeholders in response to the Department's existing guidance and regulations. Such feedback, both positive and negative, is helpful for the Department in assessing whether the Department's guidance is effective in assisting stakeholders in understanding their rights and responsibilities under the law and regulation. In some cases, we have updated guidance documents to incorporate and address comments from stakeholders. As discussed before, the Department engages in a robust process to ensure that the Department's work is legally sufficient whether issued through guidance or rulemaking. In cases where a legally binding rule is needed, the Department will engage in rulemaking.

4. Has the Department of Education ever penalized a regulated party for not following guidance, such as a Dear Colleague Letter, Frequently Asked Questions, or other guidance documents? Has the Department of Education ever threatened to penalize a regulated party for not following guidance, such as a Dear Colleague Letter, Frequently Asked Questions, or other guidance documents?

The purpose of guidance documents is to assist stakeholders in understanding and complying with laws and regulations. Because guidance documents themselves are not legally binding, the Department has no authority to issue a penalty for failure to follow guidance itself; the Department does have the authority, however, to issue a penalty for failure to follow laws and regulations underlying its guidance.

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*On the Decision to Initiate Guidance and Relevant Controls*

1. **Please describe how officials in your department make the determination that a guidance document is appropriate rather than going through the rulemaking process.**

Decisions to issue new guidance or regulations within the Department go through a robust discussion and consultation process to ensure appropriate feedback and collaboration among internal relevant offices. In these discussions, if it becomes clear that a legally binding rule is needed to meet agency goals, the Department will engage in rulemaking rather than issuing guidance.

- a. **Do you consider those controls over the process to be sufficient?**

The Department believes the process for developing and producing guidance is sufficient.

- b. **How do you determine if a guidance document is significant?**

The Department follows the Office of Management and Budget’s 2007 Final Bulletin for Agency Good Guidance Practices. Section I(4) of the Bulletin defines significant guidance and prescribes procedures that must be carried out for the significant guidance.

- c. **So it is at the sole discretion of the agency to determine whether a guidance document requires OIRA review?**

The Department’s analysis of whether a guidance document requires OIRA review is based on the factors listed in the Bulletin.

- d. **What analysis is conducted to ensure that the guidance will not have economically significant effects?**

The Department follows the Bulletin’s definition of “economically significant guidance document”. We note that the term “economically significant” in the Bulletin does not imply that the guidance establishes mandatory requirements, but rather that the guidance, while still non-binding, would be reasonably be anticipated to lead to economic effects. The Bulletin does not state that agencies should avoid issuing guidance that has such effects (which may include benefits as well as costs), but rather that the guidance must follow certain procedures, including a more formal opportunity for public comment.

*On OCR sexual harassment guidance*

2. **OCR issued a Dear Colleague letter on April 4, 2011, which changed the burden of proof used in sexual assault disciplinary proceedings from the more rigorous widely used “clear and convincing” standard to a “preponderance of the evidence” (“more likely than not”) standard. Law professors from the University of Pennsylvania and Harvard wrote op-eds criticizing the guidance as legally questionable. At what level within the agency was the determination to issue this policy as guidance made?**

The April 4, 2011, Dear Colleague letter (DCL) issued by the Department’s Office for Civil Rights (OCR) did not change the burden of proof. The DCL merely articulated OCR’s interpretation of “equitable” in the Title IX regulation at 34 C.F.R. 106.8(b), in place since 1975, consistent with Supreme Court case law on the appropriate burden of proof in the civil rights context and OCR’s past enforcement practices. OCR uses the same burden of proof when resolving complaints against recipients and in fund termination hearings under all of the civil rights statutes that OCR enforces.

OCR made the initial decision that guidance was needed. As with all significant guidance documents that the Department issues, the draft April 2011 DCL was reviewed, before it was issued, by the Office of the General Counsel and other Department offices, which agreed it was appropriate to issue this as guidance. During this review process, the DCL was deemed to be “significant guidance” and thus required to be submitted to OMB for review.

- a. **Who was the highest-level official aware of this determination?**

The Department uses the same process for all significant guidance. As such, final approval to release the document was obtained by the Office of the Secretary subsequent to OMB approval.

