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CONTINUED REVIEW OF AGENCY REGULATORY GUIDANCE, PART III

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY AFFAIRS AND FEDERAL
MANAGEMENT

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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CONTENTS

WITNESSES

THURSDAY, SEPTEMBER 22, 2016

ALPHABETICAL LIST OF WITNESSES

APPENDIX

CONTINUED REVIEW OF AGENCY REGULATORY GUIDANCE, PART III

THURSDAY, SEPTEMBER 22, 2016

U.S. SENATE,
SUBCOMMITTEE ON REGULATORY,
AFFAIRS AND FEDERAL MANAGEMENT,
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 3 p.m., in room SD–342, Dirksen Senate Office Building, Hon. James Lankford, Chairman of the Subcommittee, presiding.

Present: Senators Lankford, Heitkamp, Tester, and Carper.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Good morning—good afternoon, I should say, to everyone. I guess it is morning somewhere but not here currently. Good afternoon.

I am going to begin this hearing. This is a hearing before Regulatory Affairs, Federal Management Subcommittee on the continuing review of agency regulatory guidance. This is the third in our series, to be able to walk through just guidance and regulations, how it comes about, and the process and the decisionmaking, obviously the interaction with the Office of Information and Regulatory Affairs (OIRA) and all the agencies, and the American people.

I am going to put my opening statement into the record[1] for the benefit of time. And we have blocked off about two hours of time to be able to go through this conversation. So to be able to honor and get to our questions faster, I am going to put this toward the record for my opening Statement.

With that, I would recognize the Ranking Member.

OPENING STATEMENT OF SENATOR HEITKAMP

Senator HEITKAMP. And in the interest of time and great gratitude to our witnesses, who I understand are a little time-crunched, I am going to do the same. So I will submit my opening statement for the record.[2]

Senator LANKFORD. Great.

At this time we will proceed to testimony from our witnesses. Let me introduce all three of them.

[1] The prepared statement of Senator Lankford appears in the Appendix on page 41.
[2] The prepared statement of Senator Heitkamp appears in the Appendix on page 44.

Do you want to be able to make an opening statement?

Senator TESTER. I would like to submit my opening statement for the record[1] too, Mr. Chairman.

Senator LANKFORD. You are welcome to be able to put your opening statement in the record.

At this time we will proceed with testimony from our witnesses. We have three witnesses here.

Howard Shelanski is the Administrator of the Office of Information and Regulatory Affairs, a post he has held since confirmation in June 2013.

Patricia Smith is Solicitor for the Department of Labor (DOL). Before assuming this post in 2010, Ms. Smith served as the New York State Commissioner of Labor. Ms. Smith also served as the Chief of the Labor Bureau in the Office of New York State Attorney General for eight years, and as the Deputy Bureau Chief and Section Chief for the Labor Bureau before that.

Amy McIntosh is the Deputy Assistant Secretary, delegated duties of Assistant Secretary, at the Department of Education's Office of Planning, Evaluation, and Policy Development—which, as we mentioned before, her business card has two sides. [Laughter.]

In this capacity, Ms. McIntosh oversees policy development on all aspects of education, from pre-kindergarten through higher education, and leads Policy Program Study Services.

I appreciate all three of you here. It is the custom of this Subcommittee to swear in witnesses before they testify. I would ask you to please stand and raise your right hand.

Do you swear the testimony that you are about to give before the Subcommittee is the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. SHELANSKI. I do.

Ms. SMITH. I do.

Ms. MCINTOSH. I do.

Senator LANKFORD. Thank you. You may be seated. Let the record reflect all three answered in the affirmative.

We are using a timing system today. You will see that countdown clock. All three of you are familiar with the timing clock on that, and I will ask you to honor that and leave plenty of time for our questions.

Mr. Shelanski, you are recognized first.

TESTIMONY OF THE HONORABLE HOWARD SHELANSKI,[2] ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. SHELANSKI. Thank you very much.

Chairman Lankford, Ranking Member Heitkamp, and Members of the Subcommittee, thank you for the invitation to appear before you today. I am pleased for this opportunity to discuss the role of the Office of Information and Regulatory Affairs, in the development of Good Guidance Practices for Federal agencies.

OIRA's role with respect to guidance documents is twofold. We advise agencies regarding best practices for developing and issuing

[1] The prepared statement of Senator Tester appears in the Appendix on page 46.
[2] The prepared statement of Mr. Shelanski appears in the Appendix on page 47.

guidance and we also review of subset of those guidance documents.

Agencies issue guidance to explain existing regulatory or statutory requirements, often at the public's request, or to make nonbinding policy statements and recommendations. These documents provide substantial value to the regulated community. They can increase efficiency and help the public understand the full scope of applicability and available compliance options for current statutes and regulations.

Agency guidance practices should be transparent, consistent, and require agency accountability. In 2007, the Office of Management and Budget (OMB) published a bulletin in the Federal Register titled "Agency Good Guidance Practices to Establish New Policies and Procedures for the Development, Issuance, and Use of Significant Guidance Documents."

This bulletin, which remains in effect, establishes policies, practices, and procedures for guidance documents that executive branch agencies identify as significant or economically significant. Designations that arise from criteria are very similar to those for regulatory significance.

Those criteria include whether a guidance may reasonably be anticipated to cause changes that have a $100 million annual economic impact, have material budget effects, implicate interagency interest, or otherwise raise novel legal or policy issues.

For the subset of guidance documents that agencies designate as significant, the 2007 bulletin sets forth the general policies and principles for agencies to help ensure quality and transparency. These include adoption of written internal approval procedures at each agency; establishing a website that lists all significant guidance documents, in effect, and that specify how the public can comment on them, request modifications or rescissions or submit a complaint; and following a notice and comment process for economically significant guidances.

The bulletin also reminds agencies that the Administrative Procedure Act (APA) generally requires notice and comment when an agency establishes new requirements that it treats as binding. In addition to the procedures required by the 2007 bulletin, OIRA also works with agencies to identify significant guidance documents that will undergo interagency review.

Once a guidance document is under interagency review, OIRA plays two roles. The first is to coordinate the review. OIRA circulates the guidance to other agencies in the executive branch whose own policies, expertise, or responsibilities may in some way interrelate with the draft guidance document.

The second role that OIRA plays is to ensure that the guidance embodies the relevant principles laid out in Executive Orders (EO) 12866 and 13563, including whether the guidance is both necessary and consistent with applicable statutes and regulations.

OIRA reviews economically significant guidance documents as well, although such guidance documents have been relatively uncommon. In OIRA's experience, and based on agency analysis, the behavioral impacts associated with non-binding guidance documents do not often exceed $100 million in a given year.

One example where this could happen is when an agency issues guidance on emergency or disaster preparedness to State and local authorities. Even though the guidance is not binding, if the guidance is sound, many States might be expected willingly to follow such recommendations and change their behavior accordingly.

The implementation of governmentwide Good Guidance Practices continues to be a priority for OMB and OIRA. Agency guidance documents serve an important role in the regulatory sphere. The Good Guidance Practices set forth in the 2007 bulletin serve as a useful tool for agencies in setting the appropriate scope for their guidance documents and in deciding whether regulation would be a more appropriate mechanism. OIRA will continue to work with agencies, as appropriate, on the review of the various kinds of significant guidance documents that the agencies issue.

Thank you for your time and attention. I would be happy to answer any questions you may have.

Senator LANKFORD. Thank you. Ms. Smith.

TESTIMONY OF THE HONORABLE M. PATRICIA SMITH,[1] SOLICITOR OF LABOR, U.S. DEPARTMENT OF LABOR

Ms. SMITH. Thank you. Chairman Lankford, Ranking Member Heitkamp, and Members of the Subcommittee, I am pleased to testify before you today on the Department of Labor's efforts to ensure that we develop guidance which is accurate, helpful, and appropriate; that informs workers and employers and all of our stakeholders about their rights and responsibilities under the laws that we administer and we enforce.

We take seriously our obligation to develop regulations that implement laws. The Department issues effective regulations to help achieve Congress' objectives to do things like invest in human capital to build a skills infrastructure that helps American businesses. Our regulations also ensure that employers and workers have the information they need to better understand their rights and responsibilities, to improve compliance with worker protection laws, and to achieve safety and security in the workplace. We developed those regulations consistent with governing laws and executive orders.

While the Department strives for full clarity in its regulations, we know from long experience that our regulations cannot seek to speak to every scenario in our complex economy. And with any other governmental agencies, our stakeholders often have legitimate questions about practical implications of our regulations.

Therefore, we issue guidance to our stakeholders to clarify either statutory requirements or our regulations. Our guidance often includes answers to frequently asked questions about how the rules apply to specific circumstances, or examples of best practices for compliance and implementation.

We strive to issue guidance that is timely as well as responsive to stakeholders, and one that is applicable to a broad range of stakeholders. I can tell you firsthand how well-drafted guidance can really help increase efficiency and reduce stakeholder confusion, and reduce the need for enforcement.

[1] The prepared statement of Ms. Smith appears in the Appendix on page 51.

We strive to issue guidance that is clear and accessible to members of the public who are not subject matter experts and who should not have to retain a lawyer to understand their rights and responsibilities. Many guidance documents aim to inform employers about their rights and responsibilities in plain language, focusing on their most common concerns and questions.

For example, the Department's Wage and Hour Division has created a fact sheet and handbook about rights for workers and responsibilities for employers under the Family Medical Leave Act (FMLA) that lay out together the most common types of requests for familial leave and what FMLA requires that employers should do in response to those requests.

Another important aspect of Department guidance is that we must provide timely assistance that is responsive to stakeholder questions or emerging challenges. For example, in April of this year, the Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health issued interim guidance on protecting workers from occupational exposure to the Zika virus.

The Department of Labor remains committed to continuously working to improve our guidance process. Following helpful recommendations from the Government Accountability Office (GAO) over the past year, the Department has pursued multiple improvements in our issue of guidance. We have adopted procedures to assure that, in accordance with OMB's Final Bulletin for Agency Good Guidances Practices, the Department's written procedures for approval of significant guidance are made available to component agency staff.

We shared best practices on the development of non-significant guidance among our component agencies and created a checklist document that provides questions based on best practices for agencies to consider when developing guidance. We developed additional materials to assist agencies in developing internal control procedures for guidance development.

And, finally, we conducted training and developed best practices and tools to assist agencies in using and interpreting Web metrics for guidance documents on their agency websites, including ensuring that the documents are up to date, relevant, and easy to access on the Department's website.

The Department remains committed to our broad efforts to develop and disseminate accurate, timely, helpful, and lawful guidance that informs our stakeholders of their rights and responsibilities under the laws that we administer and enforce. We continue to look forward to having a dialogue with you and the public to discuss ways to improve our processes.

Thank you, and I am pleased to answer any questions you may have.

Senator LANKFORD. Thank you. Ms. McIntosh.

TESTIMONY OF AMY McINTOSH,[1] PRINCIPAL DEPUTY ASSISTANT SECRETARY, DELEGATED THE DUTIES OF THE ASSISTANT SECRETARY, OFFICE OF PLANNING, EVALUATION, AND POLICY DEVELOPMENT, U.S. DEPARTMENT OF EDUCATION

Ms. MCINTOSH. Hello, Chairman Lankford and Ranking Member Heitkamp. I appreciate the opportunity to appear before you again to testify about the Department of Education's issuance and use of guidance.

The Department uses guidance to communicate timely and consistent information to the diverse groups that we serve. In general, we communicate with our stakeholders and the public through a variety of forms, and guidance documents are one important tool.

Guidance provides useful information about the statutes, regulations, and programs that we administer. In addition, guidance often responds to stakeholders' questions, helps them understand and comply with the laws of Congress and related regulations, and communicates best practices.

The Department uses guidance to promote transparency and assist and guide our stakeholders, not to create new rules. We use the rulemaking process, not guidance, when we need to issue legally binding rules to carry out the Department's mission.

The Department is committed to issuing guidance that reflects appropriate review and is well-developed, responsive to grantee and other stakeholder needs, and appropriately disseminated. We appreciate and often seek the opportunity to hear from members of the public about their views before and after the issuance of guidance.

The Department fully adheres to OMB's Bulletin on Good Guidance Practices. As confirmed in the recent GAO report, the Department has established written procedures for the approval of all significant guidance. We have also compiled a list of the Department's significant guidance documents, posted it in a central location on our website, and update it periodically.

The Department often issues new or revised guidance to respond to questions and feedback that program offices receive from stakeholders. In some cases, the development of new regulations may serve as the impetus for developing new guidance. As the Department indicated to GAO, we make every effort to issue guidance documents that restate the statute or regulation in plainer language, that summarize requirements and suggest ways to comply with the new regulation or offers best practices.

The Department believes that its internal controls for developing and producing guidance are effective, but we are committed to continuous improvement of our internal control processes and we appreciate the recommendations provided in the GAO report. We have a plan approved by GAO that is in place and we have made progress on implementing it since I last testified. For example, we are finalizing new protocols for our offices to use to clarify management roles and document management review and approve all types of guidance beyond those that are deemed significant.

Regarding significant guidance documents, we have recently begun to require that all documents include a prominent statement

[1] The prepared statement of Ms. McIntosh appears in the Appendix on page 59.

clarifying the purpose of the guidance and explaining that it is not legally binding, nor does it have the force or effect of law.

Additionally, we now more prominently encourage the public to comment on each document and we explain how they can submit comments. Also, we have recently created a separate page on our website that explains, in general, the role of guidance and how the public can provide feedback.

Finally, we have provided Department of Education staff with a new best practices document about how best to most effectively present guidance documents online.

The Department is committed to using guidance in a way that will best assist our stakeholders and inform the public. We believe we have done a good job implementing the OMB bulletin and will continue with the recommendations made by GAO.

Thank you for the opportunity to testify today about the Department's use of guidance documents, and I, too, would be glad to answer any questions from the Committee.

Senator LANKFORD. Thank you.

I would like to first recognize the Ranking Member for questions.

Senator HEITKAMP. Thank you, Mr. Chairman.

And we on this Committee do not do, necessarily, oversight on individual guidances or regulations, but sometimes getting into the details of those guidance does, in fact, help us evaluate where the issues may be with blurring the lines between guidance and rulemaking taking shortcuts.

It is no surprise to the panel here that I have deep concerns about the OSHA regulation as it relates to anhydrous ammonia. And I think—I do not intend this to be an oversight hearing on that, and I just want to make that clear, Ms. Smith, but I think it does—I am trying to understand how we got to the point that this was a guidance and not a rulemaking.

First I am going to ask Mr. Shelanski. In my opening statement, I talked about a survey that the Department of Agriculture (USDA)—the State Department of Agriculture—did on the OSHA guidance and asked, what are the impacts, because I wanted some kind of comparable analysis to what information we have received from OSHA.

I want to just kind of give you some statistics: Only four companies representing 11 facilities—that was 3 percent of the North Dakota overall facilities—state that they are prepared to be compliant October 1 of this year. Twenty-six companies representing 67 facilities—which is 2 percent of the North Dakota facilities—indicated that they will not be in compliance by October 1. Eighteen companies representing 31 facilities—which is roughly 9 percent of North Dakota facilities—indicated that they will, in fact, shut their door if OSHA begins enforcement on October 1.

The estimate that we got from OSHA about costs of compliance was about $2,100 and some change. Each one of these companies that answered this survey and reported that they believe that their compliance costs are in the neighborhood of $25,000 to $50,000.

Now, I want to set the context that these are folks who have been operating for a lot of years, in fact as many years as what some of these staff people have been born, under the same regulation, under the same rule. Nothing has changed. But now a guid-

ance has been issued that results in them believing they have to shut their doors or incur $25-to $50,000 worth of costs to be in compliance.

In your opinion, Mr. Shelanski, do you believe that this is non-significant guidance? Senator Lankford asked this question for the record. I think that it is fair to say OSHA did not give us a direct answer. But given what I am telling you about the attitude of this and the appearance of cost on the ground, I mean, would you say this is non-significant?

Mr. SHELANSKI. Thank you very much, Senator.

I will just start by saying I will treat the question as asking about whether it should be economically significant, just because "significant" and "economically significant"——

Senator HEITKAMP. Yes.

Mr. SHELANSKI [continuing]. Are two different categories.

Senator HEITKAMP. That is a fair point.

Mr. SHELANSKI. Certainly the guidance—just to start with the basic principle—I think was significant in that there was interagency interests in that guidance. And that is one of the reasons that the Department of Labor I think brought it to OIRA for review at the time that it came in.

It can be quite hard, especially with guidance, which already has a pre-existing regulation that it is interpreting, to know at the time of review what the costs will be. And I think that, in this particular case, at the time that—and I will refer you to DOL and to OSHA for the particulars of their process, but certainly when it came to OIRA—and we coordinated the interagency review process—I do not think that we had the kind of data that you just articulated before us.

And one of the good things about guidance is that it is flexible. There is the opportunity for the public to come back to the agency and bring this kind of information forward. So I would have to look at what the current state of the numbers are and what the current evidence is to know whether or not the guidance would be economically significant, but I think at the time it was treated as a significant guidance but not an economically significant one.

Senator HEITKAMP. Yes, I think we would concede that there probably is $100 million worth of impact. But my concern is that if guidance is simply clarification under, kind of everybody—and does not have the force and effect of law—that guidance cannot change the law, cannot change a regulation; it can clarify—how can implementation of a guidance shut down a business?

Mr. SHELANSKI. I think in this particular case——

Senator HEITKAMP. Legally.

Mr. SHELANSKI. In this particular case there was an underlying regulation that at one point had been interpreted to have an exemption—a particular exemption—that was in place under which many of these businesses operated, or at least to some extent operated. And then this was an interpretation that changed, is my understanding, what the earlier interpretation had been.

Senator HEITKAMP. Yes, and this is a problem because we give deference—and I do not mean to give the Chairman any more ammunition than what he already has on deference—but we give deference to longstanding interpretations of agencies. We say, look, if

Congress believed that should change, they have had notice over a long period of time that this is the interpretation, it is entitled to deference. It is how we have interpreted this rule.

When we change how we interpret either rules or statutes, and the change has a dramatic impact on the livelihood of business people, we get a little suspicious that that does not look much like a guidance and it is not a legitimate new interpretation that somehow we have been wrong these 20-plus years and now we are right.

And so, I think that this is the kind of example that leads people to really question all the good work that can be done in guidance. And I would be the first one to argue I think we need guidance. I think that guidance is extraordinarily valuable. I have seen it work, especially in the tax arena when we think about tax letters and giving certainty so people can move forward. But I am really concerned about putting a label on an agency interpretation that changes a longstanding interpretation and that has this kind of impact in the marketplace.

And so I want to just want to kind of go through where we are at, Ms. Smith, because I want to acknowledge some of the work that OSHA has done in response to probably this Committee more than almost anything. And so I want to say, both the Chairman and I wrote letters which resulted in six months' stay of enforcement and OSHA attendance at the Anhydrous Ammonia Dealers Conference in Mandan, North Dakota, which I greatly appreciate.

The Fiscal Year 2016 Omnibus Appropriations bill included report language that restricted implementation of the guidance that resulted in reclassification of retail facilities. It is my understanding that OSHA considered it report language and not legal language and announced that it will begin enforcement on October 1. On May 6, OSHA announced the convening of a panel and is asking that panel to make recommendations.

I guess my question is, this might be a path forward. And, if the best thing that we can do is just two more months of forbearance while we work through some of these issues—I know you guys—October 1 is around the corner, but it would be extraordinarily helpful for us as we work through this.

So I want to know where the panel is in process. And what can you tell me about the work that you are doing? How will the results of the panel affect the decisions that you make at OSHA going forward? And is OSHA planning to commence enforcement next Saturday?

Ms. SMITH. I am having problems pushing the right button.

So, thank you, Senator, for those questions.

The OSHA rulemaking process, as you probably know, is long and complicated, longer and more complicated than most. Before they engage in rulemaking, they have to go to the small business—called a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel and basically ask the panel what is their opinion about whether they should engage in rulemaking. That is a required first step to rulemaking.

So we have gone to that panel. We have not gone through that process—it can be a lengthy process—and we will take the recommendations of that panel into serious consideration. We cannot do rulemaking until we go to that panel. So that is the first thing.

And the second thing is, it is true that we at the Labor Department did not consider the report language legally binding. However, given the facts that you have, given the interest that Congress has had, we did agree that we would abide by the report language and not do any enforcement before October 1, 2016.

My understanding is that the text of the continuing resolution (CR) was released this afternoon. I have not seen it. I do not know if that report language continues. And, honestly, I have not been able to consult with my colleagues in OSHA to determine—if there is report language, they clearly will follow it. If there is not report language, I honestly do not know what they are thinking of doing.

Senator HEITKAMP. And I would say this: I do not think that at this point, although this is a moving—it is an instrument in process, so we do not know what the final CR is going to look like, but I do not think you need a CR to say, look, we may have been too hasty in making a determination.

And I get safety. I mean, anyone who lives in farm country the way I do—I basically was on the board of directors of an entity that manufactured anhydrous. I understand what anhydrous ammonia is and I understand the risk. So the net result is when you do not have retailers who are managing it at that level, you have direct sales off semis in a farmstead. So let's just presuppose that that might even be more dangerous. In the law of unintended consequences, that might be actually even more dangerous than what you are proposing.

And so, I do not think you need Congress to tell you not to do this. I think what you need to say is, guidance should be interpretive. Guidance should not change the status quo in a dramatic way. We need to rethink our cost estimates, and that we are going to make an election to delay the implementation of this guidance.

I mean, if you have the authority to issue it, you have the authority to delay it. That is just law 101. If you just do that, and even if it is just until the end of the year while we work through this, that would go a long way toward people in rural America, who already have a whole lot of stress right now, given the economics—people saying, well, at least they listened and we have a chance to actually have a conversation.

And I recognize all the statements, especially yours, Ms. McIntosh, about, we want access to letting people know, but, guidance—if you said, as a lawyer, we issued a guidance, I go, hmm, guidance does not have the force and effect of law. If I only have so much time and so many billable hours to my client, am I going to read a guidance or am I going to read a proposed rule?

