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EXAMINING THE USE OF AGENCY REGULATORY GUIDANCE

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY AFFAIRS AND FEDERAL
MANAGEMENT

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

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EXAMINING THE USE OF AGENCY REGULATORY GUIDANCE

WEDNESDAY, SEPTEMBER 23, 2015

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

The Subcommittee met, pursuant to notice, at 11:06 a.m., in room SD–342, Dirksen Senate Office Building, Hon. James Lankford, Chairman of the Subcommittee, presiding.

Present: Senators Lankford, Ernst, and Heitkamp.

Also present: Senators Alexander and Daines.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Good morning, everyone. Welcome to the Subcommittee's sixth discussion today on the regulatory State.

We are examining today Federal agencies' use of guidance in the regulatory process. Guidance is one of the most common ways that agencies communicate with the American public and one that receives little oversight.

In order to better understand how guidance fits into our regulatory scheme, it might first help to take a step back and look at the full picture, and that always begins with us, with Congress writing and passing laws that provide statutory authority to agencies to implement our intent. It is one of the areas that the Ranking Member and I have talked about often, that the Congress has a responsibility to be able to write clear statutes. Agencies have only as much rulemaking power as we grant them, so it is incumbent on us to use our legislative power judiciously while simultaneously exercising the oversight of how those agencies use their regulatory authority.

Agencies, armed with rulemaking authorities, promulgate regulations. Regulations are legally binding statements of policy that are legally enforceable, and those who fail to comply face consequences such as a hefty fine or even jail. When Congress granted agencies this expansive rulemaking power, it also placed some requirements on the promulgation of regulations. Many of these requirements can be found in the Administrative Procedure Act (APA).

The Administrative Procedure Act requires agencies to publish a Notice of Proposed Rulemaking in the Federal Register and receive public comment before they promulgate rules. Notice and comment is critical for the agency to gain feedback from potentially regu-

lated parties, and it is likewise critical to the American people to ensure that rulemaking is transparent and fair. In order for the Federal Government to work for the people, the people must have a voice in the rulemaking.

Congress, cognizant of the complexity of administrative law and the need to get certain timely information out to the affected parties, also provided in the APA an exception to rulemaking requirements for interpretative rules and general statements of policy. These terms are often grouped together under the umbrella of guidance. Guidance is a helpful tool when, for example, agencies merely wish to clarify or define a point of ambiguity in existing regulation. The APA acknowledges that agency guidance is useful by exempting it from its notice and comment requirements. Therefore, when an agency chooses to issue a guidance document in lieu of rulemaking, it may, for example, publish it on its website and do that immediately.

But the benefit of guidance that it bypasses notice and comment and, therefore, can be readily issued comes with a catch. Guidance may not impose legal obligations on the agency or on the parties it regulates beyond those inherent in the rule that it clarifies.

Given these characteristics that guidance is not legally binding but merely rearticulates a regulation's existing legal requirements and regulated parties' obligations under those requirements, it can be very difficult even for experts to determine or discern when a document can be rightly called a guidance and when it should go through the rigor of APA notice and comment rulemaking. In fact, the Government Accountability Office (GAO) in its most recent report found that legal scholars and Federal courts grapple with these very determinations.

I do believe that agencies may issue guidance documents with the best of intentions, to clear up confusion or to provide timely information. However, I also understand the concerns and frustration of regulated entities that must sift through the huge stacks of guidance with widely varying names to ensure that they are appropriately complying with standards.

For example, the Department of Labor (DOL) has issued guidance documents under various headings, such as "Advisory Opinions," "Notices to Interested Persons," "Brochures," "Policy Directives," "Bulletins," "Questions and Answers," and "Circulars," just to name a few. Likewise, the Department of Education issues guidance under the headings such as "Dear Colleague Letters," "Memoranda," "Best Practices," "Frequently Asked Questions," "Program Memos," and "Manuals."

