

September 22, 2016

Opening Statement of Senator James Lankford

**Homeland Security and Governmental Affairs Subcommittee on Regulatory
Affairs and Federal Management Hearing titled:**

“Continued Review of Agency Regulatory Guidance, Part III”

Good morning and welcome to today’s Subcommittee hearing, “Continued Review of Agency Regulatory Guidance, Part III.” As this Subcommittee has previously emphasized, the intended purpose of regulatory guidance is to allow agencies to communicate to stakeholders their interpretations of the statutes and regulations they enforce.

Guidance comes in various forms, including Dear Colleague letters, memoranda, bulletins, FAQs, and notices. With so many forms, it can be difficult to pin down exactly what guidance is. For example, guidance is not a rule, since it is not promulgated pursuant to the requirements in the Administrative Procedure Act and therefore cannot bind the public like a regulation.

Guidance is intended to merely clarify existing regulatory authority and legally cannot advance substantive policy changes. If agencies can implement policy through guidance documents without adhering to the APA, any administration, Republican or Democrat, can pursue their own political agenda while ignoring Congress and the American people.

Today, we welcome the Administrator of the Office of Information and Regulatory Affairs, Howard Shelanski, and look forward to his insights on the subject at hand. OIRA has been called the executive branch’s “information aggregator” and the “gatekeeper” of the regulatory process. As the “gatekeeper,” OIRA reviews regulations and guidance for their significance, and oversees certain regulations at their proposed and final stages. OIRA also has an important role in coordinating agency compliance with Office of Management and Budget bulletins, such as the one governing good guidance practices, effective since 2007.

This Subcommittee has set an example of being solution-oriented. We recognize that more consistent application of the tools currently available to OIRA could go a long way in ensuring that guidance documents are issued consistently and in accordance with best practices, and more importantly to ensure guidance documents are not regulations in disguise.

We also have with us today witnesses from the Departments of Labor and Education. At our initial guidance hearing on September 23, 2015, the Subcommittee inquired about specific guidance documents issued by each Department, and we will revisit those issues today. Specifically, the Subcommittee had a discussion with Labor about three process safety management, or PSM, memoranda issued in June and July 2015. Labor has maintained that these memoranda were merely interpretive guidance documents that did not bind regulated parties.

Accordingly, these memoranda were not submitted to OIRA for a determination of significance or economic significance, even though stakeholders told us that a simple back-of-the-envelope calculation would easily have revealed an economic effect in the high hundreds of millions of dollars. Stakeholders subsequently sued Labor over the PSM guidance memoranda, alleging that the agency's issuance of the memoranda violated the APA. The Department of Labor recently signed settlement agreements with regard to two of the three memoranda, both stipulating terms of consensus with the stakeholder plaintiffs.

As to the third memoranda governing the "retail exemption," Labor took the unusual step of notifying Congress that, quote, "OSHA has begun the regulatory process" by initiating a panel to discuss potential changes as mandated by the Small Business Regulatory Enforcement Fairness Act. I applaud these outcomes; even though I expect Labor to maintain that such action does not constitute an admission that they should have gone through the rulemaking process, it serves to highlight the legal vulnerabilities the federal government incurs when agencies issue questionably improper guidance. The Department of Education also appeared at the September 2015 hearing, and is here again today. Last we met, the Subcommittee discussed two guidance documents from Education regarding bullying, harassment and sexual violence. From our discussion, I followed up with Education through multiple letters, in which the Department only responded to some of my questions, therefore leaving many issues still unanswered.

In August of this year, Oklahoma Wesleyan University joined a lawsuit regarding the 2011 Department of Education Dear Colleague letter on the reporting and evidence standards of sexual violence on college campuses. Oklahoma Wesleyan became the first university to sue the Department of Education for an APA violation when the Department unilaterally reduced evidence standards related to sexual violence cases through the 2011 Dear Colleague letter. As this case proceeds in the courts, I hope the Department recognizes the legal challenges it will continue to face when it circumvents the rulemaking process and attempts to advance substantive policy without proper legislative authority.

Most recently, Education has issued a Dear Colleague on transgender students, which may have far-reaching ramifications for how the federal government defines and applies anti-discrimination law. In my view, this Dear Colleague redefines the meaning of "sex" in Title IX, a step that Congress itself declined to take when deliberating recent education legislation. The policies advanced in this Dear Colleague letter are not based on existing law or regulations. A

Federal District Court in Texas recently took this same position and blocked enforcement of this Dear Colleague letter as a result of a lawsuit filed by 13 states and two school districts.

Finally, I want to stress that I understand that regulatory guidance is a useful and needed tool to transmit key information to regulated parties. It is problematic guidance that we need to address, and I fear that more and more, agencies are using guidance procedures as a way to get around APA rulemaking requirements. Congress, with the cooperation of officials in the executive branch, needs to find a way to ensure that guidance across the federal government is issued with transparency and applied consistently, so that the administrative state is better held accountable. With that, I recognize Ranking Member Heitkamp for her opening remarks.

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