And so, just understand the frustration that I have defending this kind of action when I believe that it has an economic consequence issued in a guidance, not in a rule, and as a result we are going to put people in North Dakota out of business. It is just tough.

Ms. SMITH. So, Senator, I appreciate your comments and I will take them back to my colleagues in OSHA. Obviously, I am not the Assistant Secretary for OSHA so I cannot make any commitments to you, but one thing I would like to point out, which is that I think OSHA did recognize the seriousness of these changes and they did put out a request for information. They put out, in the Federal

Register, notice to the regulated community that they were considering making these changes. They asked for comments on these changes. They got a lot of comments on these changes, including from many of the trade associations.

Senator HEITKAMP. You know you are just arguing that this should have been a rules change.

Ms. SMITH. I am not arguing. [Laughter.]

I am arguing that we go above and beyond——

Senator HEITKAMP. Yes, you are convincing me it should have been a rule change.

Ms. SMITH. We go above and beyond what we are required to do.

Senator HEITKAMP. I think you did less than what was required. And that is our difference of opinion on—and it leads this Committee to think, guidance, boy, that does not look like guidance, because something that should not have the force and effect of law, simply provides some structure to a regulation, should not change the status quo the way this has changed the status quo.

And I do not want to beat a dead horse here. I would like an answer on whether you guys are going to—regardless of what happens with the CR, whether your colleagues at OSHA are going to delay implementation of this guidance as we work through some of these additional issues and as we get a response to some of the concerns that I have raised today and that have been raised across rural America.

Ms. SMITH. Senator, like I said, I can commit to you that I will take these remarks back to OSHA and discuss this with them very seriously.

Senator LANKFORD. OK, as is the tradition of the Committee, I am going to open up the microphone just for an open conversation here between the two of us and other Members as they join us in the conversation as well.

But, Mr. Shelanski, let me start with you. Are you confident that OIRA sees all the agency guidance documents that could potentially be significant? Are you confident you are seeing all those now in all definitions of "significant"?

Mr. SHELANSKI. No, we do not, and I do not think that we would expect to. The number of guidances that we would review I think is just a subset even of significant guidances.

Agencies are required, under the 2007 Good Guidance Practices, or are advised under the 2007 Good Guidance Practices, to follow certain procedures and develop certain procedures for significant guidances. But I think it would get in the way of the real benefits of guidance if all such significant guidances were to come through OIRA for review, or any entity for review.

Senator LANKFORD. So what is the standard of what the agency should send to you for review?

Mr. SHELANSKI. Well, certainly the economically significant guidances are ones that they must take notice and comment on, and those are the ones that we want to see. As I said, those are relatively uncommon.

The ones we tend to see—I would say the largest categories of the documents that we tend to see are ones that just agencies are interested in getting additional input on and help in developing clarity, so they will voluntarily bring a number of them with us.

Guidances that are associated with a rule that we have under review or have recently had under review tend to be ones that we would see as a matter of course and that we ask the agencies to submit to us because they are closer related to something that is really very much our core function of reviewing the executive branch regulations.

Senator LANKFORD. But you are looking for overlap as well, and what I am trying to figure out is—I would assume you are trying to get as many significant guidance documents as possible, because if three different entities are all putting out some sort of rule that affects the same industry at nearly the same time, possibly different deadlines—which has happened before—you are the person that is supposed to help sort that out and to say, pause, wait, somebody else is doing this; let's coordinate this together.

Mr. SHELANSKI. Right. That is exactly right. And the third category I think that is, one of the very common ones where we would see a guidance document is where there are those interagency kinds of interests, and we want to make sure that the agencies are coordinated.

Senator LANKFORD. But they would only know if they actually sent it to you. What I am trying to figure out is if—you have an interest in seeing as many as possible. If I am an entity and I have my own process in place for developing—whether it is significant or not; I look at it as significant—I would assume that is coming to you, not assume I have it. It sounds like you are saying, it would be nice if they sent it to us, but they do not have to unless it is economically significant.

Mr. SHELANSKI. They do not have to unless—if we get a request that as——

Senator LANKFORD. But then who is sorting out the conflicting guidances that may come out or the conflicting deadlines that may come out from multiple entities because they do not know someone else is doing this unless you flag them to it.

Mr. SHELANSKI. So I think there are two ways for that to be sorted out.

In the time that I have been in the job, I have not seen instances where a guidance that affects another agency's similar guidance has failed to come through us. We tend to see those because agencies bring them to us, or the agency that has not promulgated a guidance but regulates in the same area will contact us and say, we know that Department X is developing a guidance on a topic that is relevant for us; we would like to see it.

I think the other very important way that this kind of thing gets sorted out is, under the 2007 Good Guidance Practices and under a lot of the practices that the GAO identified and that the departments are developing, there is a lot of feedback—even on guidances that do not go out for formal notice and comment and for guidances that we do not review—for the public to submit comments, concerns, complaints, inconsistencies so that those guidances can be coordinated.

So there is, I think, a pretty good system in place without our intervention for making those corrections.

Senator LANKFORD. It gets noisy in a hurry when industry, individuals, employers, employees suddenly realize, I have two or three

bosses here all telling me to do different things. Their perception, rightfully so, is no one is watching. And so the opportunity for those things to be able to come to you first rather than individuals having to raise it and know the right person to call and to say, this is a problem, we have two different deadlines that conflict or two different guidances, would be helpful.

Let me ask a question with that same thing on what you were just saying on working at deconflicting. If a guidance is promulgated by any entity and, fairly quickly, industry, businesses, whoever it may be, States—contacts you and say, this has above $100 million of cost, and they can show you pretty quickly how and why, is there a position from OIRA to then stop and say: This is economically significant, or it could be. Was there a study done? Let's pause on this guidance. Let's make sure that it is done—just make sure this should have not been a regulation rather than a guidance document.

Because you go back into some of the process safety management (PSM) rules and other things that we have discussed, pretty quickly it was learned this is well in excess of $100 million. But to be able to raise some issues up and to say, well, this is guidance, we are going to keep pressing it as guidance, who has the pause button to say, we have to relook at this as economically significant?

Mr. SHELANSKI. Thank you, Senator.

If we get information from the public—if industry contacts us or stakeholders of any kind contact us to let us know that a guidance has gone out that is either having the effect of new law, so really is not on the side of the line of guidance but more of regulation, or is having an economically significant effect and did not go through the notice and comment requirements of the 2007 Good Guidance Practices, we are in a position to ask the agencies to please come in to talk to us about the guidance. And once we get a better picture of what is going on, we can call that guidance in for review.

Senator LANKFORD. Do you have the ability to be able to force a pause? It sounds like a very polite process: We can ask them to go back and review on that. Who has the ability to be able to say this is an issue? Is that an outside court? Is that working with the agency? Is that OIRA? Who has it?

Mr. SHELANSKI. I do not know the extent to which I can say I have an—I can absolutely stop something.

Senator LANKFORD. I am just saying it is not hypothetical, obviously.

Mr. SHELANSKI. No.

Senator LANKFORD. We can all go through multiple guidances that when it went out and came out, agencies all said, I do not think this is economically significant, did not come to OIRA so therefore was not open to the Congressional Review Act (CRA), for instance, and could have the possibility of skirting Federal law. There are so many different things that go out. And immediately it comes up and individuals say, just in my company that will cost $20 million. So it is easily above $100 million nationwide.

How do we pause and say, let's do this right; I think we put out something that is economically significant without good input?

Mr. SHELANSKI. I think at that point there are two processes that can be in place. I do not think an agency would refuse our request to look at the guidance to determine whether or not there was a likelihood that it was economically significant and then to consider what remedial steps should be taken.

Senator LANKFORD. Do you have an example of when that might have happened or—I mean, I am not trying to put you on the spot on it, but just, is there one that you know of at this point that has happened like that?

Mr. SHELANSKI. There are times when we have known that agencies were working on guidances that could possibly have a significant effect on the public, a significant economic effect, and we have asked the agencies not to issue it without interagency review, and the agency has said OK and submitted it to us.

A recent example of that would be the Food and Drug Administration (FDA's) sodium guidance. It is a guidance that sets no thresholds; it sets no sodium reduction methods. It makes recommendations. We do not know the extent to which restaurants or food manufacturers will follow those recommendations, but there is a reasonable chance that one could anticipate they would take a number of steps that could cost quite a bit of money.

We therefore asked for that guidance to come through review. We put it through review and now it is out for notice and comment, which is how we would treat a guidance that either will have or has a reasonably good possibility of having an economically significant effect.

Senator LANKFORD. Because there are guidance documents that are going out that are not coming through OIRA, do you have a concern that there may be some guidances being promulgated and put out there that are economically significant that might bypass the CRA legal requirement for the Congressional Review Act, and to say: We are putting this out; it is not economically significant so it is not exposed to the Congressional Review Act?

Mr. SHELANSKI. I think that would be—I have not encountered such a situation.

Senator LANKFORD. So that is not a concern to you that that would come out?

Mr. SHELANSKI. I think it would be a very unlikely event that that would happen. If it happens, I think it is extremely rare and unusual.

Senator LANKFORD. I hope you are correct on that. The question is the unknown part of it. There is a concern to say, if something looks significant, there is a benefit for the agency to go within the executive branch and ask the second opinion. That is why the process was set up in the first place, not to bog you down.

But you are seen by everyone within industry and across the United States—that know you are an incredibly important but invisible agency in many ways. You are seen by the entity as being the gatekeeper to make sure there are no conflicting rules, there is not significant things that come out, that everybody is following the law through the process.

The agencies see the thing that has to be done, you see the way that it has to be done, and I think there is a great benefit of the design of it to make sure that there is a check. And my concern

is—it is right to be able to run it through you whenever it gets close, and my perception—and you can tell me I am wrong—my perception is, because there are so many rules that are coming out, there is not time to be able to run through all of them so set up a process in the agency and we will trust you on it, when really everybody else is trusting you on it.

Do you have a thought on that?

Mr. SHELANSKI. Yes. My thought is this: I think while there is the theoretical possibility and maybe the occasional example of where that has happened, I think it is unusual for two reasons. Agencies do not want their guidances to be held in abeyance, whether by a court or Congress or some other process. They therefore are interested—I think if they are concerned that there would be that kind of public response—to get that cleared up ahead of time. So I think in most cases agencies would bring those kinds of guidance documents to us.

Because guidance is, by its nature, non-binding and should not be creating new legal obligations——

Senator LANKFORD. That is the theory.

Mr. SHELANSKI [continuing]. I think the number of guidance documents that would, themselves, separately from the underlying regulation, create a lot of economic impact are very limited.

And I would point out that the one case that we have talked about today, I think we and the agency heard rather quickly what the public concern was about that guidance, which is one of the reasons it has not gone in to effect. So I suggest that there are some pretty good safeguards.

Senator LANKFORD. Well, I would say only this: That public consternation that came back at the agency and entities obviously floods into our office when they raise the question, what is the Federal Government doing to us rather than for us? And it begged for early notice and comment rather than late having to fight it.

I can assure you, Americans are not excited about fighting their own government. Once it is out there, there is a perception that they are now fighting it. If you can help them in the process to go, this is going to be a fight, this is economically significant, you can certainly help resolve a lot of the frustration across the "fruited plain" just because people want their government to help them, not do something to them on that. And I get that.

Let me ask you a question just on exemptions. In 1993, OMB gave exemptions to the Internal Revenue Service (IRS) from a lot of the process of going through OIRA. It was an interesting letter. And it was obviously OMB had the opportunity to be able to give exemptions based on the statute and they did that. They still hold on that today. Do you think it is appropriate for the IRS to be exempt from OIRA review?

Mr. SHELANSKI. Thank you, Senator.

I want to clarify first that the IRS is, in fact, not exempt from OIRA review. We do review some IRS regulations.

Senator LANKFORD. Make a guess on a percentage.

Mr. SHELANSKI. Oh, it is small, but that has to do with the nature of IRS rulemaking.

Senator LANKFORD. Sure, and I understand a lot of their rules are very specific in their letters, as we have talked about before.

And by the way, I am not trying to cut off those letters because they do help provide clarity. I am trying to figure out oversight.

Please go ahead. Continue.

Mr. SHELANSKI. Thank you.

I think the purpose of that Memorandum of Understanding (MOU) with the Treasury Department was that many of the IRS rules—in fact, the vast majority—really are purely interpretive rules that are rather directly implementing statutory directives from Congress into the tax code. And often those have to be put in place rather quickly so people can do new tax planning, and there is very little value to another layer of review.

So I think the decision was reached for the interpretive rules of the IRS to be outside of the OIRA review process. On the other hand, rules that do not fit that description do come to OIRA for review. The IRS just does rather few of those.

Senator LANKFORD. Right. Well, the question that hangs out there, though, is the GAO just did this study where they determined that the IRS really does not document their analysis of their economic impact. They basically refer that there is not an economic impact. Or if they have it, they are not documenting it.

And so it is the unknown that hangs out there as well that, again, the GAO determined IRS is not really tracking this. And OIRA is in a position to say, we are only looking at what they have tracked. There seems to be no gatekeeper in between the two. That is my concern.

Senator HEITKAMP. I guess, Mr. Shelanski, one of the IRS rules that is—or IRS interpretive changes that we have seen has been the inversion, the change in terms of how we are dealing with inversions, corporate inversions. Is that a change that came to OIRA?

Mr. SHELANSKI. So we have had two rules from the IRS related to inversions and they did come through for review.

Senator HEITKAMP. OK. So that would be a good example of something that would reach that level of review at OIRA?

Mr. SHELANSKI. Yes, those would not fall within the exemption or the Memorandum of Understanding that was issued in the early 1990s, because those do not fit the definition of interpretive rules that are really dictated by the statutory changes.

Senator HEITKAMP. I think that we all know that financial and commercial paper changes, the nature of it changes. There has to be some flexibility that they have because they have to make those determinations. They cannot wait five years. I mean, the tax returns have to be filed.

And so I can appreciate it, but I do believe that there are things that are done at the IRS that need maybe a second look, especially when people believe that they have relied on longstanding interpretation and that interpretation now is changing.

And that is—it goes back to—and I do not mean to beat a dead horse, but you did say, that very quickly you realized that there was a significant impact, a lot of significant interests that implantation has been delayed. It is not exactly true. We are up against the wire, again October 1. And, we still have not satisfied the public that they have had adequate input in this process.

And so, would you join me in encouraging OSHA to delay implementation of that regulation, or that guidance?

Mr. SHELANSKI. Well, I think one of the things that I think OSHA has done that is really heartening is that they did initiate the SBREFA panel to make recommendations.

Senator HEITKAMP. Right.

Mr. SHELANSKI. And I think that they did that because they heard this kind of——

Senator HEITKAMP. But if I can—I mean, I am going to add to this because so often what we hear is that: We go to court but in the meantime the court does not stay the implementation. The process goes on. So even if we win through that review process, even if we win in court, we have already changed and implemented and spent this money, so we were not given an opportunity to really have input before the economic input hit us.

So I think that is the case here, and I think we need to be really careful. You say, well, we are heartened that they started this process. So, fine, let's say that through this process they reverse it but they are going to do enforcement October 1 and you already have some people who have changed their operation to facilitate the change. Is that really the kind of relationship we want with the public as it relates to an interpretive change that we see in this case?

Mr. SHELANSKI. I think that certainly the public feedback and acting in an accountable way on that public feedback is important to all of our regulatory system.

Senator HEITKAMP. Yes.

Mr. SHELANSKI. And I will look forward to discussing the matter with our colleagues at the Department of Labor and OSHA in the wake of this hearing.

Senator HEITKAMP. Yes. And, it has to be done fairly soon. Is it the 21st today?

Senator LANKFORD. Twenty-second.

Senator HEITKAMP. Twenty-second, so we have 8 days.

Senator LANKFORD. Just following up on that same issue—we obviously talked about this last year as well and it is still an ongoing issue, and it is a good example of process and how the process works or does not work on determining guidance or non-guidance.

So the last time that we actually talked through this with the wonderful Recognized and Generally Accepted Good Engineering Practices (RAGAGEP), which has the worst possible acronym ever out there——

Senator HEITKAMP. I could not agree more.

Senator LANKFORD [continuing]. Yes—the chemical concentrations and the retail exemption. We in this Committee challenged all three of those, saying these do not smell like guidance. These look like regulations to us but they are being given out as guidance.

Obviously OSHA and the Department of Labor dealt with multiple lawsuits. This was not just industry saying, hey, there is a problem. It all goes to court. Tremendous amount of cost and expense both to the Federal taxpayer and outside industry to be able to fight against that. And since that time, we have delayed enforcement of the retail exemption. And we received at this Committee a very interesting letter from the Department of Labor coming back and saying, we are now putting this out for notice and comment.

And then we have had a settlement dealing with the Recognized and Generally Accepted Good Engineering Practices piece in the chemical concentrations, which again look like regulations to me when it is all said and done because those were pulled out, gone to a court; with that court and those group of individuals that were in the lawsuit, created a settlement and came out with a decision, and then now are giving it to everyone.

That looks like a new regulatory process to us to say: We needed a regulation. We put out a guidance. We went to a lawsuit, did a settlement, then came out with a piece. It just looks like a faster way to create a regulation in a different route to be able to get there.

And it also comes back to us and reaffirms our question from a year ago. These smell like regulations and it certainly looks like they ended up acting like regulations, based on just not only cost but what they did and how they were treated once they left off here. What am I missing?

Ms. SMITH. Both the RAGAGEP guidance, the original guidance, and the Appendix A guidance were guidance documents. They were never legally binding.

When the Department of Labor was asked to look into that by the President's Executive Order, we did go above and beyond what we thought and put out, for notice and comment that we were thinking of changing these guidance documents. We then did change the guidance documents after we got notice and comments.

And, yes, we were sued. The plaintiffs in both the lawsuits that we settled, although their original claims were that we had to go through notice and comment, in the end the plaintiffs who were—the trade associations representing most of the regulated industry, the plaintiffs were willing to basically say: If you make certain changes in these guidance documents we are happy with them.

Senator LANKFORD. Again, that is only those individuals that were in the suit.

Ms. SMITH. Right.

Senator LANKFORD. That is part of the challenge. It created a new process but not everyone was privy to the conversation. Those that had enough money, and through the trade association, were able to do the lawsuit. They got to negotiate that rather than everybody.

Ms. SMITH. Well, everyone could have negotiated it. I mean, we would have been perfectly happy with OSHA, that if those individuals had come in to us and say, we think there are some problems with the guidance; we want to make changes to the guidance, we would have sat down and talked to them. We have made changes to other guidances when individuals have come in after the guidances were done and they tell us that. But——

Senator LANKFORD. But you know—I am sorry to interrupt—you know as well as I do, those were coming out very rapidly after the fertilizer plant explosion in West, Texas. And what we heard in this Committee and what was out in the public was: This is an emergency. We have to do this. Let's get it done quickly and let's get the process started. Of course, now we have learned the West plant was actually intentionally set fire, not an industrial accident

after all. But the perception at the time was, we are running; we are going.

And so I understand industry stepping in, raising their hand and saying, include us in the conversation, but it seemed to take a lawsuit to be included, not just a, hey, let's sit down at the office and talk.

Ms. SMITH. With all due respect, Senator, after the explosion the President put out an Executive Order. We did put out the request for information, specifically saying that we were considering changing the three guidances. And we waited three months for comments from the public. We got a lot of comments. We then extended it—at the public's request we extended the comment period even further for about three weeks. And then we sat back and we analyzed the comments and put out the guidance.

Senator HEITKAMP. Under the Administrative Agencies Practice Act there is an emergency rulemaking procedure that can be utilized in circumstances where public safety needs to be addressed in an expedited fashion. Why wasn't that used?

Ms. SMITH. Because what we were changing was guidance. We were not changing a rule.

Senator HEITKAMP. That is a problem. [Laughter.]

And, we keep going back to, what we were changing was guidance. And, it just keeps getting to that point where had you started with a rulemaking process, you would have a firmer foundation for this whole structure that you have created, and therefore more systematic support, I think.

And, we are talking in circles here because we are here to try and figure out how we more effectively delineate between guidance that we know—and I think it is unanimous at this podium—that these guidances that were issued by OSHA are a whole lot more like rules and not guidance, in our understanding of what that means.

So, I mean, you obviously have a difference of opinion. Just work with us to try and figure out where that line is. And when it so dramatically affects people's livelihoods, it just really gets us to that spot where we just go, that should not be done. And I am not saying on a whim. I understand what you are saying about process, Ms. Smith. I understand what you are saying about opening it up. But it looks and reads to me like guidance is being used as "rulemaking light."

Ms. SMITH. Senator, I understand your point.

Two things I would like to say, which is that the original guidances were not done through notice and comment rulemaking. And maybe that is the problem, because we were interpreting a rule. If we had gone through notice and comment, for all we know we would not have put out the original guidance. We would not have put out guidance. We might have put out a different rule than the one that we put out. But we did not go through notice and comment guidance when we originally put out all these interpretations.

And I know I am being the lawyer in the room here, so I apologize for that, but the Supreme Court has said that if you put it out originally as guidance, you do not have to go through notice and comment rulemaking to change that guidance. So I wonder whether we should consider if we are putting out guidance that is inter-

preting certain regulations, maybe we do need to put more notice and comment, but we did not do notice and comment.

And remember—Senator Lankford, I would like to say this to you about the settlements. Yes, we settled those cases, but it is still guidance documents. In any individual situation—if, for instance, OSHA cites someone for violation of Appendix A, they can contest that citation. It is not legally binding on them. It is our interpretation. But there is a whole contest provision that can go. And from time to time, the OSHA or the Labor Department, either the administrative law just says, you are wrong; your guidance is wrong.

And so that is the difference between guidance, in my opinion, and notice and comment rulemaking. If we had gone through notice and comment rulemaking in the beginning or the second time, there would not be that opportunity to contest it.

Senator HEITKAMP. Would you agree, as a lawyer, that longstanding agency interpretation is given a certain level of deference by the courts?