I hope the discussion we have today will be of service of ensuring that guidance is properly and selectively issued going forward. Today's concern lies with the process by which the decision to issue guidance is made. Circumventing the rulemaking process robs the public of congressionally mandated notice and comment and it is wrong in and of itself, even if the substance of the policy it articulates is sensible.

In the past, for example, independent watchdog organizations and congressional Committees have expressed concerns with particular Department of Education guidance. In 2010, 2011, and in 2014, the Department's Office of Civil Rights issued guidance

dubbed as "Dear Colleague Letters" on bullying, sexual assault, and school discipline in higher education. The letters served to significantly expand prohibited conduct and the way in which disciplinary procedures could be conducted and the scope of school liability for failing to prevent prohibited conduct.

Especially troubling is the Department of Education is rarely challenged on its guidance, likely because of the Department's powerful position. Schools frequently follow improperly issued guidance without question for fear of an investigation that may damage their academic reputation or recision of Federal funding. Because of this, the Department may continue to improperly issue guidance in circumvention of notice and comment, unchecked by the courts.

More recently, the Labor Department's Occupational Health and Safety Administration (OSHA) issued problematic guidance on process safety management and standards. OSHA issued three process safety management (PSM) standards or memoranda, in June and July of this year. The memoranda subjected many previously unregulated parties to newly burdensome requirements and compounded their compliance costs. To maintain the integrity of the Federal rulemaking process, I hope the Department of Labor seriously reconsiders the manner in which it effectively regulated stakeholders within its jurisdiction. Principles of good governance require that the policies in these memoranda are subject to the procedures mandated by the APA.

We have a GAO witness present today to discuss these and other findings on use of guidance. I am grateful for her office's work and look forward to her testimony.

Also with us today are officials from the Department of Labor and Education. In May, Senator Alexander, Chairman of the Health, Education, Labor, and Pensions (HELP) Committee, and I wrote to the Departments of Labor and Education asking their Departments to determine when to issue guidance in lieu of rulemaking. In response, they provided some helpful agency-specific insights and I look forward to expanding on some of those insights today. I look forward to a detailed discussion on these issues with our witnesses.

This is something that is a serious issue that is not just these two agencies. This is a bigger issue. And even in the letter that we promulgated and in other questions that we have, this is not picking on two agencies. This happened to be two agencies that, obviously, there are a lot of questions and that a lot of guidance documents come out of.

As I mentioned before, some of these guidances are good policy. It is the process that we are talking about, to make sure that people are actually included into it, and ask the question, where do we go from here.

With that, I would like to recognize Ranking Member Heidi Heitkamp for an opening statement.

OPENING STATEMENT OF SENATOR HEITKAMP

Senator HEITKAMP. Thank you, Mr. Chairman, and thanks for calling this hearing.

Agency use of guidance documents may not sound like the most riveting topic, but it is one of incredible—we are like the rules nerds, so we get very excited about all these topics. [Laughter.]

But, obviously, this is one of incredible importance and one that affects so many of our businesses and so many of our schools and pretty much the entire regulatory community.

As I have said many times, regulations underpin almost everything our Nation and our citizens do. Regulations keep our products and food safe. Regulations work to prevent fraud and keep our economy and Americans working. However, sometimes, the language agencies use creates confusing and seemingly conflicting standards.

Guidance is the means by which businesses can get the clarity and answers they are searching for. It gives them certainty. Guidance removes ambiguity and helps clarify expectations. Guidance is the conduit for informational exchanges and a tool to streamline processes. Guidance allows businesses to better understand their relationship with the regulator. Guidance is not, nor should it be, substantive rulemaking.

It is important to recognize that, more often than not, guidance comes at the request of the regulated parties. Any work that we do here must not chill that exchange, for it is a valuable tool for both business and government.

There is more to guidance than simply clarifying views and expectations. The creation of guidance must take into account the effects these documents will have on the affected parties. Although guidance cannot change laws, it has the power to influence markets. It is incredibly important that we ensure regulated entities are given an opportunity to voice their concerns, share data, and submit comments. In order for this to be a truly exceptional process, we must ensure that there are seats for all interested parties at the table, and that seat must be a real seat.

