

September 22, 2016
Opening Statement of Senator Heidi Heitkamp
Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and
Federal Management Hearing titled:
“Continued Review of Agency Regulatory Guidance, Part III”

An appropriately functioning guidance process is a fundamental piece of an efficient and effective regulatory system.

Guidance is a vehicle an agency can use to provide clarity to businesses and other stakeholders outside the traditional notice-and-comment rulemaking process.

Correctly issued Guidance helps the public get the answers they need. Guidance removes ambiguity, and clarifies obligations. It is a conduit for exchanging information and can assist in outlining the relationship between the government and stakeholders.

Therefore, guidance must be flexible and responsive. As technologies change, businesses cannot wait years for the federal government to outline permissible behavior. In a world where seconds count, agencies must be able to provide answers to the questions that people are asking.

But, that doesn't mean guidance is always appropriate. Significantly altering pre-existing guidance deserves more consideration and stakeholder input.

One such example is the OSHA Retail Exemption enforcement memorandum, published on July 22nd, 2015, that impacts the storage of a common fertilizer that farmer all across the nation use.

This document has created uncertainty and shuttered businesses in North Dakota. Companies in my state have indicated the actual implementation costs to be \$25,000 to \$50,000 per facility. This is considerably higher than the \$2,160 per facility estimated by OSHA.

In a recent survey by the North Dakota Department of Agriculture, those who responded signaled that only 3 percent of North Dakota facilities are prepared to be compliant by October 1st, when the guidance is slated to go into effect.

The same survey also found the cost of compliance is between \$25-50,000 per facility—substantially higher than OSHA estimated in their guidance.

Additional costs will be incurred by our farmers, who will now have to travel farther to find a product that they depend on. We've also heard concerns that farmers will begin storing more anhydrous on their farm—increasing safety issues instead of reducing them.

Let me be clear, we need to ensure that safety protocols are in place. However, the regulated deserve a seat at the table for the discussion on how we get there.

What these stakeholders deserve is significant and real dialogue, and a Request for Information published in the Federal Register along with 16 other bullet points does not count as meaningful consultation.

That being said, I still believe – that when used correctly – guidance is a valuable tool for businesses, stakeholders and the government. Any change as to how agencies develop and review guidance must not chill this exchange.

However, we must also be very careful when making changes to longstanding guidance that can have significant impacts on important sectors of our economy.