- b. **Because this guidance was designated as significant, you presumably submitted this for OIRA review. Could you describe OIRA’s review of this guidance?**

The Department submitted this guidance for review to OMB for review, including OIRA. OMB concluded review of the revised DCL prior to OCR issuing the DCL.

*On OCR bullying/harassment guidance*

3. **The Department of Education’s Office of Civil Rights’ (OCR) October 26, 2010 Dear Colleague letter on bullying “greatly expand[s] the scope of school liability compared to” existing legal standards as it relates to bullying. The guidance changed the prior test of bullying prohibited under Title IX, which required schools to prevent behavior that is “severe, pervasive, and objectively offensive,” to subject schools to liability for allowing behavior that is “severe, pervasive, or persistent.” Please explain why OCR chose to prescribe bullying and harassment policies through guidance rather than the rulemaking process?**

The October 26, 2010, Dear Colleague letter (DCL) issued by the Department’s Office for Civil Rights (OCR) did not expand the scope of school liability compared to existing legal standards as it relates to bullying. Rather, the October 2010 DCL merely reminded school districts that that some student misconduct that a school deems to be “bullying” under its anti-bullying policy

may also constitute discriminatory harassment under the civil rights laws that OCR enforces; thus rulemaking was not necessary.

- a. **At what level within the agency was the determination to issue this policy as guidance made?**

OCR made the initial decision that guidance was needed. As with most guidance documents, OCR consulted other Department offices prior to issuance, who agreed it was appropriate to issue this as guidance.

- b. **What outside input was obtained on this guidance before issuance?**

OCR heard from a wide range of stakeholders, including other federal agencies, members of Congress, representatives of state and local governments, researchers, advocates, educators, nongovernmental organizations, corporate leaders, and the nation's youth. For example, in August 2010, the Department sponsored the first-annual national summit to address bullying prevention, which brought together a diverse audience of more than 100 participants.

- c. **Who was the highest-level official aware of this determination?**

Final approval to release the document was obtained by the Office of the Secretary.

- d. **How was the determination not to designate this guidance as significant made? Did OCR discuss the content of this guidance with OIRA?**

The Department's Office of General Counsel determined that the October 2010 DCL was not significant guidance because it did not meet the standard set forth in the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices.

#### *On OCR school discipline guidance*

4. **On January 8, 2014, OCR and the Department of Justice's Civil Rights Division issued a Dear Colleague letter that said that "schools may be liable for 'disparate impact' race discrimination if different racial groups are disciplined at different rates, even if these disparities do not result from intentional race discrimination." The guidance drew authority from Title VI of the Civil Rights Act of 1964. However, as the two Commissioners argue, the guidance is at odds with the Act, which prohibits only "actual" discrimination, and not "disparate impact." Further, even if Education had the legislative authority to create preventative rules using the disparate impact theory of racial discrimination, it could not issue them as interpretive guidance.**

- a. **Please explain why OCR chose to prescribe school discipline policies through guidance rather than the rulemaking process.**

The January 8, 2014 Dear Colleague letter (DCL) issued by the Department's Office for Civil Rights (OCR) and the Department of Justice's (DOJ's) Civil Rights Division addressed the application of existing OCR regulations prescribing unjustified discriminatory effects to the administration of student discipline. This did not require rulemaking because the requirements of disparate impact regulations are well established and the guidance was based on the regulations.

Following a careful review of the applicable case law and OCR enforcement practices, as well as complaints received and data collected from the Civil Rights Data Collection demonstrating significant disparities on the basis of race in the imposition of exclusionary discipline, OCR determined that guidance was needed regarding how OCR applies its existing disparate-impact regulation, in addition to others, as OCR investigates complaints of race-based discrimination in the specific context of student discipline.

**b. At what level within the agency was the determination to issue this policy as guidance made?**

OCR made the initial decision that guidance was needed. As with all significant guidance documents that the Department issues, the draft January 2014 DCL was reviewed, before it was issued, by other Department offices, which agreed it was appropriate to issue this as guidance. During this review process, the DCL was deemed to be “significant guidance” and was submitted to OMB for review.