However, there is a difference between having a seat at the table and getting one's own way. Many times, agencies are handcuffed and the Congress holds the key. Sometimes agencies simply do not have the authority to alter a regulation due to a statutory mandate. In these instances, it is up to Congress to be vigilant. It is up to everyone on this dais to ensure that we listen to agencies and we listen to businesses and we listen to those who are regulated. It is up to us to be willing to work together to tweak and amend legislation when necessary. And it is up to us to ensure that good intentions do not overly burden our economy.

In reviewing the testimony and reports in preparation for this hearing, it seems that there is much we can do as a chamber to ensure that guidance published is of the highest quality. It is important that there is consistency across agencies. And as the Chairman noted, although we have two agencies represented here, we are not looking just at two agencies. We are looking at—and that is the role of this Committee, to look more at a systemic view. However, these illustrations can, in fact, help inform us on the types of reforms that we may be advancing out of this Committee.

Small businesses do not always have the staff or the time to sift through pages and pages—in fact, I can guarantee you, they do not have the staff or the time to sift through pages of confusing and

dissimilar fact sheets, administrator interpretations, directives, information memorandums, and program instructions spread across multiple websites and multiple pages. We need to work to make sure that guidance is accessible to the public. We need to ensure that one does not need to have intimate knowledge of the regulatory State to understand what is and what is not a guidance document. We need to simplify terms and create consistencies. We need to ensure that it is an inclusive system where impacted parties have a real voice. This is how we ensure positive outcomes moving forward.

I look forward to examining this guidance process. I look forward to hearing from our witnesses and, hopefully, having a fairly lively debate on what we could all learn from these examples and move forward to amend the system when it is not working.

Thank you, Mr. Chairman.

Senator LANKFORD. Thank you.

At this time, we will proceed to testimony from our witnesses, and as I mentioned to the witnesses earlier, it is the tradition of this Committee that we have two rounds of questions. The first round of those questions will be a very structured 5-minute time period after your oral testimony is given. So, we will go around the dais here and do 5 minutes at a time.

The second round will be open. That is, the microphones will all be turned on and we will have open dialogue, so any member can jump in at any point and to have dialogue and to be able to follow up on question and answer. So, it will be more of an open conversation in the second round, but the first round will be very structured, and I hope that makes sense.

Let me introduce our witnesses, then we will ask you to be sworn in, as well.

Michelle Sager is the Director of Strategic Issues at the U.S. Government Accountability Office. In that capacity, Ms. Sager manages a range of cross-cutting regulatory, intergovernmental, and budget issues spanning multiple Federal agencies. Previously, she held positions as an Adjunct Faculty Member at Johns Hopkins University Institute for Policy Studies as well as George Mason University's School of Public Policy.

Mary Beth Maxwell is the Principal Deputy Assistant Secretary for Policy at the U.S. Department of Labor. Previously, she was the Deputy Chief of Staff for the Department's Senior Advisor to the Secretary of Labor and Acting Deputy Administrator for the Wage and Hour Division (WHD).

Amy McIntosh is the Deputy Assistant Secretary Delegated Duties of the Assistant Secretary at the Department of Education's Office of Planning, Evaluation, and Policy Development. Your card must have two sides to have your title on it. [Laughter.]

Use both the front and the back.

In this capacity, Ms. McIntosh oversees policy development on all aspects of education, from pre-kindergarten through higher education, and leads the policy and program studies services. Previously, she was the Principal Deputy Assistant Secretary for P through 12 Education Policy at the Office of Planning, Evaluation, and Policy Development. Before that, she served in various capac-

ities in New York State, in New York City's Department of Education.

Thank you all for appearing before us today. It is the custom of this Subcommittee to swear in all witnesses before they appear before us, so if you do not mind, please stand and raise your right hand.