Ms. SMITH. I would have said that 5 years ago, but given the recent Supreme Court decisions, I am not so sure that is true. I mean, I think the most interesting thing in the mortgage bankers case, which is that the Court said you did not have to go through notice and comment rulemaking to change guidance——

Senator LANKFORD. Only on interpretive.

Ms. SMITH. Only interpretive guidance, but it did not say what level of deference it would give to that change in guidance.

Senator HEITKAMP. I think that there are intellectually challenging questions here in terms of where the line is. And I think that there is some common ground that we can achieve with agencies, especially when we are now operating with a third branch of government, which is the judicial branch, which you hardly ever get clarity from, right? I mean, that takes a much longer period of time to build the case law. That is a pretty big ship to move.

And so, I could not agree with you more that guidance, especially the kind of guidance that we are talking about here, if, in fact, you have it in an agency, that you may have to rethink whether a guidance document is the right instrument to, in fact, provide that kind of clarity to the law, that kind of direction, and that if this is not better done in rulemaking. I could not agree with you more.

And maybe that is the cyclical discussion that we are having here, because you know what you are doing in terms of your guidance, your amending guidance, and we are saying, we do not get how any of this can be guidance and how this cannot be rulemaking, given the consequences of what the change means to the industry.

Senator LANKFORD. OK, can I jump in here as well, just based on what you were saying on that, because what Senator Heitkamp is saying is the crux of the issue. It is trying to figure this out and why this process part of this conversation is so important. And obviously we are talking through specifics here because they give examples, but it is much larger issue that we are trying to get to the crux of in the definition and how we can help provide some clarity to this.

Based on what you were just saying, Ms. Smith, on the legally binding and going to a court to be able to review this and to go

through the process on it—Ms. McIntosh, before you think we are just going to skip Education on this—— [Laughter.]

Let me draw back and come right off of what Ms. Smith was just saying.

Last year Secretary King and I were having a conversation in one of the hearings and we were talking about the 2011 "Dear Colleague Letter (DCL)" sexual assault guidance that was put out. The change from clear and convincing evidence—which most universities use—to the preponderance of evidence, and to try to figure out how this works within that institution—Ms. Smith was alluding to something that we have all talked about—it is not legally binding.

The question is, if a school chooses to apply clear and convincing evidence in their issues for sexual assault, how would the Department respond?

Ms. MCINTOSH. So, thank you for including me in this conversation and for that question.

I am not a lawyer, and you did ask me before about the change—what you determine—what you call a change in the standard of evidence. It is my understanding that our "Dear Colleague" that makes a reference to the preponderance did not change our interpretation—longstanding interpretation——

Senator LANKFORD. I could introduce you to a lot of university presidents that do not agree with that statement and a tremendous number of law professors across the country that do not agree with that statement. They see it as a very large change in how evidence is handled.

Ms. MCINTOSH. So we may have to disagree for this moment, but that was the evidence standard that our agency had been using and it is what we understand many universities were using, and we think it properly derives from the words in Title 9.

So, that said, that guidance document, again, does not have the force of law. So the guidance document——

Senator LANKFORD. I am so sorry to interrupt. Can you help me understand, from Title 9, where that comes from? And again, not trying to put you on the spot——

Ms. MCINTOSH. Right.

Senator LANKFORD [continuing]. But you were just mentioning you think it comes from Title 9 and from the word that is there. I cannot seem to draw that standard from anything that I read in Title 9.

Ms. MCINTOSH. So I will tell you what I believe the source is.

So, this is our interpretation of the words "equitable" in the Title 9 regulation, and this burden of proof is how we, you know—here we go. Apparently multiple administrations, not just our administration, that for procedures to be equitable they must use the preponderance of evidence standard. And that that is our interpretation of Title 9.

Now, the guidance document itself simply explains that. It does not have the force of law. So any——

Senator LANKFORD. So we are back to my original question. If a university chooses to use clear and convincing standards versus preponderance of evidence, what does the Department of Education do with that school?

Ms. MCINTOSH. Well, so what would happen in all of our enforcement is there could potentially be a complaint that comes from someone who feels that the sexual harassment policy in the university was violating their rights, and we would investigate that complaint thoroughly and around all the specific facts of that individual case. And that could take some time. And we would then come to a determination on the law—not about our guidance but on the law—and work with the university to come into compliance, if that was required.

Senator LANKFORD. I am still waiting. I am sorry. If a university uses clear and convincing as their evidence standard, which many have for a long time——

Ms. MCINTOSH. So, I cannot answer about any hypothetical case or example where there might be——

Senator LANKFORD. Well, how many——

Ms. MCINTOSH [continuing]. Clear and convincing.

Senator LANKFORD. How many lawsuits are currently pending in the United States based on this "Dear Colleague" letter? Do you know?

Ms. MCINTOSH. I do not know the answer to that. I can certainly follow up.

Senator LANKFORD. You know what? I would be interested to know.

Ms. MCINTOSH. Based on the letter or the clear and convincing?

Senator LANKFORD. Correct. So, for instance, just this week—and I am going to leave all the different universities out—just this week I was talking with a university president, and I mentioned that we were going to have this hearing, we were going to talk about some of these issues, and he shook his head and he said: I currently have two lawsuits against my university right now because we chose to use preponderance of evidence instead of clear and convincing, and we have lawsuits against our university right now.

And that story is repeated over and over again from students or former students that are challenging the new process, and also from universities that are challenging the Department of Education.

This has not been a simple guidance just to be able to clarify what most universities do. This has been an enormous change that it would have been extremely helpful not only to be able to look at and to be able to go through a full notice and comment, but to also be able to determine why this standard versus this standard?

And it has created this long fight over an issue that we all care very much about. None of us want sexual assaults on campuses. We all want a fair process. This is often a legal process with local police within that State, but it is also a university issue as well and it has become a very big issue. So if there is a way that the Department of Education can identify for me how many lawsuits they know of across the country, that would be helpful.

Ms. MCINTOSH. So, I appreciate your concern about the prevalence of sexual harassment and sexual violence on campus and how very important it is that our Office of Civil Rights (OCR) maintain vigilance and investigate complaints as they come to us. I think you know we have over 200 active investigations about sexual har-

assment and sexual violence on campuses. It is a very serious problem.

Senator LANKFORD. It is a very serious problem.

Ms. MCINTOSH. And it is something we take very seriously.

Senator LANKFORD. But it suddenly——

Ms. MCINTOSH. I cannot answer the question about other lawsuits filed against universities on the basis of this standard, but I will certainly take the question back and see if I can get more information about that.

Senator LANKFORD. So at this point your statement would be it does not have the force of law, but it is your understanding——

Ms. MCINTOSH. Our guidance document does not have the force of law.

Senator LANKFORD. So if someone has a different standard——

Ms. MCINTOSH. We would investigate complaints on a case-by-case basis. And much of that goes well beyond the evidence standards, all the circumstances and facts about how a university handles sexual harassment complaints——

Senator LANKFORD. Sure.

Ms. MCINTOSH [continuing]. And work with the university to come to a better place.

Senator HEITKAMP. I think one of my concerns—and it goes back to what I said, longstanding agency interpretation and deference. I understand you have an opinion about what the law provides: clear and convincing evidence versus preponderance of the evidence. The university may have a different point of view. Eventually we are going to be in litigation, determining what, in fact, that standard is.

The concern is that, when you issue guidance, somehow the courts get the idea that: We have given notice now. This is what it is. And it is an agency interpretation that is entitled to deference and so we are going to rule with the agency, when that interpretation was done through a guidance and not through a regulation where people were given an opportunity to comment.

And so, where I may divert a little bit—I understand what you are saying. It is just: Hey, guys, this is what we think the law says. It is not binding. You want to litigate this. You want to have a different opinion. You can, but you run the risk, having a different opinion, of us taking enforcement action based on how we are interpreting the statute.

I mean, you would agree that that happens, right? So why issue the guidance otherwise, if you are not giving them notice that you are going to sue if they do not agree with you?

Ms. MCINTOSH. So, we issue the guidance so that a broader audience can understand how we interpret the laws and the related regulations under Title 9. If we did not issue the guidance, we would do one complaint at a time, which would not be an especially good use of taxpayer funds, and it would not protect students on the very broad and serious question of sexual harassment.

I would repeat that we do not think we have ever changed our interpretation of the burden of proof from—we have never changed our longstanding interpretation. So——

Senator LANKFORD. So why was this published, then, if that was the assumption?

Ms. MCINTOSH. Well, the "Dear Colleague" letter about sexual harassment covers a variety of topics related to how a university can appropriately handle these. And that is simply one——

Senator LANKFORD. But that standard of evidence was not published before. You are saying it was the assumption, but it has caused a firestorm across universities having to create, in many places—I am talking about regional colleges, 2-year colleges having to commit a tremendous amount of individual time and literally—as I have talked to some regional universities, literally pulling people out of the classroom and not hiring a professor in that spot because they had to hire additional compliance people to be able to manage just this one "Dear Colleague" statement.

Ms. MCINTOSH. Well, I appreciate your concern and it is interesting to hear that feedback. I will certainly discuss it with my colleagues.

Senator HEITKAMP. I want to bring you back into this discussion, Mr. Shelanski. Obviously you can see we are struggling a little bit here. You are a lawyer, right? He is like, oh, do not ask me for a legal opinion.

And I think that, given your experience and the role that you play, maybe your insight as we try and kind of narrow this issue or look at how we address concerns of the public about the overreach of guidance—not overreach in terms of the substance, but just that this should not be done with the guidance; this should be done with more process.

I mean, how big of a problem do you think this is in agency interpretations today, this use of guidance rather than rulemaking?

Mr. SHELANSKI. Thanks, Senator.

I think that while there are certainly examples that we have been discussing today where there has been concern over agencies' use of guidance, I think that we should not lose sight of the fact that the vast majority of guidances do not raise this kind of concern, and that overall I think the guidance system works quite well.

Senator HEITKAMP. And it is welcomed by the regulated.

Mr. SHELANSKI. And it is welcomed by the regulated entities because very often what they are looking for is a reasonably fast clarification or answer or explanation of how they might comply with existing legal obligations.

Senator HEITKAMP. Yes. I do not care what the answer is; just give me an answer so that I have certainty.

Mr. SHELANSKI. Right, or let me know if what I am doing is good enough because the underlying regulation is not sufficiently clear to me that my compliance is adequate.

So, I think that the—overall my observation, what I have seen, is a guidance system that works quite well and is quite healthy.

Then I think there are the, few close cases that raise hard questions. And I think what I am hearing loud and clear from you and from Chairman Lankford today is these close cases need further thought in the level of process that they should go through. And I think that raises an interesting question that my agency colleagues and I, I am sure we will all take back to discuss about how——

Senator HEITKAMP. I mean, nobody up here wants to throw out the baby with the bathwater.

Mr. SHELANSKI. Right.

Senator HEITKAMP. I have long maintained that I think guidance can be extraordinarily helpful. In fact, to eliminate guidance could be extraordinarily disruptive. But when guidance changes long-standing interpretation or somehow flips a switch and we are headed in a different direction, the spider sense takes off and we go, I am not sure that that is the right way to do this.

Senator LANKFORD. Senator Carper, we are in just an open conversation. You are welcome to be able to join us.

Senator HEITKAMP. It is what we do in this Committee.

Senator LANKFORD. Senator Carper, who is the Ranking Member of the full Committee, we are glad that you are here as well.

Senator CARPER. I can kindly do that. Thank for holding the hearing. All of you, thanks for coming out.

I walked in and I noticed that the Chair of the Subcommittee has red hair and the Ranking Member. I notice the reporter here has red hair and one our witnesses appears to maybe have it. But I was going to ask unanimous consent for someone who did not have red hair to have a chance to say something. [Laughter.]

Senator LANKFORD. Well, let me check with Senator Heitkamp before I give that right away.

Senator HEITKAMP. I do not know. [Laughter.]

Senator CARPER. OK, thanks. Thank you for—I love the spirit with which you—the two of you work together. It is an inspiration and a loud, good example for all of us. So thank you for that.

Senator HEITKAMP. Thank you.

Senator CARPER. I wish I could say something nice about your staffs, but I cannot do that too. [Laughter.]

Good to see you all. Thank you very much for coming, for your service to our country.

Mr. Shelanski, you remind me a lot of a guy who sat before us in this room not that many years ago, and I think the President nominated you for a job over at OMB. What was it called?

Mr. SHELANSKI. That was when my hair was still red, before it was gray. [Laughter.]

Senator CARPER. That is OK; you still have hair. That is a plus.

All right, I want to go back to something the President said in a State of the Union address. And I am not sure what year it was. It was about five or six years ago, maybe four, five, or six years ago. And he was talking about issuing regulations.

And he was talking about not just, like, looking forward but actually taking the time to look back and to see what we had done by issuing regulations, if they were having the kind of effect that we were hopeful for or not, and if there were ways that we could tweak those regulations and in some cases retire them entirely, and what would that mean for our country?

And I have heard a number, in the five or six years since he spoke at the State of the Union, that indicate how much we have saved in reducing just waste and, in some cases, paperwork and so forth. But the initial number I seem to recall hearing was like—we thought we would save, like, maybe $10-or $15 billion over five

years. That was, like, a preliminary number. And I am told that the number has gone up by quite a bit.

Would you just talk about that for us and tell us how this has happened, because this is a number that I am seeing advertised now. I think it is $36-or $37 billion in savings over a five-year period. It is a good deal greater than what I think I had earlier anticipated, but that is good. But just talk about how we got there.

Mr. SHELANSKI. Thank you, Senator Carper. I appreciate the question.

The President did issue an Executive Order 13610 that asked agencies, all agencies, to put in place a process for retrospectively looking at the rules they already have on the books and to either eliminate or modify those rules that were no longer doing their job or were unnecessarily costly.

Since that time—and a lot of——

Senator CARPER. When I heard about him doing that my thought was, do you think agencies would take this seriously or will they hunker down and maybe after a while just it would go away?

Mr. SHELANSKI. I think the agencies have taken this seriously. And I think I actually—by the time I had arrived at OIRA, through the hard work of my predecessor and the OIRA staff——

Senator CARPER. Cass Sunstein.

Mr. SHELANSKI [continuing]. Yes—they had put in place a reporting system. And we have kept the agencies on schedule, reporting to OIRA twice a year on their plans for retrospective review.

Reports are easy to generate. What is harder is to institutionalize a practice of actually acting on those reports.

Senator CARPER. Right.

Mr. SHELANSKI. And what we have seen in the four to five years since this process was undertaken, is that the agencies have—and we have asked them to—have been more specific about what actions they have completed, what actions they are abandoning, and an accounting for what savings they have created.

And I think to date—I think at the time that I was going through my confirmation hearings, the number was about $10 billion in savings were predicted. Since that time, and after that initial ramp-up, we have hit a level of five years' savings that we now estimate to be $38 billion and growing. Agencies have wholesale repealed, I think, you know, dozens of regulations and eliminated thousands of pages from the Federal Register.

More importantly, we now have this process institutionalized throughout the executive branch agencies and have these agencies rather regularly dedicating resources to retrospective review.

This is a process that we hope will continue. It is hard work for the agencies. The agencies obviously have tight budgets and tight staffing and they are eager to move forward with new policies, so to get them to stop and look back at regulations they have completed I think is difficult. I give a lot of credit to the agencies for taking this seriously and for achieving the benefits for the American public through regulatory reform that we have achieved to date.

Senator CARPER. If I could ask, who are some of the agencies that seem to have taken this more seriously than others?

Mr. SHELANSKI. We have really gotten very good feedback and very good participation across the Federal Government. Some agencies have had lower-hanging fruit than others and so have been more able to do rules with major savings. USDA and the Environmental Protection Agency (EPA) have been able to grab a couple of rules that were very costly and change them early on, the Department of Transportation (DOT) as well.

But I do not think that should signal that other agencies with less flamboyant single results are taking this any less seriously. We have really had very good participation, and it is one of the things that I hope will continue into the future and be one of this administration's positive legacies.

Senator CARPER. I think that certainly has a potential for being—is there anything that the Congress—this Committee of the Senate, the Congress could be doing, should be doing to make sure that this kind of good work continues?

Mr. SHELANSKI. I think that——

Senator CARPER. Because the next President may not be all that much interested in this stuff.

Mr. SHELANSKI. My hope is that the next President would be interested in this, because I think that retrospective review is part of good government, and I think that any President and, frankly, anybody of any party should think that being good stewards of the rules we have on our books is part of good government and a healthy regulatory system.

I would be happy to give some further thought to what more you could do to support this, because I do think it is a very important function to carry forward.

Senator CARPER. Good. Thank you.

Senator LANKFORD. There is a Heitkamp-Lankford bill that would help with that, that is already sitting out there, by the way, that our Committee has passed and you have supported. And there are ways to be able to deal with this directly. So, appreciate the conversation.

Ms. McIntosh, by the way, Senator Carper, you are welcome to join in anytime in the conversation on this.

Senator CARPER. Thank you.

Senator LANKFORD. Ms. McIntosh——

Senator CARPER. In that case—no, go ahead. [Laughter.]

Senator LANKFORD [continuing]. Let me ask you a question that deals with current rulemaking in some process areas.

All three of us on this dais voted for and supported a change for the Every Student Succeeds Act last year. In fact, 85 Senators supported that, overwhelming supported in the House, affirmed by the President. In that, we specifically put in the "supplement not supplant" provision and specifically stated that States and local entities created their own methodologies.

Some of the earlier rules that have come out from the Department of Education where the Department of Education has actually given a Federal methodology rather than allowing the local individuals—it seems to be a pretty straightforward, plain reading that all of us supported, allowing more local control in some of the decisions.

Tell me that process for that reg coming out, and why, after specific statements of saying local decisionmaking on these methodologies, there is a Federal methodology coming out.

Ms. MCINTOSH. So, on the topic of "supplement not supplant," I think you know that the proposed rule first went into the negotiated rulemaking process, where people from all—the stakeholders that deal with our Department got to discuss a first proposal and make a number of very interesting and helpful suggestions.

We did not reach consensus on that negotiated rulemaking, but we did obtain quite a lot of feedback. We also obtained feedback from Members of Congress on the authorizing Committees and others. And after much reflection, we have a new proposal. I am not the expert on the details on this one either, but we have a new proposal that is now out for public comment. And it would basically be inappropriate for me to talk too much about how it is structured or how it might be structured in the future. We are eager to get public comment on that rule and we will then wrestle with those questions and of course be interested in your input as well.

Senator LANKFORD. Sure. Yes, and we are glad to be able to say—but I guess what I am trying to get at is, again, it goes back to our Committee is not the authorizing Committee there that wrote the Mitchell bill. We are dealing with some of the oversight and the decisionmaking behind the scenes.

The initial proposed rule came out with a Federal guide for that, a Federal statement on how to do it, when the law is pretty plain there would not be one, but there was right at the very beginning. And I guess I am trying to figure out how, in the first version that comes out publicly, suddenly there is a Federal ruling when everything says locals will decide the methodology here.

Ms. MCINTOSH. I do not remember if it is true in the first, but in the current proposal there are several options for States to follow——

Senator LANKFORD. Yes, but——

Ms. MCINTOSH [continuing]. And districts to follow, so——

Senator LANKFORD. But any options still violates, because it makes the statement very clearly, local decisionmakers set this. There is not a Federal guideline for it.

Ms. MCINTOSH. So, I believe the Secretary has also addressed this in some of his hearings, and we think our rule addresses the very plain language in the statute that Federal funding should supplement and not supplant.

Senator LANKFORD. Totally agree.

Ms. MCINTOSH. And the rest of the rule is how we are proposing to implement that, and it is subject to Federal comment—public comment rather now for a good long time, another month or six weeks.

Senator HEITKAMP. Just to get clarification, so if a district does not follow one of the three options, will they be considered to be ineligible for Federal funds?

Ms. MCINTOSH. I cannot answer that.

Senator HEITKAMP. Well, that would be a problem.

Ms. MCINTOSH. First of all, it is a rule under public comment. It has gone through extensive legal review here at OMB. The Congressional Research Service (CRS) has taken a look. But I could not

answer that question. I would be happy to let the experts get back to you.

Senator HEITKAMP. But, I could see doing something where you say, well, you might consider this, you might consider that; here are some things that we would consider appropriate. But foreclosing all other options when we say we are giving local option, those are the kinds of things that rise to the attention of Committees like this one and create, kind of, mischief. And so, I hope you take back the concerns that we have.

Ms. MCINTOSH. Well, thank you for the feedback.

Senator LANKFORD. Yes. No, please do.

And while we are talking about non-controversial topics——[Laughter.]

Let's talk a little bit about the reinterpretation in Title 9, what is affectionately called the "bathroom/locker room/dorm room" policy as it came out, dealing with gender identity on the basis of sex.

I think it would be safe to say that many school officials did not find the interpretation to be inherent in Title 9, just based on their response. So many districts around the country, thankfully, were incredibly engaged in trying to find ways locally to be able to help transgender students not be isolated, not be bullied, and they were already very engaged in local districts, thankfully finding ways to be able to have a safe environment for every single child in the school—terrific.

Then a new interpretation came out on Title 9, which obviously a court has now stayed and has said no. Again, it is the thinking process of what went into this that is helpful to us to be able to determine how that guidance came out and that process was done.

Congress has passed legislation defining both "sex" and "gender." It is two different sets of issues; for instance, the Violence Against Women Act, where we have dealt with that specifically. Clearly that was not in the previous statute and was not clarified that way, and so I am trying to figure out the jump.

How did it move from the assumption in the statement that gender was always implied, when Congress has separated that out in previous statutes and when districts all over the country did not deal with that in the past and they already found other ways? So help me understand the process of that decisionmaking to suddenly include "gender" where it said "sex."

Ms. MCINTOSH. So, thank you for your concern about the protection of the rights of transgender students and for pointing out how many States and school districts are actively engaged in trying to make sure that these students are not bullied and have a safe and protective environment. In fact, when we issued that "Dear Colleague" letter, we also put out a guidance document that highlighted some of the excellent practices of many of those States and school districts.