**c. Who was the highest-level official aware of this determination?**

Final approval to release the document was obtained by the Office of the Secretary.

**d. Because this guidance was designated as significant, you presumably submitted this for OIRA review. Could you describe OIRA’s review of this guidance?**

The Department submitted this guidance for review by OMB, including OIRA. OMB concluded review of the DCL prior to OCR and DOJ’s Civil Rights Division issuing the DCL.

**e. This guidance document, although significant, is not included in Education’s list of significant guidance documents. Please confirm that this will be remedied.**

We appreciate you drawing attention to this inadvertent omission. The Department intends for that list to be comprehensive. This guidance document was added to the list on November 4, 2015.

*On Adherence to OMB Guidelines for Guidance*

- 5. Given both the importance of guidance and concerns about its use, in 2007 OMB issued a Bulletin establishing policies for the development, issuance, and use of “significant” guidance documents. This included establishing departmental written procedures for the approval of significant guidance and maintaining a website to assist the public in locating significant guidance documents. It seems that when OMB’s good guidance practices were issued there was a healthy response from the agencies, but that this has waned. Some of GAO’s findings about compliance with the bulletin are worrisome, especially as significant guidance documents represent such a small subset of the universe of guidance being issued to the public. Can you speak to your agency’s efforts on the subject and what you think you could be doing better?**

While GAO did make recommendations to the Department regarding non-significant guidance, the GAO did not indicate that the Department was out of compliance with the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices, nor did GAO make recommendations that the Department take further action to come into compliance with the

Bulletin. The Department has strived to adhere to the Bulletin since its issuance. In line with the Bulletin, the Department does its best to maintain a list of all significant guidance currently in effect on the Department's website. Also in line with the Bulletin, the Department has written procedures for the approval of significant guidance documents and continues to follow those procedures.

#### *On Conferring with Regulated Entities*

- 6. We've had several hearings now with agencies, and our staff has spoken to many agency officials on regulatory issues. One thing we hear over and over is that agencies are having frequent conversations with those affected by their regulations and work closely with them to get their thoughts and input on their regulatory programs. However, I then hear over and over from regulated communities that they aren't being heard or they were unaware of new guidance or requirements. Please explain where the disconnect lies.**

The Department considers feedback received from stakeholders when issuing guidance, and individual offices have many ways to receive feedback from stakeholders. In many cases the decision to issue guidance is based on questions we have received from the field. Under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, the Department is required to post significant guidance on the Department's website and an email address is provided for receipt of public comment. The Department also regularly reviews comments, questions, and concerns received from stakeholders for all guidance even after the guidance is issued; such public comment is useful for the Department in evaluating the efficacy and clarity of issued guidance. We welcome any additional feedback from the communities you have heard from, and ask that you direct them to reach out to our program offices when you hear such concerns, especially if there are suggestions for how the Department can better disseminate information to them.

#### *On Maintaining Up-to-Date Information for the Public*

- 7. When it comes to guidance, a frequently raised issue is the amount of it and that it is hard to find. For example, a Task Force on Federal Regulations of Higher Education last year found that the Department of Education issues official guidance to amend or clarify its rules at a rate of more than one document per work day. How can we ensure that agencies to invest the time in ensuring that websites ensure that relevant guidance is easy to find, accessible, and up-to-date?**

The Department is currently reviewing its website to determine methods by which the website can be improved to make guidance easier to find.

#### *On Progress Made in Response to GAO's Report*

- 8. In its letter in response to GAO's final report and recommendations, Education stated that it believed that its internal controls for developing and producing guidance were effective and that its online guidance could be easily accessed by the public. However, it committed to reviewing components' procedures for guidance development and production, as well as to develop and provide to components standard protocols used to clarify management roles, document management review and approval of guidance, and review posted guidance to ensure it is current and**

**accessible to the public. In its response to GAO's report, Education made several commitments to review component procedures for guidance and develop standard protocols to clarify management roles, review and approval of guidance, and ensure that posted guidance was current and accessible to the public. Please elaborate on Education's actions to date, and any additional actions Education plans to take to further strengthen these processes.**

The Department has started this process and we are pleased to report that we have already started an internal working group consisting of representatives from all agency components that will: (1) review the Department's website and metrics for pageviews of posted guidance documents to assess accessibility and ease of use; and (2) review agency non-significant components' written guidance procedures and develop standard protocols to clarify management roles for review and approval of guidance. The group is discussing the framework and procedures for moving forward and will continue working on this issue.