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

Ms. SAGER. I do.

Ms. MAXWELL. I do.

Ms. MCINTOSH. I do.

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

We will be using a timing system today. I would ask that your oral testimony be no more than 5 minutes. Before we begin, I would like to request unanimous consent for Senators Alexander and Daines to be recognized before the Subcommittee today. Much of what we discuss today will relate directly to a May 7 letter that Senator Alexander and I sent to our witnesses at the Departments of Education and Labor. Senator Alexander's leadership at the helm of the HELP Committee has been extraordinary, and I am happy to have him here today. Senator Daines has also taken leadership roles in these issues and we welcome him, as well, here today.

Without objection, so ordered.

Ms. Sager, you are first up to give oral testimony, so thank you very much.

TESTIMONY OF MICHELLE A. SAGER,[1] DIRECTOR, STRATEGIC ISSUES, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Ms. SAGER. Thank you. Good morning, Chairman Lankford, Ranking Member Heitkamp, Senator Ernst, Senator Alexander, and Senator Daines. Thank you for the invitation to appear before you today to discuss GAO's work on regulatory guidance processes.

My remarks today will explain this aspect of agency communication and highlight answers to four key questions that were covered in our April 2015 report on this topic. First, what is regulatory guidance? Second, how do agencies use regulatory guidance? Third, how do agencies determine when to undertake rulemaking or when to issue guidance? And, fourth, how can agencies ensure more effective guidance processes that adhere to applicable criteria?

So, first, in terms of what regulatory guidance is, regulatory guidance is an important communication tool that agencies use to communicate about the implementation of regulatory and grant programs to regulated parties, to grantees, and to the general public. One of the main purposes of guidance is to explain and help regulated parties comply with agencies' regulations. Regulatory guidance can take a variety of formats and names, including directives, interpretive memos, frequently asked questions, and fact sheets, to name just a few.

[1] The prepared statement of Ms. Sager appears in the Appendix on page 41.

Guidance policies help agencies move quickly, often more quickly than may be possible using rulemaking. Even though guidance is not legally binding, guidance can have a significant effect on regulated entities and the public, both because entities rely on large volumes of guidance documents and because the guidance can prompt changes in the behavior of regulated parties and the general public.

Second, in terms of how agencies use regulatory guidance, in our report, we focused on four agencies and we found that officials at the Departments of Agriculture (USDA), Education, Health and Human Services (HHS), and Labor used guidance for a number of purposes, including to explain or interpret regulations, to clarify policies in response to questions from regulated entities, and also to disseminate suggested practices or leadership priorities. Departments typically identified very few of their guidance documents as significant, which is defined by the Office of Management and Budget (OMB) as guidance with a broad and substantial impact on regulated entities.

Third, in terms of the decision of whether to issue guidance or undertake rulemaking, officials considered a number of factors before making this decision. Key among those factors was whether or not they intended for the guidance document to be legally binding. Officials said that they generally understood when guidance was inappropriate and when it was more appropriate to undertake rulemaking.

Fourth, in terms of how agencies can ensure that their guidance processes adhere to applicable criteria, we found that agencies did identify standard practices to follow when they were developing their guidance. We also found that they could strengthen their internal control, or management control, processes to ensure that their guidance processes achieved desired results and also prevent errors. In the absence of specific government standards for non-significant guidance, which is, in fact, the majority of issued guidance, the application of internal controls is particularly important.

The 25 agency components within the four agencies included in our review addressed some control standards more regularly than others. So, for example, very few components had written procedures that governed their guidance production processes. However, all components could describe some sort of review process that they did follow for management approval of their guidance.

We recommended that agencies consistently adhere to OMB requirements for significant guidance and also strengthen their internal controls for guidance production processes. The agencies generally agreed with the recommendations in our report and reported that they were taking actions to comply with these recommendations.