Sadly, that is not universally true, however. And through OCR's enforcement process, where they have gotten complaints about transgender discrimination as long ago as at least 2010, OCR has, in their enforcement work, interpreted discrimination on the basis of sex to include gender identity. And I think, as you know, our "Dear Colleague" letter, that explains this, to a general audience,

cites a number of case law and legal precedent that is consistent with that interpretation.

It is true, as you point out, that a Texas court has recently stayed our work on that interpretation. And we respectfully disagree with that decision but of course are complying with that judge's order while we investigate our legal options. I do not think the last legal chapter has been written here.

Senator LANKFORD. No, but it is an interesting challenge just to be able to look at five courts ruled the other direction; one court ruled that way. Education grabbed the one court that ruled their way, ignoring the five others. And then a statute that did not refer to gender, all the way from the 1970s, when clearly Congress has passed statutes before that dealt with both—I understand the dynamics and the challenges of it. I talk to school districts, as you do as well, and there is a very real challenge to be able to make sure that student is protected.

The challenge is, it was not just a statement of: Make sure that your school has a policy. It was a Federal imposition of: We have Title 9 authority. We will remove funding from you if you do not follow this, though it is guidance, though everyone understands it the same. And what I hear from every district and from every university president is: We treat "Dear Colleague" as regulation because we feel like we better. And that is a different dynamic.

Now, I do want to do something here back and forth on it. I know, Ms. Smith—I understand you asked a month ago to be able to go, and this has been a longstanding planning time to be able to get to this spot. And so I do want to respect your time on this. I know you have to slip away. We have quite a few questions that we still have dealing with things like the overtime rule, which has been incredibly significant, the fiduciary rule, a lot of the challenges that we are currently facing. So I would like to be able to submit those to the record for you.

But I will tell you just quickly, on the overtime rule, this has a tremendous effect for nonprofits and for universities, and every nonprofit and university and small business that I talk to is struggling under this tremendously, especially nonprofits, where the nonprofits—often the people who work there understand they are not there to get rich and they understand the nonprofit does not have very much money, but you put the nonprofits in a very difficult situation.

The nonprofits advertise to their donors that: We are very efficient in the use of dollars because we have very low overhead, because the people that work there work for very little money and love to do it. Now you are literally making it tougher for them to fundraise because they are going to show a higher amount of overhead cost, which some donors do not want to give to something with a higher overhead cost. They want to make sure it gets directly to the place it needs to go. So it makes it tougher for them in fundraising and makes it tougher for the entities.

Secretary Perez and I had this conversation last year. I brought him letters that the YWCA sent to my office saying: We have X amount of dollars. When the overtime rule is implemented, if it is, we will close domestic violence shelters because we do not have enough money to run all of them and meet the standard. We will

meet the standard, but it will force the closure of domestic violence shelters.

I hear the same thing from church employees, that rarely a church employee makes that amount, in the Central Time Zone, and that they are struggling on: What do I do? I love to give my time. I am involved in this work because of my love for it.

And even dealing with how it is implemented. As you go through the rule—which I am sure you have taken a good, hard look and gone through the overtime rule—it is incredibly difficult just to be able to determine, and with 25 weeks for small businesses to be able to implement it, when you walk through all of the exceptions—which I took some time to be able to walk through all the exceptions that are within it, things as simple as commissioned sales employees, farm workers, motion picture theater employees—which I thought was interesting—motor carrier drivers, amusement park employees—all these brought exemptions, the allowance to be able to do, are you a 51 percent supervisor or are you a 49 percent supervisor?

One of my favorites, as I look through it, a generally not-exempt are registered nurses, but generally exempt are licensed practical nurses, but—no, they are not exempt but nurses are exempt, registered nurses. And everybody is trying to figure this out in a 25-week time period of who is in, who is out?

Is there any chance that small business, that nonprofits, that universities and others can get more time on this or to be able to have some consideration within that lane? And this is a very big issue for a tremendous number of companies, as is the fiduciary rule, as is things like the rules dealing with franchises. There are so many issues that are coming at so many small businesses right now. They are having a very difficult time maintaining this.

Ms. SMITH. So that is a very large question in a very short period of time.

Senator LANKFORD. Yes, ma'am. I know you are running out of time too.

Ms. SMITH. But one thing I would like to talk about for the not-for-profits, one of the things that the Labor Department has been doing in recognition of that is that we have been—since the final rule has come out, and even before then, we have been working directly with funders of not-for-profits.

We have sat down; we have had many meetings with foundations and other funders to talk to them about why they should increase their funding for not-for-profits so that there would be an opportunity, and why, even though their administrative costs are going up, it is not because they are being frivolous in any way. We have gotten some good responses from foundations.

Senator LANKFORD. How many non-for-profits are there out there in America?

Ms. SMITH. Senator, I could not tell you. I mean, I think if I read the rule I might know. I mean, if I read in the——

Senator LANKFORD. How many have you met with at this point, because there are hundreds of thousands.

Ms. SMITH. Do you mean how many not-for-profits we have met with?

Senator LANKFORD. Yes. No, no, no—yes, how many have you met with, because there are hundreds of thousands of them.

Ms. SMITH. Before the rule came out we had a number of listening sessions specifically with not-for-profits. Then, since the rule has come out, not only did we put out guidance for not-for-profits, specific guidance, but we also had a number of webinars specifically for not-for-profits to talk to them about how they could implement the rule.

I mean, there is not just one way to implement the overtime rule, and we have been giving a lot of technical assistance both specifically to universities, as you mentioned, and higher education, for not-for-profits, and for small businesses.

Senator LANKFORD. So, basically you are giving donors to non-for-profits 25 weeks to donate more so that they can stay open, because I am telling you, some of these domestic violence shelters are closing because they do not have the money to be able to run them. And this is a big issue to a lot of non-profits in this very short window. They do not just magically have more money in October, December.

Senator HEITKAMP. If I can add to this, because I think the nonprofits that are struggling the most with this are nonprofits who may have 24-hour call centers. They may, in fact—you could sit there and say, well, there is an easy way to comply with this rule: Make sure no one works over 40 hours a week, right?

Senator LANKFORD. Or donate more money.

Senator HEITKAMP. Well, yes, I get that, but my point is that very many of these nonprofits that are hit the hardest are nonprofits that rely on call centers, rely on the ability to call workers in at two in the morning to deal with a domestic violence situation, deal with placement of a child.

And I think you need to understand that where the simple answer sometimes in the overtime rule is that you can, in fact, comply by maintaining, and I am sympathetic to your rule. I mean, I think that when you work someone, what is it, $23,000 a year right now——

Ms. SMITH. That is correct.

Senator HEITKAMP [continuing]. Somebody can be classified as a manager and then you can work them 60 hours——

Ms. SMITH. Or 80 hours.

Senator HEITKAMP [continuing]. Or 80 hours. And, to me the problem is that you are not only not paying them enough for the 40 hours, you are also taking away the advantage that they may have of getting a second job to support their family.

So I may see this a little differently than Senator Lankford, but I will say I think that the overtime as it relates to on-call is very problematic.

Ms. SMITH. So, thank you, Senator. I do not think I am going to have, really, time to answer all these questions, but I would be happy, if you wanted to submit some QFRs for the record——

Senator HEITKAMP. Yes, we will.

Senator LANKFORD. We will definitely do that.

Ms. SMITH [continuing]. We would be happy to answer those.

Senator LANKFORD. Is it possible for us to be able to get responses back—and we will be very specific—within 30 days? Is that a reasonable time period?

Ms. SMITH. We will do our level best.

Senator LANKFORD. Give me a percentage of what "level best" looks like—80 percent chance I get those?

Ms. SMITH. I guess it depends upon the number of questions. [Laughter.]

Senator LANKFORD. So we will be very specific in our questions as we walk through it.

I would tell you, December 1 is screaming at a lot of people in my State as it is coming.

Ms. SMITH. I understand that. You may or may not know, Senator, that there were two lawsuits filed in the last two days in an attempt to enjoin the overtime rule, so it is very possible that, no matter what the Department of Labor would prefer to happen as to the date, that it may be pushed back.

Senator LANKFORD. Well, there are a tremendous number of people that are begging for that because it is incredibly difficult to both understand and implement in a lot of businesses because of the number of exceptions. And if you are a nonprofit, especially, or a university—I have spoken with university presidents again. They tell me tuition is going up in the spring specifically because of this rule.

Ms. SMITH. Just one last comment, Senator, which is that the exemptions that you were talking about, those are statutory exemptions to overtime. They are not affected one way or another by our overtime rule, which only deals with the white collar exemptions.

Senator LANKFORD. Right.

Ms. SMITH. So, I understand that those exemptions are confusing. That is because the Fair Labor Standards Act has been amended from time to time and Congress puts in an exemption for this one and an exemption for that one, but those are longstanding exemptions. They are not new to this overtime law.

Senator LANKFORD. But every small business employer is right now hiring a consultant to be able to come help explain this to them because they know what they have and they do not know what is coming. And so they have added expense already of that consultant, and then trying to figure out what to do on the costs on it, or who they are going to lay off or who they are going to keep, or who they are going to switch to hourly, as multiple businesses I have talked to have already shifted salary to hourly to try to make the shift.

I know you have to get gone. I am trying to honor my commitment to everybody else that we would be done by five and——

Ms. MCINTOSH. And, Senator, I am sorry, but I also communicated a prior commitment, that I would need to leave soon as well, although of course I would be happy to take your comments, your questions.

Senator LANKFORD. Can you stay until 5 o'clock?

Ms. MCINTOSH. I really need to be somewhere else at 5. It is getting very close to that. Can I take a few more questions? And then we would certainly be very happy to answer any others that you would like to submit to us for the record.

Senator LANKFORD. OK. If we can get a few more questions to you, that would be helpful.

Ms. MCINTOSH. OK.

Senator CARDIN. Mr. Chairman?

Senator LANKFORD. Yes, sir.

Senator CARDIN. I have other questions. I will just ask them for the record.

Senator LANKFORD. OK, thank you.

Senator CARDIN. Sure. And thanks for letting me join you.

Senator LANKFORD. You bet. I am glad you joined us.

Senator Heitkamp, do you have anything that you would like to start with?

Senator HEITKAMP. No, you go ahead. I do not want to take up more of Amy's time.

Senator LANKFORD. Well, let me try to get through a couple of these here, because it is part of the challenge that we have as we go through some of the "Dear Colleague" letters, when they were determined—for instance, the one on the Title 9 dealing with transgender, it was determined to be a significant guidance. My understanding was, based on the previous hearing, that it raised a novel set of questions from the stakeholders.

What kind of processes go back and forth with OIRA when it ends up being a significant guidance based on novel questions? And why is that a guidance rather than a regulation?

Ms. MCINTOSH. Well, it is a guidance document because it is interpreting and saying in plain language how OCR is enforcing the law and related regulations to Title 9. We do not believe the DCL added any new requirements.

Senator LANKFORD. But it started with: It is a novel piece.

Ms. MCINTOSH. But we deemed it—we have a centralized process at the Department to review guidance for—based on the bulletin, for what are the characteristics of significant guidance, and we judged that one to be significant. And as we do with all significant guidance documents, we offered it to OIRA for review. And I believe OIRA accepted it in that case because it touched on issues that were involved with other agencies as well as—clearly we were getting a great deal of questions and urgency from our regulated parties.

Senator LANKFORD. But it was the perception of the Department of Education this was nothing new, this was always in the statute; it had just never been enforced? Or it had been enforced; it just needed clarification?

Ms. MCINTOSH. So, I think I mentioned earlier the interpretation of Title 9, where discrimination based on sex includes gender identity, is actually a longstanding interpretation of the Department, backed by case law. As you——

Senator LANKFORD. When you say "longstanding"—somebody help me understand "longstanding."

Ms. MCINTOSH. At least 2010, arguably earlier than that. But the specific issues around transgender students and bathrooms in schools did increase—we got an increasing number of complaints and questions over the last few years. And the Office of Civil Rights was engaged in investigating and reaching agreements with States and districts.

Because those complaints seemed to be accelerating as, in general, the world has been paying much more attention to gay and lesbian and transgender rights in the recent years, we felt that it was important that we tell a broader audience than just the audience that OCR was getting to one complaint at a time how we were interpreting Title 9.

Senator LANKFORD. So you determined at that point, early on, this is not a regulation, this is a guidance, because internally this was always the understanding in the Department of Labor at least since 2010.

Ms. MCINTOSH. So, the Department of Education. And not internally. It was the interpretation that the Office of Civil Rights was using in their active, ongoing, external work investigating civil rights complaints around this issue. It was not widely known because it was investigation-specific.

And we do not think that school districts and States, who are not lawyers and not, deeply immersed in this law, should have to read the resolution agreements we come up with, with an individual investigation, and figure out how that applies to them.

So we simply explained in this guidance document how OCR has been doing interpreting. And, as I mentioned, we also published examples of States and school districts who were coming up with very excellent solutions to stay in compliance with the law.

Senator LANKFORD. And by the way, I completely agree with that. That is entirely reasonable to say: It is an expectation that every student is able to be at school in a safe environment for that student, free of bullying and the threats of all those things, and here are good examples of some schools that have done it.

That is entirely reasonable. You took the next step and said: And here is how you are going to do it now. And it changed dramatically and redefined a statute from the 1970s in a new way.

Ms. MCINTOSH. I would respectfully point out the "Dear Colleague" letter is not binding. It does not have the force of law. And it does not specify a single way that States and school districts can stay in compliance with the law.

Senator LANKFORD. I would say there are a lot of districts that disagree with that, and we can agree to disagree.

Let me ask a question here. As well as language—and we are back to the same issue here in just helping me understand this. This comes from that "Dear Colleague" letter: "A school may not, however, adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex." Help me understand the term "overly broad generalizations."

Ms. MCINTOSH. I would not be able to comment on that specific phrase. I could certainly ask the Office of Civil Rights to elaborate on that.

Senator LANKFORD. I will try to follow up on it because, again, we are back to everyone else has to read it and to be able to understand what it means. And clearly a guidance document is there to be able to provide clarity. A term like "overly broad generalizations" really needs some clarity itself, trying to figure out what that means because, again, every school district lives in fear of the

Department of Education walking in and saying: You have a Title 9 violation and your funding is at risk.

Ms. MCINTOSH. So I will take that input about that phrase back to our office.

Senator LANKFORD. Tell me as well about—when we are trying to deal with a new piece that has come out from the Department of Education and the Office of Civil Rights—there was a document that was put out saying that there is a process that we are going through right now to be able to identify religious discrimination or bullying based on religions, and specifically highlighted minority religions in the United States, to make sure that we do not have individuals that are discriminated against, and trying to form some sort of process to be able to collect complaints.

So I am trying to figure out where this is going and how the process will go to collecting. Again, I am in the same position. I do not want any kid of any faith, of any background, of any—whoever it may be, to have an unsafe environment. So I am trying to figure out this. How will you collect the data based on religious discrimination in a school, or statements about religious discrimination?

Ms. MCINTOSH. So, I apologize, Senator. I am not familiar with the document or the process that you are referring to, but I can certainly get more information for you.

Senator LANKFORD. I will try to send a list of questions into you as well. Same question as well. Can I get those within 30 days responded to?

Ms. MCINTOSH. I will ask my colleagues. We will do our very best.

Senator LANKFORD. I am back to "our dead level best," yes.

The question really, then, boils down to several things we need to deal with religious liberty on a school campus. Again, that has been longstanding policy that individuals can both have a faith and live their faith, especially for a student on a campus. It has been well-protected and restated multiple times by both courts and by Presidents, affirming over and over again, of both parties.

I would just be interested to be able to know some of the process of what is out there. And there are some very specific situations that become more challenging of who this is collected on, the process of how it is collected, and where we go from here.

Ms. MCINTOSH. And we will get back to you on all your questions.

Senator LANKFORD. Thank you.

Ms. MCINTOSH. I apologize for having to slip out. Thank you very much for having me here.

Senator LANKFORD. All right, thank you. And we will follow up with additional questions.

Mr. Shelanski, you are the last man standing. It is redhead on redhead now. [Laughter.]

Mr. SHELANSKI. All right.

Senator LANKFORD. So my question for you is, again, back to where we started. This is difficult in our conversation. It is much more difficult in conversations outside of this building: What is a regulation? What is a guidance? Which one do I follow? Which one do I not follow?

I had a university president as recently as this week say to me: When a "Dear Colleague" letter comes out, I follow it—and his exact words were—as if it is regulation, because I understand the price that I may pay in trying to explain to my board in case I do not and in case the Department of Education steps in and says, I am going to take away your funding.

This is not a level playing field where an individual can just, as it has been argued: Well, it is not legally binding. We are just giving you guidance. Everyone there understands full well the consequences of not following it. And if they do not, it is not just a court hearing; it is the possibility of losing funding and being published as a school that has a Title 9 violation, or, in multiple cases with the Department of Labor, having a public setting that this place is under investigation, or now even with contracting, because some of the new conversation is that if you are going to get a Federal contract, you are going to have to say how many investigations they you have been through, and that is going to count in your scoring.

So if Department of Labor shows up at my place three times a year and shows up at someone else's place once every three years, you are at a much greater risk for not getting a Federal contract because you are going to show active investigations and they are not, though they may be exactly equal as two entities.

These have very serious consequences both to businesses, individuals, taxpayers—lots of litigation both for the Federal Government and us. How do we provide clarity to this? And who is the gatekeeper to make sure that there is a difference between guidance and regulation and people know the difference within the agencies? Who has that?

Mr. SHELANSKI. So, I think in the first instance it is up to the agencies because the vast majority of guidances that they are issuing are pretty clearly explanatory and interpretive. I do think that in cases where agencies overstep, I think there are a couple of different paths that can be adopted.

The one thing I would note is that, in a guidance document, what we look for first is whether or not the guidance is adding anything by way of obligation or requirement to the underlying law or regulation. And sometimes when the guidance is repeating that which is already established in the underlying law and regulation, one would expect that the recipients of the guidance document would treat at least that part of it as regulation, as binding, because it is a repetition of that which went through that proper process.

After that, what we try to do—and I think what the good guidances practices do, what the back-and-forth outreach that agencies do in accordance the Good Guidance Practices and the kinds of things the GAO has recommended—is to try to give really helpful advice about alternative ways to meet those preexisting obligations.

And so, I think it is primarily on the agencies to follow those practices and to make sure that what they are giving to stakeholders is something that does not go beyond that which was previously established and which is helpful.

Senator LANKFORD. And if there is the perception they have gone, it is the courts? Who do they respond back to——

Mr. SHELANSKI. So I think there are a couple——

Senator LANKFORD [continuing]. As individuals that are affected?

Mr. SHELANSKI. I think there are three different routes that one sees happening.

I think the most direct route is to go back to the agency, because typically when an agency puts a significant guidance out, it does provide contact and invite response. That is, indeed, a best practice that is in the 2007 document. It was identified by GAO. And, in fact, we have seen the two agencies that were sitting here this afternoon increase their specific request for that kind of feedback so that they can tune their guidances in response to that. So number one would be the agencies.

Another option is to come to us at OIRA and to say, we think either that this guidance is not a guidance and should be regulation, or it is a guidance but it is turning out to be economically significant; it should have gone through the notice and comment. And as stewards of the 2007 Good Guidance Practices, we would be in a position to call the agencies in, again, to discuss what options there might be to remedy the problem that was brought by stakeholders. So we are another place that stakeholders can come.

And then the final place, which we have seen in a couple of recent examples quite clearly, are the courts.

Senator LANKFORD. What is the best timing in the process for people to be able to come to you as the gatekeeper?

Mr. SHELANSKI. As early as possible. And so an example would be the following: Patricia Smith identified some requests for information that were issued to the public and a comment period that was issued to the public when they put the public on notice they were considering some guidance changes.

I think concern at that point about, A, whether the document is really guidance or really should be APA rulemaking, and, B, whether even if a guidance—it might be economically significant—would be things we would be interested in learning quite early from those stakeholders, because when we can engage before a guidance is developed and issued, we are better able to work with the agencies and to put in place a good process.

Senator LANKFORD. I would also say to you—and something we have discussed before—when the American people have the opportunity to be able to do the same, that helps. That is one of the reasons this Committee has promoted advanced notice of proposed rulemaking, to get more people involved in the process earlier so that when significant things like that come out, we do have the opportunity to be able to get maximum amount of input from the affected individuals.

That is a positive input. As you and I have discussed before, we are still a nation of the people, by the people, for the people. And when people find out about it last rather than get the opportunity to be able to contribute first, it makes a big difference to people in their frustration level. They do not have money to go hire lawyers and to go chase down and do lawsuits. They just want their own government to be responsive. And they expect someone is watching that, and that is very helpful to them.

One of the things that would be extremely helpful for us to know is that OIRA is active, that when a guidance comes out and immediately people across the country raise the issue and say, this is

more expensive than $100 million, it has the effect that OIRA will lean in quickly and second-guess that agency and at least ask them: Did you do cost-benefit? Where did this stand? Why didn't we get this, and to be able to hold the agencies to account, because that seems to have come up several times of late where guidance is coming out and everyone says, no one seemed to have done cost-benefit on this, or if they did, they did not see it was $100 million and we are trying to figure out why because this will have a dramatic effect on our business. We will have to close, we will have to merge, whatever this may be. That would be helpful for us to know that OIRA is leaning in on that aspect.

Mr. SHELANSKI. Thank you. This is certainly something for me to take back. We can always try to do better that which we already do. And I think it is an important issue for me to take back and discuss with our team about what more we can do to make that assurance more salient for Congress and for the American people.

Senator HEITKAMP. Yes, I do not know what the rest of our Committee schedule is in this Congress, but I want to express, as long as we are still here, our great appreciation for your cooperation, our interest in continuing this relationship in the next Congress, depending upon who is sitting in either chair here.

But I think you can tell from the way we work, we are very serious about trying to do things that give the American public confidence that the government actually has a level of transparency and openness to listen to varying opinions, but also not so hamstringing these agencies that we do not get regulations out, which is one thing that I talk about quite a bit, that the failure to regulate can also create huge problems.