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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441 G St. N.W.  
Washington, DC 20548

November 6, 2015

The Honorable James Lankford  
Chairman  
Subcommittee on Regulatory Affairs and  
Federal Management  
Committee on Homeland Security and  
Governmental Affairs  
United States Senate

On September 23, 2015, I testified as GAO's witness for the Subcommittee on Regulatory Affairs and Federal Management's hearing titled, "Examining the Use of Agency Regulatory Guidance." The enclosure to this letter contains GAO's responses to your questions for the record from that hearing. If you or members of your staff have any questions about these responses, please contact me at (202) 512-6806 or [sagerm@gao.gov](mailto:sagerm@gao.gov).

A handwritten signature in black ink that reads "Michelle A. Sager".

Michelle A. Sager  
Director, Strategic Issues

Enclosure

**Post Hearing Questions for the Record  
Submitted to Michelle Sager  
Director, Strategic Issues  
U.S. Government Accountability Office  
From: Senator James Lankford**

***“Examining the Use of Agency Regulatory Guidance”  
September 23, 2015***

**Subcommittee on Regulatory Affairs and Federal Management**

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***On Characteristics of Guidance***

- 1. In your testimony, you mention that agency guidance can sometimes clarify information requested by grantees or regulated entities but sometimes may also cause confusion. Could you provide an example of each circumstance from your report?**

Answer: In our April 2015 report on regulatory guidance processes, we noted that officials from the Department of Labor’s Office of Labor-Management Standards told us that ideas for their guidance often come from questions in the field or the regulated community, particularly if multiple unions had similar questions about a new regulation.<sup>1</sup> We also found that providing information about new or upcoming requirements may sometimes cause confusion as details are revised. For example, we reported that the Department of Agriculture’s (USDA) Food and Nutrition Service (FNS) distributed five memorandums related to new statutory requirements for the content of school lunches prior to the issuance of the final rule on changes to the content and nutrition standards for school lunches. As FNS implemented the final regulation, it also issued guidance containing new flexibilities or substantive changes to previously issued guidance. Although state and school food authority officials said that some of these changes were likely made by USDA to respond to problems they were having implementing the new lunch

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<sup>1</sup>GAO, *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, [GAO-15-368](#) (Washington, D.C.: Apr. 16, 2015).

requirements, the guidance changes were difficult to keep up with and led to increased confusion about the requirements.<sup>2</sup>

## 2. What are some examples of economically significant guidance?

Answer: None of the four departments in our review had issued economically significant guidance. Staff from the Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA) also told us that they very rarely see economically significant guidance. However, OIRA’s database does identify a few economically significant guidance documents from other agencies that were submitted to OIRA for review, such as the Environmental Protection Agency’s “Clean Water Protection Guidance” and the Department of Housing and Urban Development’s “HOPE for Homeowners Program – Comprehensive Guidance.”<sup>3</sup>

### *On Maintaining Up-to-Date Information for the Public*

#### 3. One issue that comes up when we talk about guidance is the amount of it and that it is hard to find. What did you find in your work on guidance— were there any promising practices or areas that agencies could improve the accessibility of their guidance?

Answer: To be effective, guidance documents must be accessible by their intended audiences. Application of relevant federal guidelines and best practices for web dissemination—such as the

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<sup>2</sup>See GAO, *School Lunch: Implementing Nutrition Changes Was Challenging and Clarification of Oversight Requirements Is Needed*. [GAO-14-104](#) (Washington, D.C.: Jan. 28, 2014).