In summary, agencies must exercise diligence in issuing guidance. Although it is not legally binding, guidance documents can affect the actions of stakeholders and other interested parties by articulating agencies' policy choices as well as their interpretations of existing and forthcoming regulations. The potential effects of these documents and the risks of legal challenges to agencies underscore the need for consistent and well-understood processes for the development, review, dissemination, and evaluation of guidance.

This concludes my prepared statement. I look forward to any questions that you may have. Thank you.

Senator LANKFORD. Thank you. Ms. Maxwell.

TESTIMONY OF MARY BETH MAXWELL,[1] PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR POLICY, U.S. DEPARTMENT OF LABOR

Ms. MAXWELL. Good morning, Mr. Chairman, Ranking Member Heitkamp, Members of the Subcommittee, Senators. Thank you for the opportunity to testify on the Department of Labor's efforts to develop and disseminate accurate, helpful guidance that informs our stakeholders about their rights and responsibilities and to do so in a way that complies with all applicable laws and procedures.

Congress has charged the Department with administering and enforcing more than 180 Federal laws that cover 10 million employers and 125 million workers. The Department takes this seriously, including by issuing regulations that give employers, workers, and the workforce system the information they need to comply with the law and achieve safety and security in the workplace.

Employers, workers, job seekers, and retirees regularly seek additional guidance to further clarify requirements that are set out in statutes and regulations. In deciding when to issue guidance, we consider the letters and phone calls that we receive from Members of Congress, from the public, advisory Committee reports, listening sessions with stakeholders, regular requests for information, and more, depending on the situation.

The Department's guidance can serve any number of different purposes, clarifying regulations, providing information on promising practices, providing assistance on grant administration, responding to specific stakeholder questions, and directing stakeholders to compliance assistance resources. We strive to issue guidance that is clear and accessible to members of the public, who may not all be experts and who should not have to hire a lawyer to understand the law. For example, the Wage and Hour Division created a handbook about rights and responsibilities under the Family and Medical Leave Act (FMLA) that lays out the most common types of requests for leave and what people should consider in responding to requests.

Guidance also helps us to maintain the flexibility to respond to stakeholder questions or current and emerging challenges. For example, the Occupational Safety and Health Administration coordinated the worker safety and health aspects of our domestic response to last year's Ebola outbreak. OSHA and its partners released numerous guidance documents that focused on safer work practices for workers at risk of Ebola exposure in health care, laboratories, waste management, and a variety of other industries.

Of course, there are situations in which we more formally seek public comments on a guidance document because of its significance. We abide by the Administrative Procedure Act and OMB's Good Guidance Bulletin, and we are pleased that GAO's recent multi-agency audit found that the Department consistently applied

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

OMB Bulletin requirements for public access and feedback for significant guidance.

And, so, an example of that this past spring is that the Department published for comment our proposed guidance to assist the contracting community in applying population Obama's Fair Pay and Safe Workplaces Executive Order (EO), including evaluating the severity of labor law violations. The proposed guidance was published alongside the Federal Acquisition Regulatory (FAR) Council's proposed fair pay regulations, with concurrent comment periods providing 90 days to weigh in on the full implementation picture.

As GAO noted in its multi-agency audit, the Department strives to make guidance easily accessible from the home page of each of our component agencies, and we do work hard to use technology to share guidance.

While we focus on agency-specific guidance, we know that many visitors to our website do not know where to go to find answers to their questions, and so accordingly, another really important Department-wide resource is our Employment Laws Assistance for Workers (ELAWS) and Small Businesses Program. It is an interactive website that enables the public, including workers and employers to find information about their rights and responsibilities.

The ELAWS advisors are unique web-based interactive tools that provide easy-to-understand information about Federal employment laws. Each advisor simulates an interaction you might have so you could actually ask a question and get an answer, and even feature being able to e-mail and file DOL forms online. Our ELAWS advisors receive over 44,000 visits a day, which is a remarkable number for a single program, which signals that employers and workers are finding the site and finding it useful.