But I want to thank you, Howard. You have just been a great guy to work with. And if we do not get a chance to publicly thank you for your service to our country as this transition moves forward and ask you to remain engaged in an intellectual and academic way with this Committee as we move forward. Your advice is always welcome, I think by both the Chairman and by this Ranking Member, and we look forward to working with you even if you are not in the capacity as head of OIRA.

Mr. SHELANSKI. Thank you very much, Senator. I also look forward to that.

Senator LANKFORD. Yes, I would second that as well.

And do you have additional comments?

Senator HEITKAMP. No, I am good.

Senator LANKFORD. I would say—and not looking for you to move any place, but I am grateful to be able to have the ongoing conversation. We do want this just to work. There are a lot of jobs, there are a lot of businesses that are on the line, and these decisions that are made based on preferences here have real effect out there.

Senator HEITKAMP. I——

Senator LANKFORD. Now, you said that was your last statement.

Senator HEITKAMP. Oh, I am sorry, but I forgot——

Senator LANKFORD. This is it. [Laughter.]

Senator HEITKAMP. On the OSHA, just some commitment—you said you would take that back—maybe have a discussion with OSHA on the anhydrous guidance and see if there is a way that

we can at least delay that, because I do not know what we are going to be able to negotiate in the CR. There is a whole lot of discussion about something being purer than what it has been in the past. But leaving this in limbo will create great stress——

Senator LANKFORD. I agree.

Senator HEITKAMP [continuing]. On businesses. And I do not think, given what we know right now, a delay to the end of the year is asking too much so that we can get additional dialogue.

Mr. SHELANSKI. Thank you, Senator.

Senator LANKFORD. Yes, I would agree with that completely.

I would tell you, this Committee has had a particular sense of benefit over the past several years, now the past couple years, by connecting with former heads of OIRA, and they have been extremely helpful to us in multiple times and multiple conversations because they are able to say the things as former head they could not say as head. [Laughter.]

And so, not looking for you to leave your job, but I do hope we maintain this relationship, because you have in your head and from your experience a lot of things that would help the American people for a long time. And so we hope to be able to maintain that relationship for the sake of the American people and for the future of how we actually operate on all these issues.

Mr. SHELANSKI. Thank you, Senator.

Senator HEITKAMP. And what you say will matter to us.

Senator LANKFORD. Yes, it will. Thank you.

Let me do a quick closing statement that I am sure will be moving and stirring to all that hear it.

I do want to announce, on September the 29 we will hold a hearing connected with Millennials—strategies for the Federal Government to attract and utilize younger workers.

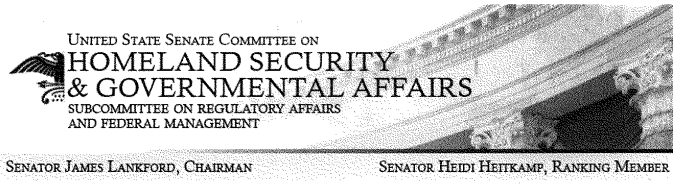
That concludes today's hearing. I would like to thank our witnesses for their testimony. The hearing record will remain open for 15 days until the close of business on October 7 for the submission of statements, questions for the record.

Do you have a statement?

OK, the hearing is adjourned. Thank you.

[Whereupon, at 5:01 p.m., the Subcommittee was adjourned.]

APPENDIX



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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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.

Statement for the Record
Senator Jon Tester

Subcommittee on Regulatory Affairs and Federal Management: "Continued Review of Agency Regulatory Guidance, Part III"
September 22, 2016

"Thank you, Mr. Chairman, Ranking Member Heitkamp. I appreciate our panel being here today to discuss the appropriate use of agency regulatory guidance. Guidance allows a clear channel of communication between regulators and the businesses they are charged with regulating. Guidance must be used diligently and with great consideration for the affected parties. But if guidance is improperly issued, it can have a broadly negative effect on regulated parties and the public at large. I'm glad to see that the subcommittee is once again taking this issue up and look forward to hearing from our witnesses. Thank you, Mr. Chairman."

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OFFICE OF MANAGEMENT AND BUDGET
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TESTIMONY OF HOWARD SHELANSKI
ADMINISTRATOR OF THE
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET

BEFORE THE COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENT AFFAIRS
SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT
UNITED STATES SENATE

September 22, 2016

Chairman Lankford, Ranking Member Heitkamp, and members of the Subcommittee:

Thank you for the invitation to appear before you today. I am pleased to have this opportunity to discuss the role of the Office of Information and Regulatory Affairs (OIRA) in the development of good guidance practices for federal agencies. OIRA's role with respect to guidance documents is twofold: we advise agencies regarding best practices for developing and issuing guidance, and we also review a subset of guidance documents under the same principles that guide our regulatory reviews.

Guidance documents serve an integral function in the policy development process. Agencies issue guidance to explain existing regulatory or statutory requirements, often at the public's request, or to make non-binding policy statements and recommendations. These documents often provide substantial value to the regulated community—they can increase efficiency, help the public understand the full range of compliance options that are available to them under current statutes and regulations, clarify to stakeholders whether a particular regulation or policy applies to them, and channel the discretion of agency employees.

OMB has long believed that agency guidance practices should be transparent, consistent and require agency accountability. In 2007, OMB published a bulletin in the Federal Register titled

Agency Good Guidance Practices to establish new policies and procedures for the development, issuance, and use of significant guidance documents.[1]

The bulletin, which remains in effect, establishes policies, practices, and procedures for guidance documents that Executive Branch agencies identify as significant or economically significant, designations that arise from criteria very similar to those for regulatory significance under Executive Order (E.O.) 12866. Those criteria include whether a guidance may reasonably be anticipated to cause changes that have a $100 million annual economic impact, have material budgetary effects, implicate interagency interests, or otherwise raise novel legal or policy issues.

For the subset of guidance documents that agencies designate as significant, the 2007 bulletin sets forth general policies and principles for agencies to help ensure quality and transparency, including:

- Adopt written internal approval procedures at each agency;
- Include certain standard elements in guidance documents, including information about applicability and appropriate citations to legal authority;
- Establish a website that lists all *significant* guidance documents in effect and specify how the public can comment on them, request modifications or rescissions, or submit a complaint;
- Follow a notice-and-comment process for *economically significant* guidance, including publication of a proposed notice inviting public comment and the preparation of a response-to-comment document.

The bulletin also reminds agencies that the Administrative Procedure Act (APA) generally requires notice-and-comment when an agency establishes new requirements that it treats as binding. A key additional benefit of following good guidance practices is that the agency's review process will help to identify any draft guidance documents that instead should be promulgated through the formal rulemaking process.

[1] https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/m07-07.pdf

In addition to the procedures required by the 2007 bulletin, OIRA also works with agencies to identify a subset of significant guidance documents that will undergo interagency review.

Once a guidance document is under interagency review, OIRA plays two roles. The first is to coordinate that review. OIRA circulates the guidance to other agencies in the Executive branch whose own policies, expertise, or responsibilities may in some way interrelate with the draft guidance document. The second principal role that OIRA plays is to ensure that the guidance embodies the relevant principles laid out in E.O.s 12866 and 13563, including whether the guidance is both necessary and consistent with applicable statutes and regulations. For example, the focus of such a review could be to help the agency hone and sharpen its arguments, interpret complex regulatory requirements into real world scenarios and applications, or discuss a particular way in which a regulated entity could comply with a regulation while not foreclosing other legitimate compliance approaches.

OIRA reviews economically significant guidance documents as well, although such guidance documents have been relatively uncommon. In OIRA's experience and based on agency analysis, the behavioral impacts associated with non-binding guidance documents do not often exceed $100 million in a given year. One example where this could happen is when an agency issues guidance on emergency or disaster preparedness to state and local authorities. Even though the guidance is not binding, if the guidance is sound many states might be expected to willingly follow such recommendations and change their behavior accordingly. Even in such cases, however, guidance documents generally do not lend themselves to formal economic analysis of the kind that is required for an economically significant regulation under E.O. 12866. OMB's Good Guidance Practices bulletin does not require agencies to conduct a formal impact analysis when making a determination about whether a particular guidance document is economically significant. In addition, in many cases, the regulatory impact analysis associated with a published rule on the same topic can prove informative when considering the magnitude of the potential effects that might result from related guidance.

The implementation of government-wide good guidance practices continues to be a priority for OMB and OIRA. Agency guidance documents serve an important role in the regulatory sphere. The good guidance practices set forth in the 2007 bulletin serve as a useful tool for agencies in setting the appropriate scope for their guidance documents and in deciding whether regulation

would be a more appropriate mechanism. OIRA will continue to work with agencies as appropriate on the review of the various kinds of significant guidance documents that the agencies issue.

Finally, we have been in contact with our agency colleagues about their work to implement GAO recommendations regarding best practices for guidance. The agencies have acknowledged and endorsed the recommendations of GAO's report and are making improvements where needed. We note, however, that the GAO report did find many good agency practices to be in place. We look forward to exploring whether there is more we can do at OIRA to promote improvements in agencies' processes for developing guidance.

Thank you for your time and attention. I would be happy to answer any questions you may have.

STATEMENT OF
M. PATRICIA SMITH, SOLICITOR
U.S. DEPARTMENT OF LABOR

BEFORE THE
SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

September 22, 2016

Chairman Lankford, Ranking Member Heitkamp, and members of the Subcommittee, my name is Patricia Smith, and I am the Solicitor at the U.S. Department of Labor. I am pleased to testify before you today on the Department's efforts to ensure that we are developing and disseminating accurate, helpful, and appropriate guidance that informs workers, unions, employers, training providers, health and pension plans, and all of our stakeholders of their rights and responsibilities under the laws that we administer and enforce.

Congress has charged the Department with administering and enforcing more than 180 federal laws. We oversee our Nation's investment in workforce development, ensuring that federally funded job training programs across the country effectively provide the skills and training American workers need to punch their ticket to the middle class. We also enforce important laws that protect health and safety in the workplace, the security of employee benefit plans, minimum wage and overtime, family and medical leave, workplace democracy, and workers' compensation programs. The laws that we administer and enforce cover 10 million employers and over 125 million workers.

The Department takes seriously our responsibility to develop regulations that implement these laws. The Department issues effective regulations to help achieve Congress's objective to invest in human capital to build a skills infrastructure that supports business growth. Our regulations also ensure that employers and workers have the information they need to better understand their rights and responsibilities in order to improve compliance with worker protection laws and achieve safety and security in the workplace. The Department develops these regulations consistent with Executive Order (E.O.) 12866, E.O. 13563, the Administrative Procedure Act's (APA) notice and comment requirements, and other agency-specific requirements. While the Department strives for full clarity in its regulations, from long experience we know that no regulation can speak to all scenarios in our complex and changing economy and, as with any governmental agency, legitimate practical questions arise for stakeholders seeking guidance on compliance and the Department's interpretations.

The Department therefore issues guidance to its stakeholders to clarify statutory requirements and our regulations. This guidance can include answers to frequently asked questions about how these rules apply to specific circumstances, or examples of best practices for compliance and implementation. The Department strives to issue guidance that is timely, as well as responsive and accessible to a broad range of its stakeholders. As a lawyer with over three decades of

service in both state and federal governments, as well as in private legal aid agencies, I have seen first-hand how well-drafted guidance can increase efficiency and reduce stakeholder confusion and the need for enforcement.

Today, I will briefly discuss how we issue responsive, accessible guidance; how our guidance allows us to maintain important flexibility to deal with emerging challenges; how we go beyond the legal requirements to seek public input on our guidance; how we use technology to disseminate our guidance to the public; and finally, some steps we have taken in the past year to improve our guidance program.

Issuing Responsive, Accessible Guidance for a Broad Range of Stakeholders

The communications the Department of Labor receives from the public and from Members of Congress inform what guidance is necessary and useful. The Department also utilizes advisory committee reports, listening sessions with stakeholders, recommendations from the Government Accountability Office (GAO), and the issuance of regular Requests for Information, as appropriate, to plan and draft more generally applicable guidance products. As a result of these efforts, the Department's guidance products have a number of different purposes. These may include clarifying the application of regulations to particular contexts, providing information on promising practices, providing assistance on grant administration, responding to specific stakeholder questions that may have broad application, providing information on the Department's current priorities and initiatives, and directing stakeholders and the regulated community to the resources available to help them comply with the laws you have entrusted to us to enforce.

Sometimes, we combine these efforts to inform a range of stakeholders. For example, we have developed numerous resources to describe our final rule establishing a minimum wage for federal contractors, including fact sheets, frequently asked questions, and an archived webinar explaining various aspects of the rulemaking. Together, these resources address the needs of a variety of audiences, from federal contractors, to workers, to other federal agencies.

We strive to issue guidance that is clear and accessible to members of the public who are not experts and who should not have to retain a lawyer to understand their rights and responsibilities. Many guidance documents aim to inform employers and workers alike about their rights and responsibilities in plain language, focusing on the most common questions and concerns. For example, the Department's Wage and Hour Division has created a factsheet and handbook about rights for workers and responsibilities for employers under the Family and Medical Leave Act that together lay out the most common types of requests for FMLA leave and what the FMLA requires that employers do in response to such requests; the Women's Bureau has developed an issue brief on how to hire women with disabilities, which includes advice on easy-to-implement recruitment strategies and workplace accommodations; and the Mine Safety and Health Administration has produced best practices pocket cards that provide useful tips about how miners can stay safe while working around conveyor belts.

Similarly, we were pleased that following our January 2016 issuance of a Wage and Hour Administrator's Interpretation concerning joint employment under the Fair Labor Standards Act

and the Migrant and Seasonal Agricultural Worker Protection Act, a number of stakeholders acknowledged the clarity provided by the guidance. One human resources firm, for example, described the guidance as providing "clear and helpful explanations, along with examples and scenarios to support those explanations, in an effort to help organizations and leaders have a stronger understanding of the regulations imposed by the DOL".[1] And one law firm commented that the guidance "does not say anything new," but rather, "summarizes the regulations and court decisions on which the Department will undoubtedly rely in any Wage and Hour investigation; it therefore can be a helpful self-audit tool for employers assessing their own situations."[2]

Maintaining Flexibility to Respond to Emerging Challenges

Another important aspect of the Department's guidance is that we must be able to provide timely assistance that is responsive to stakeholder questions or other emerging challenges. For example, the Department's Occupational Safety and Health Administration (OSHA) has been participating in and coordinating continued discussions regarding worker safety and health aspects of the domestic response to the Zika virus. In April of this year, OSHA and the National Institute for Occupational Safety and Health issued interim guidance on protecting workers from occupational exposure to the Zika virus. This guidance was in many respects a follow-on to the Department's similar efforts in the wake of the 2014 Ebola crisis, where the Department and our partners released guidance documents focusing on safer work practices, engineering controls, and personal protective equipment for workers at risk of Ebola virus exposure in healthcare, laboratories, waste management, maintenance, cleaning and environmental services, airline, law enforcement, and other operations.

Seeking Public Input For Our Guidance

In developing stakeholder guidance products, the Department's component agencies regularly consult with me and my colleagues in the Solicitor's office on compliance with the APA and other laws governing public participation. If the guidance is interpretive – that is, it clarifies the meaning of an ambiguous term in a statue or regulation – or is a general statement of agency policy, the APA generally does not require the Department to engage in notice-and-comment procedures. Public input on these documents is nonetheless valuable, and, where practical, we continue to solicit and receive such input from our stakeholders in letters, listening sessions, advisory committees, and otherwise when they seek to weigh in on our guidance.

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[1] Kayla Dineen, "What You Need to Know about Joint Employment: a DOL Interpretation Review," http://www.helioshr.com/2016/03/dol-interpretation-on-joint-employment-a-review-of-what-you-need-to-know/ (Last accessed May 18, 2016).

[2] Michael A. Alaimo, Brian Schwartz and Christopher Trebilcock, "DOL Issues an Administrator's Interpretation Regarding Joint Employment," January 1, 2016. http://www.jdsupra.com/legalnews/dol-issues-an-administrator-s-10585/ (last accessed May 18, 2016).

Of course, there are situations in which we more formally seek public comments on a guidance document. We were pleased that the GAO's recent multi-agency audit of guidance practices found that the Department "consistently applied OMB Bulletin requirements for public access and feedback for significant guidance."[3]

Using Technology to Inform and Disseminate Guidance

Each of the Department's agencies maintains a website providing information for their respective regulated communities and other stakeholders about the statutes that they enforce, and about guidance that they have issued. As GAO noted in its audit, the Department strives to make guidance easily accessible from the home page of each of our component agencies; improve website search functions for individuals seeking particular guidance; highlight new or important guidance on agency home pages; post contact information that allows for questions or feedback from the public; and categorize guidance by type, topic, date, or audience to help users sort through the available products and information.[4]

While guidance generally is posted by the agency responsible for administering or enforcing a particular law, we know that many website visitors, especially workers and small business owners, do not necessarily know when they first arrive at the site which statute or agency is relevant. They are just looking for answers to their questions about what the law requires. Accordingly, another important Department-wide resource is our Employment Laws Assistance for Workers and Small Businesses Program ("elaws"), an interactive website that enables the public, including workers and employers, to find information about their rights and responsibilities.[5] The elaws Advisors are unique web-based interactive tools that provide easy-to-understand information about federal employment laws. Each Advisor simulates the interaction you might have with an employment law expert. Elaws offers a degree of built-in "intelligence" and supports features for e-mailing and filing DOL forms online. Our elaws Advisors receive over 44,000 visits per day – a remarkable number for a single program – which signals that employers and workers are finding the site and finding it useful.

Continual Steps to Improve

The Department of Labor remains committed to continuously working to improve our approach to guidance. Following helpful recommendations from GAO, over the past year the Department has pursued process improvements for our issuance of guidance. For example, we have adopted procedures to ensure that, in accordance with OMB's Final Bulletin for Agency Good Guidance Practices (M-07-07), the Department's written procedures for approval of significant guidance are made available to component agency staff. The Department previously provided a copy of those procedures to Committee staff, and one is appended to my testimony today for your convenience. Similarly, we have also shared best practices on the development of non-significant

[3] U.S. Government Accountability Office: *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices* (April 2015) (GAO Report) at 33.
[4] GAO Report at 35-37.
[5] http://webapps.dol.gov/elaws/advisors.html

guidance among our component agencies and have created a checklist document that provides questions based on best practices for agencies to consider when developing guidance. We have developed additional materials to assist agencies in developing internal control procedures for guidance development. Finally, we conducted training and developed best practices and tools to assist agencies in using and interpreting web metrics for guidance documents on component agencies' websites, including ensuring that documents are up to date, relevant, and easy to access on the Department's website.

Conclusion

The Department remains committed to our broad efforts to develop and disseminate accurate, timely, helpful, and lawful guidance that informs our stakeholders of their rights and responsibilities under the laws that we administer and enforce. We look forward to continuing a dialogue with you and with the public to discuss other ideas for improving our process. Meanwhile, the Department will continue to provide timely and practical answers to questions that arise about these laws through a variety of products, all with an eye toward achieving our broader goal of bringing opportunity, economic security, and healthy and safe workplaces to our Nation's working families, job-seekers, and retirees.

Thank you, and I am pleased to answer any questions you may have.

December 2015

DEPARTMENT OF LABOR CLEARANCE PROCEDURES FOR SIGNIFICANT GUIDANCE DOCUMENTS

Background
In 2007, the Office of Management and Budget (OMB) issued its *Bulletin for Agency Good Guidance Practices* (Bulletin), which sets forth general policies and procedures for developing, issuing and using significant guidance documents.

The Bulletin requires agencies to establish: standard elements for significant guidance documents; a list of significant guidance documents to be posted on agency Web sites along with a means for public comment; written approval procedures for issuing significant guidance; and that agencies designate an office or offices, to receive and address complaints that the agency is not following the Bulletin or is treating the significant guidance as a binding requirement.

In its April 2015 report, "*Regulatory Guidance Process: Selected Departments Could Strengthen Internal Control and Dissemination Practices*," the Government Accountability Office recommended that the Department should review and update its written procedures for approval of significant guidance and make them available to appropriate component staff. This document represents the update to our procedures given intervening changes to EO 12866 and to the Department's structures and newer processes.

Guidance Documents
The Bulletin defines a "guidance document" as an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue and notes that guidance documents are not legally binding but can lead parties to alter their conduct.

DOL agencies produce a variety of materials for the general public, specific stakeholders and the regulated community that could be considered guidance documents, including: interpretive memoranda, policy statements, manuals, circulars, information bulletins, advisories, compliance assistance materials, e-tools, and Frequently Asked Questions documents.

Clearance of Guidance Documents not Deemed Significant
Guidance documents not determined to be significant under this definition would not be cleared through the OASP process unless otherwise directed by the Office of the Secretary. Depending on the nature of specific agency guidance documents and agency-specific procedures, approval or concurrence by other components within the Department may be required.

Significant Guidance Documents
The bulletin defines "significant guidance documents" as a small subset of guidance documents that an agency disseminates to regulated entities or the general public, and that may reasonably be anticipated to:

> (A) 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;

(B) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
(C) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or
(D) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in EO 12866.

Under this definition, information materials that clarify, restate or repackage statutory or regulatory compliance obligations would not be considered "significant." In these cases, any impacts are not a result of the specific guidance product, but the underlying statutes or rules. Also, materials that simply compile previously disseminated guidance products would not be considered "significant." These documents are not setting forth new policies with a broad and substantial impact, but clarifying and repackaging previously issued statements.

Letters of Interpretation
Many DOL agencies issue letters of interpretation at the request of employers and employees regarding the applicability of statutory or regulatory requirements to particular places of employment. Letters of interpretation generally are not considered to be guidance documents because they address legal obligations arising from discrete factual situations, and are therefore not statements of "general applicability." Where a letter states a new policy or legal position that applies more broadly, it may be significant guidance if it meets the definition set forth in the Bulletin.

Significance Determination
An initial significance determination will be made jointly by the issuing agency and its component SOL division, based on the OMB criteria and the facts available. The determination should be made at the earliest practical time during the development of a guidance document. That date may vary depending on the nature of the guidance document involved and the agency's process for clearing guidance documents. SOL and the agency are encouraged to consult with OASP, as appropriate, if they have questions about the appropriate time for an initial significance determination based on the nature of the guidance.