<sup>3</sup>The OIRA data can be found at the Reginfo.gov site’s regulatory review tab, accessed October 21, 2015, <http://www.reginfo.gov/public/>.

*Guidelines for Improving Digital Services*—is particularly important for ensuring that the intended audiences can access and are aware of these documents.<sup>4</sup> Certain component websites for disseminating guidance were easy to use. For example, components highlighted, clearly labeled, or categorized guidance documents; improved their search functions to facilitate the public’s ability to locate guidance; and posted contact information to allow for questions and feedback. However, we also found that other component websites were hard to navigate or did not effectively distinguish between current and outdated guidance. Further, components did not always leverage the web and customer satisfaction metrics they collected to evaluate their guidance and its dissemination. By more consistently analyzing such metrics, components could better ensure that their online guidance is easy to access, accurate, and relevant.

#### ***On the Role of OIRA***

- 4. In your statement, you noted that the departments considered few of their guidance documents to be significant, as defined by OMB. To what extent did you find that OMB’s OIRA plays a role in determining whether guidance documents are significant?**

Answer: OIRA staff told us that they typically rely on agencies to determine which of their guidance is considered significant under the Good Guidance Practices bulletin. The OIRA staff told us that they sometimes talk through this decision with agencies on an informal basis, but they leave the final decision to agencies. Regulatory agency officials indicated that one reason why you may not see much economically significant guidance is that, if they have to go through

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<sup>4</sup>The Digital Services Advisory Group and Federal Web Managers Council, *Guidelines for Improving Digital Services*, accessed on March 12, 2015, [www.digitalgov.gov/resources/guidelines-for-improving-digital-services/](http://www.digitalgov.gov/resources/guidelines-for-improving-digital-services/).

the notice and comment procedures required under the OMB bulletin, they will usually decide instead to just issue a rule which would be binding.

**5. Would OIRA enforcement of good guidance practices help?**

Answer: We did not address the effectiveness of OIRA’s enforcement of good guidance practices in our report. The scope of that review did include what OIRA says it looks for when its staff reviews significant guidance. OIRA officials said that OIRA reviews all guidance identified as significant by agencies and will sometimes review non-significant guidance on the interpretation of a rule included in regulatory preambles, although this type of review is not common. When reviewing significant guidance, OIRA officials told us that they typically look for the following elements:

- clear identification that it is guidance and therefore not binding (for example, words such as “shall” or “required” should not be present);
- clear and well-written so that the intended audiences are able to follow easily;
- agency has conducted the appropriate level of interagency coordination; and
- clear identification of the intended audience.

*On Solutions and Oversight over the Guidance Process*

- 6. GAO found mixed compliance with OMB good guidance practices and that these practices applied to very few of the guidance documents issued by agencies. Would requiring agencies to follow APA rulemaking procedures when issuing guidance ensure that those documents go through public notice and comment before issuance?**

Answer: No, agencies can undertake certain types of rulemaking that are exempt from the Administrative Procedure Act's (APA) notice and comment requirements. Under APA, interpretive rules and agency statements of policies are exempt from notice and comment.<sup>5</sup> OMB's *Final Bulletin for Agency Good Guidance Practices* does include procedural requirements requiring notice and comment for economically significant guidance documents. An OIRA official also told us that agencies sometimes engage in the notice and comment process for significant guidance, although they are not required to do so.

**7. Based on GAO's work, what other oversight of agencies' guidance processes could you suggest that the Congress carry out?**

Answer: The audit work for our April 2015 report focused on four departments—Agriculture, Education, Labor, and Health and Human Services—and 25 of their components that we selected for review. The findings may or may not reflect similar conditions and opportunities for improvement in other federal agencies that use guidance. The committee therefore could examine the extent to which other federal agencies are effectively applying the OMB good guidance bulletin and internal control standards through a request for information from other agencies.

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<sup>5</sup>5 U.S.C. § 553(b)(A). The Supreme Court held in *Perez v. Mortgage Bankers Ass'n*, No. 13-1041, slip. op (U.S. Mar. 9, 2015) that an agency could make substantive changes to an interpretive rule without going through notice and comment under the APA.