We are always committed to finding ways to improve. Building upon helpful recommendations from GAO, we are reviewing and updating our written procedures for how we review and approve significant guidance. The Department has convened a working group of senior policymakers from all our component agencies and that group is sharing best practices right now for more consistent application of internal controls in developing guidance. The Department is also identifying ways to improve our website so that the public can more easily access and comment on our guidance.

The Department remains committed to our broad efforts to develop and disseminate accurate, timely, and helpful guidance that informs all of our stakeholders of their rights and responsibilities under the numerous laws that we administer and enforce.

Mr. Chairman, Ranking Member Heitkamp, Senators, thank you again for the opportunity to testify today. I am happy to answer your questions.

Senator LANKFORD. Great. 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. Chairman Lankford, Ranking Member Heitkamp, Senator Ernst, Senator Alexander, my name is Amy McIntosh and I am proud to represent the Department of Education today and I appreciate the opportunity to be here to testify about our issuance of guidance.

Guidance is an important tool that the Department uses to communicate timely and consistent information to the diverse groups that we serve—students, parents, teachers, States, schools and school districts, institutions of higher education, advocates, and the general public. In particular, we use guidance to assist our partners and stakeholders in understanding and complying with the laws of Congress and with related regulatory requirements.

The Department uses guidance to promote transparency and to assist and guide 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.

We find it helpful to issue guidance for various reasons, including explaining new regulations in plain language, responding to questions from external stakeholders, clarifying policies in response to compliance findings, and identifying best practices relating to the topics in the guidance.

The Department is committed to issuing guidance that is well developed and responsive to grantee and stakeholder needs, reflects appropriate review, and is properly disseminated to reach the relevant audiences.

The OMB's 2007 Bulletin established policies and procedures for the development, issuance, and use of significant guidance documents, and the GAO report that was just referenced found that the Department, and I quote, "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." Guidance that does not meet the OMB Bulletin's definition of significant guidance is left to agency discretion for procedural development.

Because the importance and scope of guidance varies, procedures also may vary slightly among the different offices within the Department, but we encourage all offices that want to issue guidance to consider input from the intended audiences, to go through several levels of internal review for clarity and consistency and effectiveness, and, where appropriate, the Office of General Counsel will be part of that review process to ensure legal sufficiency. Program offices also may informally engage with external stakeholders during the development of guidance to seek their views and expertise.

The Department believes that our internal controls for developing and producing guidance are effective, but we are committed to continuous improvement of our processes. We appreciate the guidance that was provided in the GAO report and we are taking

[1] The prepared statement of Ms. McIntosh appears in the Appendix on page 64.

its recommendations into consideration. We are currently in the process of reviewing the procedures in our offices for the development and production of all guidance, significant or otherwise, and we will use our findings to provide offices with standard protocols that they can use to clarify management roles, document management review and approval of guidance.

The Department will also review our presentation of guidance on the Department's website and identify best practices to improve the online presentation and accessibility of guidance documents.

The Department is committed to ensuring that guidance is used 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 on good guidance practices, and we are committed to working toward implementing the recommendations made by GAO.

So, thank you, Chairman Lankford, Ranking Member Heitkamp, other Senators, for the opportunity to be here, and I will be glad to answer any questions from the Committee.

Senator LANKFORD. Thank you, all of you, and I am going to do a quick set of questions here and we will go through at a pretty rapid pace on this and then start moving around.

Again, I want to reemphasize that a lot of the issues we are going to talk about today are not about the rules themselves. They are about the process of it, and we will get a chance to talk through some of that.

Just to set some of this up, and then we will come back in the second round and I will ask some other additional questions on this to be able to build on it, Ms. Maxwell and Ms. McIntosh, because you are both experts in the guidance process in your agencies, I want to get your perspective on a couple specific guidance things that have come out. I have a thought that might have gone through notice and comment we can talk about more later on it and actually go through the rulemaking process.