To ensure awareness, a description of the guidance, its intent, and the significance determination, will be communicated to the Deputy Secretary, in the agency management briefing memorandum. The guidance and determination will be identified in the agency's management meeting and any concerns raised at that time. If determined to be significant, the significant guidance process will be triggered. Agency leadership is charged with the responsibility to keep the Deputy Secretary, OASP and SOL apprised of any changes that may arise during the guidance development that may impact the initial determination. OASP will engage OMB/OIRA as appropriate.

Clearance of Significant Guidance Documents
The Bulletin requires agencies to ensure that any significant guidance documents are approved by appropriate senior agency officials. The OASP clearance process should be used for all significant guidance documents. Economically significant guidance documents should also be published for notice and comment before such guidance is finalized if required by the Bulletin and OIRA.

The OASP clearance process mirrors the OASP regulatory clearance process and is initiated by the program agency's submission of a decision memo to the Secretary and the significant guidance document to OASP via email. OASP will circulate the documents by email and secure clearance from senior officials in the Office of the Secretary, the Office of the Solicitor, and OASP. Once cleared, OASP will then submit the significant guidance document to the Executive Secretariat for approval by the Secretary of Labor.

Some, but not all, significant guidance documents that go through the OASP clearance process will require OMB/OIRA review. OASP will engage OMB to determine if OIRA review is required just as it does with regulations.

Statement of Amy McIntosh
Principal Deputy Assistant Secretary Delegated the Duties of the Assistant Secretary
Office of Planning, Evaluation and Policy Development
U.S. Department of Education

Before the Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs
United States Senate

on "Continued Review of Agency Regulatory Guidance, Part III"
September 22, 2016

Chairman Lankford, Ranking Member Heitkamp, and Members of the Subcommittee:

I appreciate the opportunity to appear before you again to testify about the Department of Education's (Department) issuance and use of guidance documents.

The Department uses guidance to communicate timely and consistent information to the various groups we serve – students, parents, teachers and other educators, school administrators, schools and school districts, States, institutions of higher education, advocates, and the general public. In general, we communicate with our stakeholders and the public through a variety of forms, including in-person forums and conferences, grantee conferences, technical assistance sessions, the Department's webpage, publications, reports, press releases and letters. Guidance documents are another important tool used to communicate to stakeholders and the public. Guidance provides useful information about the statutes, regulations, and programs we administer and about good practices in the field. In addition, guidance often responds to stakeholders' questions, helps them understand and comply with statutory and regulatory requirements, and communicates best practices. As confirmed in the Government Accountability Office (GAO) report issued April 16, 2015, the Department has an established written departmental procedure for the approval of significant guidance.

The use of guidance is distinguished from the Department's rulemaking process, which we follow when new, legally binding rules are needed or required in order to carry out the Department's mission. The Department is committed to issuing guidance that reflects appropriate review and is well-developed, responsive to grantee and other stakeholder needs, and appropriately disseminated. The Department regularly receives formal and informal feedback from stakeholders on our guidance and we take that into account when developing and updating our guidance. We appreciate and often seek the opportunity to hear from members of the public about their views.

Use of Significant Guidance

The Department fully adheres to the Office of Management and Budget's (OMB) Bulletin on Good Guidance Practices (OMB Bulletin), which was released during the previous Administration and establishes policies and procedures for the development, issuance, and use of significant guidance documents. To comply with the OMB Bulletin, the Department adopted internal procedures for the review and approval of significant guidance, compiled a list of the Department's significant guidance documents, and posted them in a central location on its website.

We believe that our process has worked well. In fact, in its report on the "Regulatory Guidance Processes," the GAO recognized that the Department "had written departmental procedures for the approval of significant guidance, as directed by the OMB Bulletin," and "consistently applied other OMB Bulletin requirements on public access and feedback for significant guidance."

Also, in line with the OMB Bulletin, the Department maintains a list of all significant guidance currently in effect at the following web address: http://www2.ed.gov/policy/gen/guid/significant-guidance.html. The list includes the date on which we issued the significant guidance, the office that issued the guidance and a link to an e-mail address that can be used to send a comment on the significant guidance document. Not only did we include significant guidance distributed since the OMB Bulletin was established in 2007, but we went through an exhaustive review of guidance documents issued before the 2007 OMB Bulletin and included in the list all significant guidance documents found in that review.

Development of Guidance

In accordance with the OMB Bulletin, the Department has established a formal clearance process for significant guidance that adheres to the OMB Bulletin. The process for developing guidance that does not meet the OMB Bulletin's definition of "significant guidance" is left to agency discretion. Currently, procedures among Department offices vary slightly because of the differences in the importance and scope of guidance that do not meet the OMB Bulletin's definition of "significant." However, we are currently creating new protocols within the Department for developing, clearing and issuing all types of guidance, which will ensure that all guidance documents are evaluated through a standard protocol system. Until we finalize and implement this new process, we will continue to encourage all offices that issue guidance to go through a thorough internal review for clarity, consistency, and effectiveness. Program offices also may informally engage external stakeholders to seek their views and/or expertise when drafting the guidance.

The Department often issues new or revised guidance to respond to questions and feedback that program offices receive from stakeholders. As stated in the GAO report, the Department deems it helpful to issue guidance for various reasons including: explaining new regulations, responding to questions from external stakeholders, clarifying policies in response to compliance findings, and disseminating information on leadership priorities and initiatives. Offices regularly hold meetings with grantees and technical advisors and these discussions at times result in the development of guidance. In other cases, the development of new regulations may serve as the impetus for developing new guidance. As the Department indicated to GAO, we make every effort to issue guidance that restates the regulation in plainer language, summarizes requirements, suggests ways to comply with the new regulation, and/or offers best practices. Accordingly, we regard the issuance of guidance as an important way in which we can support our grantees and stakeholders. If legally binding programmatic changes are required, however, the Department uses the rulemaking process to implement them.

Feedback

The Department regularly hears from stakeholders on our guidance. This occurs in a number of ways, including through direct feedback to program officers, general e-mails, or letters. For significant guidance, and in accordance with the OMB Bulletin, the public can submit comments through a designated e-mail address maintained by the Department. Additionally, each significant guidance document includes a contact for the public to submit feedback to the Department about that specific guidance and/or our practices. In many circumstances, the Department receives feedback on guidance even without any formal solicitation, and we consider this feedback valuable for purposes

of developing new guidance and revising existing guidance. For example, within the Department, the Office of Management recently posted on the web draft guidance regarding the disclosure of student medical records under the Family Educational Rights and Privacy Act and solicited public input on that draft.

Commitment to Improving the Guidance Process

The Department believes that its internal controls for developing and producing guidance are effective, but we are committed to continuous improvement of our internal control processes and appreciate the recommendations provided in the GAO report. Based on those recommendations, we have reviewed our offices' procedures for the development and production of all guidance, significant or other. We have a plan approved by GAO in place to improve our internal guidance development process and are actively working to establish this new process. This will provide offices with standard protocols that they can use to clarify management roles, document management review, and approve guidance.

Regarding significant guidance documents, we will also now make more prominent a statement clarifying the purpose of the guidance and explaining that it is not legally binding, nor does it have the force or effect of law. Additionally, we now prominently encourage the public to comment on the document and explain how they can submit comments on that specific guidance document. Also, we have created a separate page on our website that explains the role of guidance and how the public can provide feedback. In an effort to ensure that the public is aware of our existing e-mail address where we receive comments about significant guidance, we moved that e-mail address to our new page to ensure the public is clear on how they may provide feedback to the Department about significant guidance.

Conclusion

The Department is committed to using guidance in a way that will best assist our stakeholders and inform the public. We believe that we have done a good job implementing the OMB Bulletin and will continue to implement the recommendations made by GAO.

Thank you, Chairman Lankford, Ranking Member Heitkamp, and Members of the Subcommittee, for the opportunity to testify today about the Department's use of guidance documents. I would be glad to answer any questions from the Committee.

Post-Hearing Questions for the Record
Submitted to Hon. Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
From Chairman James Lankford

"Continued Review of Agency Regulatory Guidance, Part III"
September 22, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. In order to function, the Congressional Review Act relies on accurate determinations of economic significance, including those determinations as they relate to guidance. Yet, agencies very rarely submit guidance to OIRA as economically significant.

Q: Does OIRA have a responsibility in ensuring that agencies comply with federal law?

Q: Is OIRA concerned that agencies may be avoiding triggering the Congressional Review Act by calling guidance non-economically significant, when in reality such guidance has economically significant effects? What can OIRA do to remedy this problem?

The Congressional Review Act (CRA) makes the Federal agency promulgating a rule responsible for complying with the CRA's reporting and other requirements. It is OIRA's position that Agencies should meet their obligations to report these rules to Congress. With respect to classification of regulatory actions, in our experience agencies make sincere efforts to appropriately classify regulatory actions through internal procedures designed to address the classification of regulatory actions. Of course, when OIRA has found that an agency's classification of a regulatory action differs from OIRA's assessment, OIRA has worked with the agency to address the issue. To the extent such differences arise in the future, we will continue to address them with the agencies.

2. GAO found that the IRS has no written procedures for determining when guidance should be issued as binding in the Internal Revenue Bulletin.

Q: What is OIRA doing to ensure that all agencies abide by the 2007 Good Guidance Practices?

The implementation of government-wide good guidance practices continues to be a priority for OIRA. Agency guidance documents serve an important role in the regulatory sphere. The Good Guidance Practices set forth in the 2007 bulletin serve as a useful tool for agencies in setting the appropriate scope for their guidance documents and in deciding whether regulation would be a more appropriate mechanism. OIRA advises agencies on best practices for developing and

issuing guidance in line with the 2007 Good Guidance Practices. OIRA will continue to work with agencies, as appropriate, on the review of the various kinds of significant guidance document that the agencies issue.

3. On May 17, 2016, Senator Lankford sent a letter to Dr. John King, Secretary of Education, regarding the May 13 Dear Colleague letter on transgender students, asking how Education determined the guidance to be "significant" for purposes of OIRA review. In their June 3, 2016 response, Education stated the "Dear Colleague letter was significant because it raised a set of novel questions from stakeholders," without further expanding on the point. Education has also acknowledged that its past 2010 DCL on harassment and bullying, and its 2011 sexual violence DCL were also deemed "significant" guidance and submitted to OIRA for review. The guidance documents on transgender students were sent to OIRA for review as well.

Q: How does OIRA review guidance documents like those issued by Education, that pose novel legal or policy questions?

Q: OIRA does not post guidance reviews to reginfo.gov. Why is this the preferred practice? Is the lack of posting indicative of a more relaxed review process?

For the two above questions: For guidance documents that are determined to be significant and subject to OIRA review, OIRA coordinates an interagency review process. OIRA has a longstanding and formal review process with respect to significant regulatory actions. Those significant regulatory actions may affect the legal rights and obligations of regulated entities, making such formal review appropriate. In contrast, guidance does not itself affect the rights and obligations of regulated entities, and OIRA's review process with respect to guidance is often less formal. In our experience, this less formal process still helps to ensure appropriate review.

Q: Does any documentation accompany OIRA review of agency guidance that is said to pose novel legal or policy questions? If not, how can successive administrators, and administrations, keep track of these reviews?

Any documentation related to the development of guidance is largely in the hands of the issuing agencies. Because agencies are responsible for administering their policies and authorities, and have often worked for months or years on guidance and related documents, it is the agency rather than OIRA, which may come in only at the end to coordinate review, which would have the bulk of relevant documentation. OIRA's ongoing and longstanding relationships with agencies, however, do help to ensure that questions that arose in previous reviews may be answered appropriately and consistently should they arise again.

Q: On what date did OIRA receive the guidance from Education, and at what date did they return the guidance?

OIRA received a preliminary draft of the Department of Education transgender guidance on September 15, 2015. OIRA returned comments on several drafts and returned a final version on May 12, 2016.

4. On November 3, 2015 the White House announced the "Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment," which may lead to increased costs when parties apply for permits to develop projects on federal and non-federal land. In another example, the Department of Interior's Bureau of Ocean Energy Management maintains an expansive guidance list titled "Notices to Lessees and Operators" that substantially increases the amount of money companies must set aside to develop energy resources offshore. These guidance documents for businesses seeking permits and approvals from the government impose new obligations on the public and increase costs for businesses. Congress created the APA to ensure that the public can provide input on new federal obligations.

Q: Why were these guidance documents not subjected the APA's rulemaking procedures?

The courts, Congress, and other authorities have emphasized that rules which establish new policy positions that the agency treats as binding must comply with the APA's notice and comment requirements, regardless of how they are labeled. OMB established general policies and procedures in the Final Bulletin for Agency Good Guidance Practices (M-07-07) to ensure that guidance documents of executive branch departments and agencies are developed with appropriate review and public participation, accessible and transparent to the public, of high quality, and not improperly treated as legally binding requirements.

The Presidential Memorandum, Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, is consistent with OMB's Good Guidance Bulletin. The document is intended for the internal guidance of the executive branch. The general provisions in section 5 clearly state that the document "is not intended to supersede existing laws and policies", or "construed to impair or otherwise affect the authority granted by law to an executive department, agency, or the head thereof." The guidance documents pursuant to section 4 have been issued through public notice-and-comment procedures.

Bureau of Ocean Energy Management's notices to lessees and operators (NTL) should be consistent with the Good Guidance Bulletin. Many NTLs have subsequently been incorporated into regulations, after public notice and comment and interagency review under E.O. 12866. The Department of the Interior can better assist with providing background on industry outreach with respect to the development of specific NTLs.

5. The Department of Labor issued three process safety management (PSM) memoranda: on recognized and generally accepted good engineering practices (RAGAGEP); chemical concentrations; and retail exemption. Labor has maintained that these memoranda were properly issued guidance documents that were not required to go through the rulemaking process. By not categorizing these three guidance documents as economically significant, Labor did not submit them to OIRA for review. However, OSHA has settled lawsuits and published notice of a small business advocacy review panel as required by the SBREFA to "consider" process safety management "topics" including RAGAGEP and chemical concentrations. OSHA

also sent members of Congress a letter committing to subjecting the retail exemption to the same rulemaking process and on September 23, 2016 the U.S. Court of Appeals for the District of Columbia Circuit vacated OSHA's retail exemption action.

Q: Two of these guidance documents have been settled in court and Labor is now conducting a formal rulemaking for all three concerned guidance documents. The U.S. Court of Appeals for the District of Columbia Circuit also vacated Labor's retail exemption guidance document recently and ordered it be subject to the APA regulatory process if it should go forward. Given Do you believe Labor should have submitted these three guidance documents to OIRA for review?

OIRA welcomes the opportunity to review guidance an agency believes may be significant and OIRA desk officers are always available to answer questions an agency has when making an initial determination. To the extent courts develop new law on the distinction between guidance and regulation, we expect agencies to factor those developments into their designations. With respect to the implications of any particular litigation for the Department of Labor's understanding of what constitutes guidance in a particular context, I would consult with the Department of Labor.

Q: Given what has transpired with Labor and OSHA's PSM Guidance documents and OSHA claims it has never had an economically significant guidance – do you believe OIRA needs to better police or update their good guidance practices to ensure agencies take guidance practices more seriously?

We are always discussing with the agencies ways in which their practices can be improved, including with the Departments of Education and Labor, as they respond to the GAO recommendations. We are still considering additional actions OIRA could take. For example, while it is my experience that agencies generally well understand the type of guidance OIRA is interested in reviewing, providing the agencies with more feedback may be worth considering.

Post-Hearing Questions for the Record
Submitted to Honorable Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
From Senator Heidi Heitkamp

"Continued Review of Agency Regulatory Guidance, Part III"
September 22, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1.) *Howard, everyone talks about how guidance is an important regulatory tool. We both agree that it is the most reflexive, efficient and flexible means to officially communicate with a regulated party. As I have said before, guidance should regulated entities meet the requirements. When guidance seems to change longstanding interpretations, this looks like a shortcut around notice-and-comment rulemaking.*
   - *How do we more clearly delineate guidance and substantive rulemaking?*
   - *Is there anything that could be done to avert precipitous judicial challenges, especially in cases where agencies faithfully abided by the Good Guidance Practices?*

I agree that the distinction between guidance and rulemaking should always be as clear as possible. The most important difference is whether an agency is intending to clarify existing requirements, or to establish new requirements that they treat as legally binding—guidance is appropriate for the former, and rulemaking for the latter. Agencies can minimize potential confusion by being sure to avoid mandatory language such as "shall," "must," and "required" in their guidance documents, consistent with OMB's 2007 Final Bulletin on Agency Good Guidance Practices, and by taking other steps as appropriate to ensure that the regulated community understands that their guidance documents are intended to clarify existing obligations rather than to create new ones. Keeping this distinction clear-cut is the best way to minimize potential litigation.

2.) *While I know that the Good Guidance Practices Bulletin is the authoritative standard governing agencies, I was wondering if you could shed a little more light on what you have seen from agencies in terms of best practices.*
   - *What are agencies doing to really go beyond the minimum standards included in the Bulletin, and are there specific actions or activities that could be adopted government wide?*

There are a variety of steps agencies can take to increase public participation in the guidance process and to improve its effectiveness. First, in the initial development stage, we have heard that the use of clear, consistent internal written procedures yields multiple benefits, including

more consistent implementation practices and communication across different offices within an agency. Second, even in instances where agencies are not required to seek public comment on a particular guidance, they may choose to do so nevertheless, which in some cases lead to a better, more informed policy. Third, even after issuance, agencies may find it useful to regularly evaluate whether their guidance documents have remained maximally effective, and to update them as needed.

3.) *The DOL attempt to update the Retail Exemption guidance ran into difficulty and challenges partly because it was attempting to change long-standing policy and industry worried there would be a significant impact on their businesses. In this case, the policy had been in place over 20 years and many individuals involved in the industry likely knew no other standard than the current one. At the same time, it is critical that every agency have the ability to update its guidance and rules where appropriate in order to promote compliance.*

- *In your opinion, what steps should agencies take when they are considering making a change to long-standing guidance document in order to ensure that industry and other impacted parties understand the need for the change, the process the agency is taking to issue updated guidance, and the benefits of making the change?*

Agencies often need to quickly issue guidance to clarify compliance issues, many times at industry's request. However, as you note, it is also important to seek robust public participation when updating policies that may have been in place for a long time. This tension should be carefully considered, and agencies should contemplate a range of public involvement strategies when updating long-standing policies. For example, an agency can host a public meeting or issue a Request for Information at the policy formulation stage, or by following a full notice-and-comment process with draft guidance when time permits.

Post-Hearing Questions for the Record
Submitted to Honorable Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
From Senator Thomas R. Carper

"Continued Review of Agency Regulatory Guidance, Part III"
September 22, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. *The United States Government Accountability Office issued a report in April 2015, entitled "Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices."*

    a. *How are the Office of Information and Regulatory Affairs (OIRA) and the Office of Management and Budget (OMB) coordinating with Executive Branch agencies to ensure they are working to implement GAO's recommendations regarding best practices for issuing guidance?*

    b. *What more, if anything, can OIRA and OMB be doing to promote agency adherence to the OMB's 2007 Bulletin for Agency Good Guidance Practices?*

We agree, as I mentioned in my testimony, that OIRA is in a position to help agencies adhere to the Good Guidance Practices. Both the Departments of Labor and Education took the GAO's recommendations seriously and have been implementing several specific suggestions. We also work with agencies to clarify when guidance reaches the threshold of significance and may become a candidate for OIRA review. Stakeholder input can be important in identifying such guidance.

Post-Hearing Questions for the Record
Submitted to Hon. M. Patricia Smith
Solicitor of Labor, U.S. Department of Labor
From Chairman James Lankford

"Continued Review of Agency Regulatory Guidance, Part III"
September 22, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. At the September 23, 2015 hearing, we questioned Labor on three process safety management (PSM) memoranda: on recognized and generally accepted good engineering practices (RAGAGEP); chemical concentrations, and retail exemption. Labor maintained that these memoranda were properly issued guidance documents that were not required to go through the rulemaking process. Yet, since the hearing, OSHA has settled lawsuits and published notice of a small business advocacy review panel as required by the SBREFA to "consider" process safety management "topics" including RAGAGEP and chemical concentrations. OSHA also sent members of Congress a letter committing to subjecting the retail exemption to the same rulemaking process and on September 23, 2016 the U.S. Court of Appeals for the District of Columbia Circuit vacated OSHA's retail exemption action.

Q: What do you say to those in Congress and in the industry who have said, since the beginning, that these policies should have been subjected to the rulemaking process?

Response: At each step of the way, the Department has sought to provide timely guidance to stakeholders so that they have the benefit of the Department's views for compliance-assistance purposes and prior to any enforcement. Since the 2015 hearing, the agency has had no cause to reconsider whether any of the guidance you reference was properly issued. With respect to the memoranda on RAGAGEP and chemical concentrations, the lawsuits initiated by industry parties and challenging these documents were settled by mutual agreement, and nothing in these agreements provides for OSHA to initiate a rulemaking or otherwise calls into question the process by which the guidance was released. Similarly, the initiation of the SBREFA process does not cast doubt on OSHA's use of guidance. The SBREFA process is exploratory only at this stage, and even if it eventually leads to a revised standard with respect to RAGAGEP or the retail exemption, the revision will not happen for many years, and will not meet the public's need for timely guidance on OSHA's current enforcement policies on these important issues. Finally, with respect to the panel decision on the retail exemption memo, the Department believes it is erroneous and has filed a petition for rehearing en banc and the court has ordered petitioners to respond.

Q: How do you justify the costs Labor and industry have incurred litigating this issue, only to go through the rulemaking process once and for all?

Response: While the Department cannot control what costs industry actors elect to assume and cause by suing the Federal government, the Department has continued to work to identify proactive ways to minimize compliance-related confusion and maximize timely guidance to stakeholders as to the Department's views. That said, to date, the litigation has not affected OSHA's decision to initiate any rulemakings. And, as noted above, OSHA has not decided whether any rulemaking in the process safety management standards area will cover the subjects of the referenced guidance.

2. Labor was sued on the RAGAGEP memo, which plaintiffs alleged was a violation of the APA. As part of the settlement, Labor negotiated revised terms with the stakeholders, who received greater latitude to choose RAGAGEP-compliant standards. It removed "shall" and "shall not" language when deciding whether noncompliance would be treated as presumed violations.

Q: Do you think these changes improve the overall product, and if so, why did you not initiate a rulemaking process at the beginning?

Response: The changes made to the memo in the settlement process improved the product by clarifying OSHA's original intent. In our experience, it is not uncommon for disputes to arise over the meaning of statements in documents issued by an agency, whether or not the document is an interpretive memo, an enforcement policy, or the result of a notice-and-comment rulemaking. In most cases, these disputes are amicably resolved without litigation.

3. OSHA has said that it has never issued an economically significant guidance document; yet, stakeholders I've talked with have said that a quick back-of-the envelope calculation would have been enough to show that the RAGAGEP memorandum should have been deemed economically significant.

Q: Did OSHA consider these costs, and if OSHA was not familiar with these costs, is that not testament to the increased stakeholder participation typically found in formal APA rulemaking rather than through a guidance process where less participation is normal?

Response: The RAGAGEP memo reflects OSHA's existing enforcement policy and imposes no new requirements. The costs of compliance were imposed with the promulgation of the underlying standard, which underwent notice and comment rulemaking. Accordingly, OSHA does not believe that the memo imposes any new costs, much less any new costs that would rise to the level of economic significance.

Q: Why did OSHA not submit the memo to OIRA as economically significant?

Response: As noted above, the memo reflects OSHA's existing enforcement policy and imposes no new requirements. For this reason, OSHA does not believe that the memo imposes any new costs, much less any new costs that would rise to the level of economic significance.

4. On May 23, 2016, Labor released the final rule which doubles the salary threshold indicating eligibility for overtime from $23,660 to $47,476 per year effective December 1, 2016, giving

businesses only 25 weeks to come into compliance. On September 13, 2016, the National Federation of Independent Business (NFIB) sent a letter formally asking DOL to push the date back six months to June 1, 2017 to provide some relief for small businesses and giving them time to hear of, read, comprehend and implement the rule.

Q: How does the overtime rule benefit American workers when small business owners may now be compelled to split an employee's hours with other employees, reclassify employees as hourly, or reduce their base salaries, all of which will cost employees who this rule was supposed to help?

Response: The overtime rule was issued following an extensive and open process with many stakeholder views submitted for the record closely considered and assessed in the rule.

Under the rule, employers have a wide range of options for responding to the changes to the salary level, and the Department does not dictate or recommend any method. The circumstances of each affected employee will likely impact how employers respond to this Final Rule, and the Department accounted for these (and other) possible employer responses in estimating the likely costs, benefits, and transfers of the Final Rule. Although our implementation and enforcement of the Final Rule has been delayed by a Texas Federal district court's injunction, we encourage employers to use our guidance, such as the General Guidance for Private Employers, to understand these options further.

Q: How was the December 1st implementation date chosen? Is 25 weeks a realistic time frame for small businesses to prepare for the rule's implementation?

Response: The Department's implementation and enforcement has been delayed by a Texas Federal district court's injunction. Nevertheless, the implementation date in the final rule gave employers more than six months to adjust. Implementation during this time frame gave employers sufficient time to prepare and hardworking people the potential overtime pay they deserve. In 2004, the Bush Administration gave employers just 120 days to comply with a rule that substantially reorganized the regulations, significantly changed the duties test system by shifting from short/long duties tests to a single standard test, and established a new exemption for highly compensated employees. We provided even more time for a simpler rule that does not make any changes to the duties test; something employers told us during the notice and comment process that would be highly disruptive to their businesses.

Employers have many options for coming into compliance, and the Department's Wage and Hour Division has extensive compliance assistance guidance posted online. We know from our outreach and assistance to employers across the country that many employers across sectors - business, non-profit, and higher education have been already doing the right thing to come into compliance.

Q: The NFIB has formally asked Labor to delay implementation of the final rule to give small businesses more time to comply and reclassify affected employees. Given the rule's substantial impact on small business, has Labor considered at least extending the December 1, 2016 deadline for compliance?

Response: As noted in the previous response, the Department's implementation and enforcement of the Final Rule has been delayed by a Texas Federal district court's injunction. Nevertheless, the date in the final rule gave employers more than six months to adjust. Employers had been on notice for years that the white collar regulations would be updated, and had been aware of possible features of the rule since the NPRM was released in mid-2015. The Department has created extensive outreach materials on the rule, including specific guidance for small businesses. The Wage and Hour Division has already undertaken numerous webinars and technical Q&A sessions with tens of thousands of registrants.

5. The overtime rule also provides for automatic increases to the 40th percentile every three years. While the rule itself has gone through notice and comment, the automatic increases will not.

Q: How will the rule retain the flexibility to deal with emergent economic conditions such as recessions, and also be receptive to feedback from the employers and employees it regulates?

Response: The Final Rule does not eliminate future opportunities for notice and comment rulemaking on the salary level. The Department's automatic updating mechanism exactly maintains the standard the new rule establishes by resetting the salary threshold to keep it at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census region. Thus, automatic updating preserves the status quo while leaving open the opportunity for policymakers to change the method for determining the salary threshold in a future notice and comment rulemaking if they ever believe such a change to be necessary.

6. In September of 2015, SBA's Office of Advocacy notified Labor that its analysis of the overtime rule was missing several elements required by law. The Office of Advocacy noted that Labor's analysis failed to incorporate accounting for individual states that have lower 40th percentiles of payroll than the southern census region and that the analysis significantly underestimates the rule's costs to small businesses.

Q: Is the Department implementing the Office of Advocacy's recommendation of conducting and publishing additional analysis on the rule's impact on small businesses? If not, how does Labor account for dismissing the Office of Advocacy's data and concerns in the final rule without a rigorous, quantified analysis in support of the contrary?

Response: As part of the rulemaking process, the Department conducted an extensive study of the overtime rule's economic impact, including the impact on small business, which can be found in the Federal Register pages 32448-32459 (a summary of the economic impact analysis can be found here). Since the very first regulations implementing the Fair Labor Standards Act in 1938, there have been national salary levels, rather than multiple salary levels for different regions, industries, or employer sizes. Based on comments received, DOL considered low-wage regions and made a significant change from the proposed rule: We proposed a level based on nationwide salaries, but our final rule is based on salaries in the lowest-wage Census region (currently the South). The new salary level is appropriate for employers across a broad range of regions, industries, and business sizes.

7. The proposed version of the fiduciary rule estimated up to $5.7 billion in costs over the first 10 years. However, in the final rule, this figure increased to $31.5 billion over the same period.

Q: Why did the cost estimate increase so drastically, and what process did Labor use to reevaluate the cost-benefit balance in light of the increase?

Response: The evolution of this estimate is an example of the rulemaking process in action. As discussed in detail in Chapter 5 of the Department's final regulatory impact analysis (RIA), https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/conflict-of-interest-ria.pdf , the Department's cost estimates for the 2015 proposal and 2016 final rule and exemptions differed because the Department was exposed to additional data sources during the comment period of the rulemaking. In particular, the Department closely reviewed and considered all of the comments and hearing testimony that addressed the Department's methodology for quantifying its cost estimate for the 2015 proposal. The Department found comment letters from Securities Industry and Financial Markets Association (SIFMA) and the Financial Services Institute (FSI) to be particularly relevant to quantifying costs associated with the final rule and exemptions, because SIFMA and FSI provided alternative cost estimates for parts of the broker-dealer industry to comply with the Department's 2015 proposal. The Department had significant concerns regarding the industry submitted data that are explained in detail in Section 5.1 of the RIA. Nonetheless, the Department incorporated this industry data into our estimate in order to generate a conservative estimate that was heavily based on input from the regulated community. Even using the industry's cost estimate, the Department concluded that the cost of the final rule and exemptions would range between $10.0 billion to $31.5 billion over ten years, with a primary estimate of $16.1 billion over ten years.

The Department reevaluated the cost-benefit balance of the final rule and exemptions and, as in the proposal, quantified the potential gains to investors attributable to the final rule and exemptions only for a narrow segment of the market; front-end-load mutual funds sold to IRA investors. These quantified gains for that market segment alone exceeded even the high-end estimate of the costs for all markets and products.

8. Edward Jones and State Farm have already offered a preview of what compliance with the fiduciary rule will entail, in the curtailment of available retail funds and investment advisors for middle class workers saving for retirement. The SEC estimates the shift to a fee-based model will reduce cumulative returns to small investors (with $200,000 or less in assets) by $20,000 over the next 20 years.

Q: How do you comport this with the rule's stated intent of protecting retirement plan participants?

Response: As the Department has detailed in the rule's regulatory impact analysis, the current system of misaligned incentives is costing retirement investors billions of dollars every year. The administrative record, compiled during the lengthy rulemaking process reflects that as firms increasingly compete on price and quality under the new standards, consumers are likely to

benefit from more competitive and more protective advice. And even if some firms were to choose to walk away from some retirement business, many others will be more than happy to compete under a standard that puts their customers' interests first. The actions taken by Edward Jones and State Farm show just some of the many ways the financial industry is adapting to the new best interest fiduciary standard.

Importantly, with regard to your quotation that "the shift to a fee-based model will reduce cumulative returns to small investors (with $200,000 or less in assets) by $20,000 over the next 20 years," we note that this statistic was provided in a comment letter to the SEC by Oliver Wyman and SIFMA. This statement was not made by, nor was it endorsed by, the SEC. Please refer to footnote 696 on page 160 of the SEC staff's January 2011 "Study of Investment Advisers and Broker-Dealers."

9. On August 25, 2016, Labor published its final guidance for Executive Order 13673 titled "Fair Pay and Safe Workplaces." The Guidance defines the qualifications of a "violation" as well as other terms used in determining whether a violation has occurred. Together, the EO and the Guidance enable Labor to assess a contractor's record of compliance and make a final determination on a contractor's eligibility to enter into a contract with the government. There is the potential, or at least the appearance thereof, that when deciding between two otherwise qualified contractors Labor could deem one contractor "not responsible" as a result of minor violations while allowing the other, more politically friendly, contractor to be considered "responsible" in spite of the same minor violations.

Q: How will Labor ensure that the standards established in Executive Order 13673 and the "Fair Pay and Safe Workplaces" guidance on Federal contractors who violate OSHA regulations be applied consistently and fairly?

Response: As you may know, on October 24, 2016, a Federal district court judge in Texas issued a preliminary injunction to prevent certain sections, provisions, and clauses of the rule from taking effect while the lawsuit is pending.

Specifically, the Court preliminarily enjoined implementation of "any portion of the FAR Rule or DOL Guidance relating to the new reporting and disclosure requirements regarding labor law violations as described in Executive Order 13673 and implemented in the FAR Rule and DOL Guidance."

The Department remains of the view that the Rule and Guidance are legally sound, and the Department of Justice is considering options for next steps.

10. The U.S. Chamber of Commerce reports that large franchising companies have suffered costly effects as a result of the NLRB's rejection of the bright-line "direct-control" standard for determining joint employer status in its 2015 *Browning-Ferris* decision. Labor has also taken steps to broaden its own joint-employer standard beyond "direct control."

Q: How did Labor consider the economic implications of this apparent change in policy?'

Response: As the Department previously advised the Committee, the Department has neither changed any policy nor created new legal requirements for employers as it relates to joint employment. A growing number of business models and labor arrangements make joint employment more common; and through our compliance-assistance and enforcement efforts, we regularly encounter situations where the possibility of joint employment exists. Ultimately, whether a particular franchisee and franchisor jointly employ a worker must be evaluated on a case-by-case basis applying the relevant law to the specific facts of each situation. The joint employment analysis applicable to the Fair Labor Standards Act, the Occupational and Safety Act, or other statutes administered by the Department of Labor, for example, is not necessarily the same as the analysis applied under the National Labor Relations Act.

Post-Hearing Questions for the Record
Submitted to Honorable M. Patricia Smith
Solicitor of Labor
U.S. Department of Labor
From Senator Heidi Heitkamp

"Continued Review of Agency Regulatory Guidance, Part III"
September 22, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1.) The Retail Exemption guidance that the Department of Labor (DOL) issued in July of 2015 attracted court challenges and significant concern from agricultural retailers, agricultural producers and Members of Congress. The recent decision by the U.S. Court of Appeals for D.C. agreed in principle with those concerns when it required DOL to re-do the guidance as a traditional notice-and-comment rulemaking because it was setting standards.
   - Given that outcome and the overall challenges that Congress and industry put forth regarding the issuance of this specific guidance, is DOL considering any changes to its guidance issuance process, such as the way it reaches out to industry for feedback or DOL internal processes that determine when a particular initiative should be done as guidance or traditional notice-and-comment rulemaking? Please explain DOL's reasoning behind this answer?
   - If yes, what type of changes is DOL considering?
   - What is the timeline for implementing them?
   - Is DOL working with any other agencies, such as OMB and OIRA, on what changes it needs to make to its guidance issuance process?

   Response: As we have indicated in previous correspondence to the Subcommittee, the Department asked the public for feedback when considering a change to its interpretation, and regularly seeks public input, in various ways, in developing guidance documents. That said, as to the general question of whether to issue guidance as opposed to a rule, the OSH Act and the APA provide the circumstances for when notice and comment rulemaking is required. The Department follows these laws and will continue to do so.

2.) A key concern with the Retail Exemption guidance is that it changed long-standing PSM enforcement policy that had been in effect for 24 years. In my opinion, when such long-standing guidance is changed, an agency has a larger responsibility to engage with industry and make sure that the solutions and ideas put forth by the reinterpreted guidance don't provoke unintended consequences.
   - What is DOL's policy regarding outreach to affected parties or the use of cost-benefit analysis when considering changes to long-standing guidance?
   - In the wake of DOL's experience with the Retail Exemption guidance and the court ruling, what changes will DOL make to such policies?

Response: In testimony by the Department before the Subcommittee last year, the Department outlined its existing outreach efforts for interpretive guidance products such as the retail exemption guidance. We value and seek public input for these products, including about their costs and benefits, where practical through letters, listening sessions, advisory committees and otherwise. The Department is still evaluating the Court's decision on the retail exemption memo, but, of course, will adhere to the procedural requirements of the OSH Act as ultimately interpreted by the Federal courts.

3.) The DOL attempt to update the Retail Exemption through guidance ran into difficulty and challenges partly because it was attempting to change long-standing policy and industry claimed there would be a significant impact on their businesses. In this case, the policy had been in place over 20 years and many individuals involved in the industry likely knew no other standard than the current one. At the same time, it is critical that every agency have the ability to update its guidance and rules where appropriate in order to improve safety and reduce costs.

- What steps can DOL take the next time it considers making a change to a long-standing guidance document in order to ensure that industry and other impacted parties understand the need for the change, the process the agency is taking to issue updated guidance, and the benefits of making the change?

Response: The Department needs to be able to update its guidance where appropriate. In such circumstances, we intend to continue our outreach efforts, and remain willing to consider any suggestions for improving them. On the retail exemption guidance specifically, the Department has filed a petition for rehearing en banc of the panel decision vacating the memorandum and the court has ordered petitioners to respond. We also note that the D.C. Circuit's recent decision addressing the retail exemption guidance did not address the procedural requirements of the APA, but rather limited its analysis to the requirements of the OSH Act. *See Agricultural Retailers Ass'n v. Dep't of Labor*, No. 15-1326, Slip Op. at 2 (D.C. Cir. Sept. 23, 2016).

4.) In May of 2016, the Department of Labor announced the Final Rule on Overtime Exemption. Commonly referred to as the Overtime Rule, this rule updates the salary level required for the executive, administrative, and professional exemption to ensure that the FLSA's intended overtime protections are fully implemented. The Final Rule, while critical for ensuring workers are paid a fair and livable wage and updating an antiquated threshold, also has potential undue consequences particularly to small businesses, higher education and non-profit entities.

- Of particular concern is the impact this new rule will have on non-profit employees who are required to be on-call as part of their job requirements. Domestic abuse shelters, programs working with vulnerable kids and other groups have jobs that require them to work non-traditional and unpredictable hours. What consideration did DoL give to on-call employees at non-profit entities when drafting the final rule?
- Has DoL drafted or provided guidance to non-profits with on-call employees?

- Has outreach been done to the non-profit community with assistance on compliance with the new rule? What form has that outreach taken?

Response: We recognize and value the enormous contributions that non-profit organizations make to the country. Non-profit organizations provide services and programs that benefit many vulnerable individuals in a variety of ways. The Department received public comments on the proposed rule from a diverse range of non-profit employers, and considered all comments in developing the final rule.

When Congress passed the Fair Labor Standards Act (FLSA), it did not provide an exemption from overtime requirements for non-profit organizations. The principles of the law are nearly universal and establish the most fundamental protections in the labor market. As such, the employees of non-profits are entitled to the same protections as employees of for-profit employers. In addition, some non-profits perform the same services as for-profits, and their employees can be indistinguishable.

As noted in their comments during the rulemaking, many non-profit organizations are very supportive of the new rule. They strive to use management strategies that reflect the principles they espouse, while adjusting to the new requirements. In addition to their mission focus, they recognize their responsibilities to their own employees, many of whom are low-income and vulnerable. The Department does not believe that providing important services to the community is incompatible with providing basic labor protections to the employees performing these services.

The Department is committed to thoughtful, responsible implementation, and continues to engage with non-profit organizations and associations to provide technical assistance on both the rule and the Fair Labor Standards Act. Our District Offices around the country have worked with non-profit organizations in their communities, and the Department continues to provide technical assistance to non-profit employers about the rule and the FLSA more generally. The Department also has extensive guidance available for employers on "on call" time and determining compensable time ("hours worked") under the FLSA for a wide range of work arrangements.

The Department of Labor estimates that non-profits will not be unduly impacted by the final rule. Only 5% of all workers in the non-profit sector will be affected by this rule.

Finally, in the final rule, the Department of Labor, responding to comments, modified the proposed salary level to account for the fact that salaries are lower in some regions than others. This lower final salary level will provide relief for non-profit employers, just as it does for employers in low-wage industries. As with other employers, non-profits have a variety of options in dealing with the salary level increase, including options that result in no additional cost to the nonprofit employer.

Post-Hearing Questions for the Record
Submitted to Honorable M. Patricia Smith
Solicitor of Labor
U.S. Department of Labor
From Senator Thomas R. Carper

"Continued Review of Agency Regulatory Guidance, Part III"
September 22, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. Please provide specific examples of how your respective agencies have responded to GAO's concerns about a need to strengthen internal controls and dissemination practices related to regulatory guidance.

   Response: The Department of Labor remains committed to continuously working to improve our approach to guidance. As noted in my testimony, following helpful recommendations from GAO, over the past year the Department has pursued process improvements for our issuance of guidance. For example, we have adopted procedures to ensure that, in accordance with OMB's Final Bulletin for Agency Good Guidance Practices (M-07-07), the Department's written procedures for approval of significant guidance are made available to component agency staff. Similarly, we have also shared best practices on the development of non-significant guidance among our component agencies and have created a checklist document that provides questions based on best practices for agencies to consider when developing guidance. We have developed additional materials to assist agencies in developing internal control procedures for guidance development. Finally, we conducted training and developed best practices and tools to assist agencies in using and interpreting web metrics for guidance documents on component agencies' websites, including ensuring that documents are up to date, relevant, and easy to access on the Department's website.

2. Is there any additional support that OIRA and OMB could provide that would better enable your agencies to develop best practices for issuing and using significant and economically-significant guidance documents?

   Response: The Department remains committed to our broad efforts to develop and disseminate accurate, timely, helpful, and lawful guidance that informs our stakeholders of their rights and responsibilities under the laws that we administer and enforce. We will continue to work with OMB, OIRA, Congress, and with the public to assess other ideas for improving our process. Meanwhile, the Department will continue to provide timely and practical answers to questions that arise about these laws through a variety of products, all with an eye toward achieving our broader goal of bringing opportunity, economic security, and healthy and safe workplaces to our Nation's working families, job-seekers, and retirees.

Post-Hearing Questions for the Record
Submitted to Amy McIntosh
Principal Deputy Assistant Secretary Delegated the Duties of the Assistant Secretary
Office of Planning, Evaluation, and Policy Development
U.S. Department of Education
From Chairman James Lankford

"Continued Review of Agency Regulatory Guidance, Part III"
September 22, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. In May 2016, 21 law school professors penned a letter citing their many concerns with Education's 2010 and 2011 Dear Colleague letters on bullying and harassment and sexual violence. The professors argue that Education's assertion that "harassment does not have to... involve repeated incidents" directly contradicts the Supreme Court's definition of sexual harassment under Title IX found in *Davis v. Monroe County Bd. of Ed.* (1999), which states that sexual harassment under Title IX is limited to conduction that is "severe, *pervasive*, and objectively offensive."

> **Q: How can a single incident of harassment be "pervasive," per the Supreme Court's definition of sexual harassment?**

The Supreme Court instructed in *Davis*, citing the Department's 1997 Sexual Harassment Guidance, that whether a hostile environment exists under Title IX "depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved." (citations and internal quotation marks omitted). As the Department explained in its 2001 Revised Sexual Harassment Guidance and the 2011 Dear Colleague Letter on Sexual Violence, the more severe the conduct constituting the sexual harassment, the less need there is to show a repetitive series of incidents (a concept linked to the notion of "pervasiveness") to prove that the conduct created a hostile environment, particularly if the harassment is physical. Indeed, footnote 10 of the 2011 Dear Colleague Letter cited several federal appellate court cases decided subsequent to *Davis* that had recognized that a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe, such as a single instance of rape.

2. In its responses to me, Education cites to enforcement actions to support its policies. For example, Education cited to letters of findings against Georgetown and Evergreen State College in support of the 2011 Dear Colleague letter's requirement that schools use the preponderance-of-the-evidence standard.