Ms. Maxwell, let me turn to you first. On June 5 of this year, OSHA issued a memorandum with the subject line for, Recognized and Generally Accepted Government Engineering Practices (RAGAGEP), which has got to be one of the worst acronyms in government—"RAGAGEP and Process Safety Management Enforcement." Are you familiar with this memorandum?

Ms. MAXWELL. I am.

Senator LANKFORD. Do you believe that memo is an agency guidance? Is that the perspective that it is a guidance document, not a new regulation, when that came out?

Ms. MAXWELL. Yes.

Senator LANKFORD. OK. Now, if you will turn your microphone on, too, I want to go through that——

Ms. MAXWELL. I am sorry.

Senator LANKFORD. That is all right. June 5, OSHA issued a memorandum with the subject line, "Process Safety Management of Highly Hazardous Chemicals and Covered Concentrations of Listed Appendix A Chemicals." Are you familiar with that memorandum?

Ms. MAXWELL. Yes.

Senator LANKFORD. Do you believe that is also agency guidance?

Ms. MAXWELL. Yes.

Senator LANKFORD. OK. July 22, OSHA issued a memorandum with the subject line, "Process Safety Management of Highly Hazardous Chemicals and Application of the Retail Exemption." Are you familiar with that one?

Ms. MAXWELL. Yes.

Senator LANKFORD. OK. Same thing. Do you think that is agency guidance on that one?

Ms. MAXWELL. Yes.

Senator LANKFORD. OK. Ms. McIntosh, let me bounce through a few, as well, and I think you are prepared for these, also. October 25, 2010, the Department of Education's Office for Civil Rights published a "Dear Colleague Letter on Bullying." Are you familiar with that letter?

Ms. MCINTOSH. Yes, I am.

Senator LANKFORD. Do you believe that is agency guidance for that?

Ms. MCINTOSH. Yes, I do.

Senator LANKFORD. OK. April 4, 2011, Department of Education's Office for Civil Rights published a "Dear Colleague Letter for Sexual Assault and Harassment." Are you familiar with that letter, as well?

Ms. MCINTOSH. Yes, I am.

Senator LANKFORD. Is that one also agency guidance?

Ms. MCINTOSH. Yes, it is.

Senator LANKFORD. OK. January 8, 2014, Department of Education's Office for Civil Rights, DOJ's Civil Rights Division, published a "Dear Colleague Letter on Administering School Discipline." Are you familiar with that letter?

Ms. MCINTOSH. Yes.

Senator LANKFORD. OK. Also, is that one agency guidance?

Ms. MCINTOSH. Yes.

Senator LANKFORD. OK. Thank you.

Ms. Maxwell, on OSHA's guidance on recognizing Generally Accepted Good Engineering Practices, this wonderful RAGAGEP we talked about before, was RAGAGEP intended to be a performance-based standard with flexibility for regulated parties to choose among industry's best practices that were most appropriate for their business? When that was originally set out there, was it performance-based to give flexibility so that they would have that? If so, is that still continuing even under the guidance?

Ms. MAXWELL. Senator Lankford, I think that the specificity of your question is kind of beyond my personal expertise on that particular issue. But the memo was designed to give guidance to the field on implementing the standard.

Senator LANKFORD. OK. The concern that I have is that the new guidance document seems to remove flexibility that previously existed, and when we try to look at what is guidance and what is regulation and where should we have gone out, it seems that the regulation gave flexibility to say you have this Generally Recognized Engineering Practices, go by those, or you can create your own process. You just have to be able to show that it is a good process. This new guidance seems to remove that "or" and say, no, everything has to shift over to this other standard and the flexibility seems to go away.

The reason I draw that out is that seems to be one of those things that would look like that would be a regulation that would need to go through the notice and comment rather than just someone receive it, as well. If it is intended as a flexible enforcement standard, this June 5 seems to take that away.

So, the question really is a process question.

How was that determined this is going to be a guidance rather than a rule that would go out?