> **Q: If letters of findings have no precedential value, how can they be used to justify Education's interpretation?**

Although the Department cited to those letters of findings in prior correspondence with you, the

Department did not do so to justify its interpretation of Title IX. Rather, the Department did so to demonstrate that the interpretation of Title IX's implementing regulations contained in the 2011 Dear Colleague Letter on Sexual Violence regarding the preponderance-of-the-evidence standard has been OCR's longstanding interpretation. The existence of these earlier letters of findings, spanning decades and Administrations, reflects that the 2011 Dear Colleague Letter did not constitute a change in the Department's interpretation, much less a change in the law that would require notice-and-comment rulemaking.

Q: How many lawsuits related to the 2011 DCL on sexual violence remain pending?

There are three pending lawsuits against the Department challenging the 2011 Dear Colleague Letter on Sexual Violence:

a. *Neal v. Colorado State University-Pueblo, et al.*, No. 1:16-cv-00873 (D. Colo.)

b. *Ehrhart v. U.S. Department of Education, et al.*, No. 1:16-cv-01302 (N.D. Ga.)

c. *Doe & Oklahoma Wesleyan University v. Lhamon, et al.*, No. 1:16-cv-01158 (D.D.C.)

3. During our exchange, you stated that Education's 2011 DCL regarding sexual assault's "preponderance of the evidence" standard is Education's longstanding interpretation of the standard of proof as required by Title IX. You further stated that if a University were to apply a higher standard of proof, such as "clear and convincing," that a student may file a complaint alleging that their rights have been violated by the school's policy. Education would then investigate the complaint and apply their interpretation of the law to the specific complaint.

Q. Please identify the exact source in Title IX that gives Education the authority to instruct schools to apply a "preponderance of the evidence" standard rather than a higher standard of proof.

The interpretation outlined in the 2011 Dear Colleague Letter on Sexual Violence is based on the Department's Title IX regulations, including, but not limited to, the requirement that educational institutions adopt "grievance procedures providing for prompt and equitable resolution" of complaints. 34 C.F.R. § 106.8(b). The regulations were promulgated pursuant to the Department's authority under 20 U.S.C. § 1682.

Q. Please fully explain how the application of a "preponderance of the evidence" standard protects the due process rights of those accused of sexual assault.

The preponderance standard represents an appropriate balancing of the important interests of both the complainant and the respondent and, as required by longstanding Title IX regulations, is "equitable" to both parties because they share a roughly equal risk of error. *See* 34 C.F.R. § 106.8(b). As the Supreme Court has said in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983), "any other standard expresses a preference for one side's interests." Courts determine whether a school's disciplinary process comports with the due process clause by considering a variety of circumstances.

The Department has made clear that schools must apply Title IX consistently with due process

rights, and Title IX and the Title IX regulations may provide accused students more protection than the due process clause requires. Specifically, the 2011 Dear Colleague Letter on Sexual Violence explains that all of a school's procedural rights and protections must be afforded to both parties, including, for example, equal access to and participation of counsel, and equal opportunities to present witnesses and evidence. The 2011 Dear Colleague Letter also calls on schools to provide impartial investigations and hearings, to disclose any actual or potential conflicts of interest between the fact-finder or decision-maker and the parties, and to maintain documentation of all proceedings. In addition, the 2011 Dear Colleague Letter notes that all persons involved in implementing the school's Title IX grievance procedures (*e.g.*, Title IX coordinators, investigators, and adjudicators) must have training or experience handling complaints of sexual harassment and sexual violence, as well as with the school's grievance procedures more generally. These affirmative protections, of which the standard of proof is one component, comprise a system to ensure that proceedings are unbiased and equitable for all parties, and that they result in decisions that are supported by fair consideration of all the evidence. A panel of the U.S. Court of Appeals for the Sixth Circuit recently rejected a Due Process Clause challenge to a policy adopted by a public university, allegedly in response to the 2011 Dear Colleague Letter, that determines whether students committed sexual assaults based on a preponderance of the evidence standard and gives both parties the right to appeal an adverse decision. *Doe I v. Cummins*, No. 16-3334, 2016 WL 7093996, at *1 n.1, *11 (6th Cir. Dec. 6, 2016) (university system that "reach[es] its conclusion based on a preponderance of the evidence" is "constitutionally sound and does not give rise to a due-process violation" when used as part of a system that has "other procedural mechanisms in place that counterbalance the lower standard used (e.g., an adequate appeal process)"). Use of the preponderance standard is also consistent with the standard of proof used in civil actions seeking to impose liability for sexual assault and rape. *See, e.g.*, *Ashmore v. Hilton*, 834 So. 2d 1131, 1134 (La. Ct. App. 2002) (preponderance of evidence sufficient in civil rape case); *Jordan v. McKenna*, 573 So. 2d 1371, 1376 (Miss. 1990) (in civil action for rape, plaintiff's burden is "but by a preponderance of the evidence"); *Dean v. Raplee*, 39 N.E. 952, 954 (N.Y. 1895) (preponderance of evidence is sufficient in civil case alleging sexual assault).

The Department has found Title IX violations regarding inequitable treatment of accused students. For example, the Department found that Minot State University violated the requirement for equitable Title IX procedures when it placed one respondent on probation (for nearly a full academic year) without first investigating whether the alleged sexual harassment occurred and expelled two students without providing them an opportunity to present their account of events. Similarly, the Department found that the University of Virginia's informal resolution process was not equitable to either complainants or respondents because in certain instances the University imposed sanctions without independently investigating, even where an accused student denied the allegations. The Department also recently made a violation finding against Wesley College, DE, because the college failed both to provide accused students with essential procedural protections and to adhere to safeguards provided for in its own disciplinary policies and procedures. The Department entered into resolution agreements with these schools requiring them to, among other things, implement revised policies and procedures and report to

OCR to ensure compliance with those revisions in practice. The resolution letters and agreements for these documents are available on the Department's website.

Q. If a university were to apply a higher standard of proof and a student were to file a complaint with Education, please fully explain how Education would respond to that complaint and if there is any reason that the interpretation of Title IX in an individual case would be different from the interpretation of Title IX found in the 2011 DCL.

The Department cannot predict the outcome of hypothetical complaints. The Department evaluates every complaint received to determine whether the allegations have sufficient detail to infer a timely report of possible violations of one or more of the civil rights laws that the Departments enforces. If so, it is opened for investigation and all the particular facts and circumstances are assessed. If the Department finds a violation, it seeks to obtain a voluntary resolution.

Q: Please provide a list of all universities and colleges challenging the preponderance of the evidence standard in court.

There is currently one university challenging the preponderance of the evidence standard against the Department in court: Oklahoma Wesleyan University in *Doe & Oklahoma Wesleyan University v. Lhamon, et al.*, No. 1:16-cv-01158 (D.D.C.).

4. Recently Education interpreted Title IX's language prohibiting discrimination "on the basis of sex" to include "gender identity."

Q: Based on the criticism Education has received, is it safe to say that many school officials did not find this interpretation apparent under Title IX?

The Department cannot speak on behalf of school officials, but the Department regularly consults with school officials in developing guidance, including the May 13, 2016, Dear Colleague Letter on the rights of transgender students under Title IX. The Department's Office of Elementary and Secondary Education also compiled examples of policies and emerging practices that schools were already using to support transgender students. *See* Examples of Policies and Emerging Practices for Supporting Transgender Students (May 13, 2016), www.ed.gov/oese/oshs/emergingpractices.pdf. That document includes common questions on topics such as school records, privacy, sex-segregated activities and facilities, and terminology, and then explains how some state and school district policies have answered these questions. A number of school officials have publically expressed support for the Department's interpretation. *See, e.g., Amici Curiae* Brief of School Administrators from California, District of Columbia, Florida, Illinois, Kentucky, Massachusetts, Minnesota, New York, Oregon, Washington, and Wisconsin in support of Plaintiff-Appellant in *G.G. v. Gloucester County School Board*, No. 15-2056 (4th Cir. filed Oct. 28, 2015), www.aclu.org/sites/default/files/field_document/school_administrators_amicus_brief.pdf. Before issuing the Dear Colleague Letter on the rights of transgender students, the Department of Education had consistently interpreted Title IX in policy guidance, complaint resolutions, and briefs as protecting all students, including lesbian, gay, bisexual, and transgender students, from discrimination based on sex, including discrimination and harassment based on gender identity

and sex stereotypes.

Q: Do you maintain that these policies are mere interpretations in the face of all evidence to the contrary, and in light of the criticisms from Congress, universities, and the public at large?

As is true of all of the Department's guidance documents, the May 13, 2016 Dear Colleague Letter on the rights of transgender students does not have the force and effect of law. Indeed, the Departments of Education and Justice prominently stated on the first page of the letter that it "does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments [of Education and Justice] evaluate whether covered entities are complying with their legal obligations." Any legal obligations flow from Title IX and its implementing regulations, not the Dear Colleague Letter.

5. Education has been receiving a lot of criticism from school districts, Congress, and other stakeholders regarding its recently issued Dear Colleague letter on transgender students. The guidance prohibits schools from "adopting or adhering to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex" governing athletics policies. However, many stakeholders seem unsure what such "generalizations" entail.

Q: Could you give me some examples of "generalizations" that would be "overly broad," in the Department's view?

The Department cannot determine whether a particular requirement regarding transgender student athletes violates Title IX and its implementing regulations without an investigation where all the particular facts and circumstances are assessed.

Q: Where in Title IX do you find the authority to include "gender identity" in the definition of "sex"?

The Department's interpretation is based on the text of Title IX and its implementing regulations, which prohibit discrimination by recipients of Federal financial assistance "on the basis of sex" and is informed by case law recognizing that discrimination against transgender individuals is discrimination based on sex. See, for example, the cases discussed in the Brief for the United States as *Amicus Curiae* Supporting Plaintiff-Appellant and Urging Reversal, *G.G. v. Gloucester County School Board*, No. 15-2056 (4th Cir. Filed Oct. 28, 2015), www.justice.gov/crt/case-document/gg-v-gloucester-county-school-board-brief-amicus. Moreover, a panel of the U.S. Court of Appeals for the Fourth Circuit held that the Department's interpretation of the applicable law was the result of our "fair and considered judgment," and was "in line with the existing guidances and regulations of a number of federal agencies." *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), mandate recalled and preliminary injunction stayed, No. 16A52 (U.S. Aug. 3, 2016), cert. granted, No. 16-273 (U.S. Oct. 28, 2016). Since that decision, a growing number of district courts has largely agreed, although one district court has held otherwise. *See Students & Parents for Privacy v. U.S. Dep't of Ed.*, No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016) (magistrate report and recommendation); *Highland Bd. of Ed.*

v. U.S. Dep't of Ed., No. 16-cv-524, 2016 WL 5372349 (S.D. Ohio Sept. 26, 2016), appeals pending, Nos. 16-4107 & 16-4147 (6th Cir. Sept. 28 & 29, 2016), stay of preliminary injunction denied, 2016 WL 7241402 (6th Cir. Dec. 15, 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 16-cv-943, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016), appeal pending, No. 16-3522 (7th Cir. Sept. 26, 2016), stay of preliminary injunction denied (7th Cir. Nov. 10, 2016); *cf. Carcaño v. McCrory*, No. 1:16-cv-236, 2016 WL 4508192 (M.D.N.C. Aug. 26, 2016). *But see Texas v. United States*, No. 7:16-cv-54, 2016 WL 4426495 (N.D. Tex. Aug 21, 2016).

6. Part of the criticism of the Dear Colleague letter on transgender students stems from uncertainty about how it will be applied and enforced across the country, and concerns that education and health experts did not adequately have an opportunity to weigh in on the guidance. For example, there is uncertainty about the application of the 2016 DCL to the NCAA's policy on transgender student athletes. For example, the NCAA prohibits a transgender female athlete from competing on a women's team until she completes one year of testosterone suppression treatment—otherwise, the team on which she plays would be ineligible to compete for the women's championship.

> **Q: In your view, is mandating the suppression of testosterone levels before eligibility for competition compliant with the DCL, or is it an example of "reliance on overly broad generalizations"?**

As the May 13, 2016 Dear Colleague Letter notes, Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport. In endnote 18, the Dear Colleague Letter also cited the process in which the NCAA reported it engaged when developing its policy for participation by transgender students in college athletics – consulting with medical experts, athletics officials, affected students, and a consensus report entitled *On the Team: Equal Opportunity for Transgender Student Athletes* (2010). However, the Department cannot determine whether a particular policy on transgender student athletes violates Title IX and its implementing regulations without an investigation in which all the particular facts and circumstances are assessed.

7. The Department of Education recently announced a new policy for collecting data on allegations of discrimination or bullying of students based on their religion.

> **Q: Once you receive a complaint of alleged bullying or discrimination based on a student's religion, how do you evaluate whether or not to take action and what steps must be taken to address the complaint if the Department deems such action necessary?**

The Department evaluates every complaint of discrimination received to determine whether the allegations have sufficient detail to infer a timely report of possible violations of one or more of the civil rights laws that the Department enforces. While the Department lacks jurisdiction to investigate allegations of religious discrimination, the Department would evaluate whether the complaint also alleges discrimination based on race, color, or national origin. For example, if the

alleged discrimination was based on a student's actual or perceived shared ancestry or ethnic characteristics, or citizenship or residency in a country with a dominant religion or distinct religious identity, the Department would have jurisdiction under Title VI of the Civil Rights Act to investigate and determine whether, based on all of the particular facts and circumstances, a violation of statute or its regulations occurred. If the Department finds a violation, it seeks to obtain a voluntary resolution.

If no such discrimination was alleged, then the Department would close the complaint and refer the complainant to the other federal agencies that enforce laws that expressly prohibit religious discrimination by schools, colleges, and universities, including the Department of Justice, the Equal Employment Opportunity Commission (EEOC), and the Department of Housing and Urban Development.

Q: How do you plan to use this new data that Education is collecting?

The Civil Rights Data Collection (CRDC) is a mandatory biennial survey of public school districts. The new data item (collected as optional for the 2013-14 school year and as mandatory for the 2015-16 school year) collects, at the school level, the number of allegations made by students that they were harassed based on their actual or perceived religion. To be clear, it does not collect information about the religious identity of any individual student.

The Department anticipates that the data on allegations of bullying and harassment based on religion may be helpful in identifying schools and school districts that may need additional technical assistance in addressing harassment as well as targeting compliance reviews to focus on harassment based on actual or perceived shared ancestry or ethnic characteristics, which may be intertwined with religious harassment. As with all data collected by the CRDC, these data will also be used by other Department offices as well as policymakers and researchers and school community members outside of the Department.

8. The Every Student Succeeds Act (ESSA) included an important "supplement, not supplant" (SNS) provision to prevent states and local educational agencies (LEAs) from supplanting state and local funding with Title I federal funding. SNS provisions are important because they ensure that federal Title I funds to K-12 schools add to – not substitute for – state and local education funding, especially for low-income schools. ESSA included clear statutory language that granted authority to states to develop their own methodologies to demonstrate compliance with the law's SNS provisions. Under ESSA, the Department of Education cannot impose federal methodologies for states and LEAs to demonstrate SNS compliance. Education recently proposed an SNS rule requiring LEAs to allocate at least the same amount of state and local funding spent per pupil to Title-I funded schools as non-Title-I funded schools.

Q: A plain reading of ESSA allows states to determine their own methodologies to demonstrate compliance with "supplement, not supplant" funding provisions. How does the Department of Education justify recently proposing a rule that would require local educational agencies to comply with federal methodologies when the plain statutory language forbids it?

The Department agrees that the SNS provision is essential for ensuring that Title I funds serve their intended purpose and are not used to substitute state and local education funding. The Department is mindful, as well, that the ESSA does not "authorize or permit the Secretary to prescribe the specific methodology a local educational agency uses to allocate State and local funds to each school receiving assistance under" Title I. Accordingly, the proposed rule does not prescribe a specific federal methodology; rather, the Department's goal is to clarify for States and LEAs how they can meet the statutory requirement that Title I schools receive all of the State and local funding they would otherwise receive if they were non-Title I schools. Among other options, the proposed rule would specifically allow States to create their own rigorous compliance tests. LEAs, in turn, would have the flexibility to select from multiple approaches in order to ensure compliance with Title I's supplement not supplant requirement. The Department has received more than 3,000 comments from the public on its proposed regulations and is currently reviewing them and considering how the regulations can be improved.

Post-Hearing Questions for the Record
Submitted to Amy McIntosh
Principal Deputy Assistant Secretary Delegated the Duties of the Assistant Secretary
Office of Planning, Evaluation, and Policy Development
U.S. Department of Education
From Senator Heidi Heitkamp

"Continued Review of Agency Regulatory Guidance, Part III"
September 22, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1.) Ms. McIntosh. At the first hearing on guidance you participated in, you spoke about how it can be difficult to get all the education guidance in one place – as outlined in the GAO report. At that time you stated that Education is "committed to taking a good hard look at the usability of guidance documents on our websites and to analyzing the data about usage that comes from them to make sure that people are able to find the documents."
   - I was curious how this was proceeding and what the data was showing you in terms of access and usability.

As part of our development of best practices and guidance for our internal offices in presenting guidance online, the Department analyzed the "Laws & Guidance" page found at http://www2.ed.gov/policy/landing.jhtml?src=ln to find out how users are interacting with the Department's websites and to see if any changes could be made to improve the user experience.

For example, we found that, in June, this page received nearly 1% of all page views on the Department website, and it is the 9th most popular ED.gov page. The most popular topics on this page that users select are related to special education, followed by civil rights and disability discrimination. Specifically focusing on the user experience for Department guidance, we found that users rarely used the word "guidance" in their searches on the Department website, instead focusing on the specific laws, such as "Title IX" or "Clery Act."

On the basis of this research and data metrics analysis, the Department prepared recommendations for improving the usability of those resources in presenting guidance online. One analysis of the keyword searches that users entered into the search field showed that the majority of the terms used are related to seeking out information on specific subjects (such as the ESEA), rather than seeking out a central page of information for a category of documents that applies to all programs that ED administers (such as Guidance). We concluded that, in addition to having a central page with all of the guidance, our offices should provide guidance on their topic-specific webpages. For example, the Office for Civil Rights has developed a "Reading Room" that organizes relevant guidance documents by specific program areas under their "Policy" section (see: http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/readingroom.html).

2.) The Department of Labor's attempt to update the Retail Exemption through guidance ran into difficulty and challenges partly because it was attempting to change long-standing policy and industry worried there would be a significant impact on their businesses. In this case, the policy had been in place over 20 years and many individuals involved in the industry and other impacted parties likely knew no other standard than the current one. At the same time, it is critical that every agency have the ability to update its guidance and rules where appropriate in order to improve safety and reduce costs.
   - What steps can the Department of Education take when it is considering making changes to a long-standing guidance document in order to ensure that impacted parties understand the need for the change, the process the agency is taking to issue updated guidance, and the benefits of making the change?

The Department works to ensure that guidance documents are written to help stakeholders comply with law and regulations. Since guidance documents do not carry the force and effect of law, guidance documents are used to restate statutory text and regulations in plainer language, help stakeholders understand statutory and regulatory requirements, including through examples, and disseminate best practices. In most circumstances the Department receives feedback from the field on existing guidance documents; different program offices have different practices for the receipt of such comments, but we commonly see feedback in the form of letters, emails, direct communications with program officers, and, in some cases, at quarterly/yearly meetings with stakeholders. This feedback, both positive and negative, is helpful for the Department in assessing whether our guidance is effective in assisting stakeholders in understanding their rights and responsibilities under the relevant statute and regulations. In some cases, we have updated guidance documents to incorporate and address comments from stakeholders, or issued new guidance as a result of questions we've received from the field. We have also revised or issued new guidance documents to reflect applicable statutory or regulatory changes.

The Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices requires us to post significant guidance on our website and to provide an email address for the public to submit comments. We also regularly review comments, questions, and concerns from stakeholders for all guidance even after the guidance is issued; this public comment is useful in evaluating the efficacy and clarity of our guidance. For example, in 2013, the Office for Civil Rights updated a 1991 pamphlet intended to help the hundreds of thousands of young people who become mothers and fathers each year graduate from high school ready for college and successful careers. The Department had received comments that updates were warranted to identify strategies and programs to support pregnant and parenting students.

In response to GAO's recommendation that the Department prepare written procedures for developing and issuing guidance documents, we have included a recommendation in those procedures that program offices clearly explain how and why a guidance document is being revised.

Post-Hearing Questions for the Record
Submitted to Amy McIntosh
Principal Deputy Assistant Secretary Delegated the Duties of the Assistant Secretary
Office of Planning, Evaluation, and Policy Development
U.S. Department of Education
From Senator Thomas R. Carper

"Continued Review of Agency Regulatory Guidance, Part III"
September 22, 2016

United States Senate, Subcommittee on Regulatory Affairs and Federal Management
Committee on Homeland Security and Governmental Affairs

1. Please provide specific examples of how your respective agencies have responded to GAO's concerns about a need to strengthen internal controls and dissemination practices related to regulatory guidance.

The Department of Education has responded to GAO's concerns by implementing the recommendations to develop written protocols for the development, review, and dissemination of non-significant guidance documents. These written protocols were cleared through the Department and distributed Department-wide in early November 2016. They implement GAO's recommendations by clearly defining roles for developing, reviewing and approving guidance documents; suggesting ways in which offices can document reviews and approvals such as through routing slips; providing guidance for the periodic review of existing guidance documents; and outlining various methods offices can use to disseminate guidance. Additionally, these written protocols incorporate the Department's previous written procedures for the development and review of significant guidance documents, with revisions to enhance the process and to align the processes for non-significant and significant guidance documents, where appropriate.

2. Is there any additional support that OIRA and OMB could provide that would better enable your agencies to develop best practices for issuing and using significant and economically-significant guidance documents?

The Office of Management and Budget (OMB) has issued a Final Bulletin for Agency Good Guidance Practices and the Department of Education adheres to the policies and procedures in the OMB Bulletin. We believe that following the guidelines in the OMB Bulletin has enabled us to increase the quality and transparency of our guidance practices. We do not believe that there is any additional support OIRA or OMB can provide that would better enable the Department of Education to develop best practices for issuing and using significant and economically significant guidance documents.