Ms. MAXWELL. So, to begin, we follow the APA and the OMB Bulletin in all of these determinations. We are committed to very carefully following the rules and procedures for making a decision between notice and comment rulemaking and the issuing of guidance, and if there is ever any question, that is done in consultation with our Solicitor and with OMB.

We are confident in this situation, when we were responding to the terrible tragedy of an explosion that took 15 lives and injured hundreds of more people, that when we looked and were responding to an Executive Order then issued by the President to say, close the gaps, right, we have to take action and make sure that a preventable explosion like this does not happen again, close those gaps—when our folks looked at the regulation to look at the question of, is there a need for new notice and comment rulemaking, very clear that the regulation, both the preamble and the reg text were clear, but guidance was not. And, so, there was a need to update that guidance to clarify it.

If there are specific questions that you have about the RAGAGEP memo, I want to be sure that I get you an accurate answer.

Senator LANKFORD. Sure, and we will definitely go pursue that——

Ms. MAXWELL. OK.

Senator LANKFORD [continuing]. And we will follow up on that. But the real issue is here there seems to be a change in the reg on it, and I understand a response to what happened in the explosion. The reg seemed to shift before we even determined all of the reasons for that. Was it the assumption, then, of the agency that the reason for that explosion is that they were not following the RAGAGEP standards, that they had done their own process? Is that why this shift occurred?

Ms. MAXWELL. Yes. We do not think that any of these memos represented any change in the regulation.

Senator LANKFORD. So, then, could the enforcement—I guess that is really the issue, then. Ms. Sager talked about binding, whether it is legally binding or not. If an entity created their own process, could there be a court challenge to them creating their own regulatory process, because previously, that was allowed. Would that still be allowed now, for them to be able to create their own process?

Ms. MAXWELL. I am going to be honest with you. Your question about them creating their own regulatory process, I am feeling like is getting into something outside my area——

Senator LANKFORD. That is OK. And we can come back——

Ms. MAXWELL. Yes.

Senator LANKFORD [continuing]. And we will talk about it more in the second round. But previously, there were two options. You

could follow the set of standards on it or you could develop your own process as long as it meets this, because the end was what they were after. Does it provide the safe management process on it. Now, developing their own process seems to go away and you just have to do it this way, and that is what we are trying to figure out. What just happened? If many companies that have created their own process, now that is suddenly not legal, there seems to be a legal shift that has occurred there, and we will follow up on that in the days ahead—or not in the days ahead, but we will follow up with letters on it, but talk about it in the second round, as well.

Ms. MAXWELL. OK.

Senator LANKFORD. I would like to recognize Ranking Member Heitkamp.

Senator HEITKAMP. Thank you, Mr. Chairman, and I know we will get into more in depth on this.

On this particular guidance, I think the disturbing piece of this for so many people is we thought we were in compliance. No rule changed. Now we get a letter saying we are not in compliance. It seems like the rule changed. If we were in compliance before doing what we are doing, then how can we so dramatically be out of compliance right now?

And I think you can understand the confusion, because usually if that changes that dramatically and it changes how you implement a law that dramatically, people might turn back and say, that seems to be something that should have been noticed or something that should have been handled by Congress. But to simply unilaterally, without comment or process, change the rules does not seem to be what a guidance should do. And, I think that brings us to this discussion.

But I want to maybe back away from these regulations a little bit and talk more about guidance, and I think, Ms. Sager, obviously, you had a chance to look across agencies and had a chance to think about what these guidance documents ought to be and what they ought not to be. As you look at the growth, and I think there is a chart over there that shows you this informal process, where do you think we need to tweak or change either the OMB Directive or take a look at legislating in this area? What recommendations would you make?

Ms. SAGER. Thank you for the question, Senator Heitkamp, and the answer to this question is not a bright line, if you will, in part because guidance provides agencies with the kind of flexibility that we just heard about from all the witnesses. At the same time, if there is a bright line, to the extent there is one, it is that the guidance not be legally binding. Where the difficulty comes in is that as agencies are issuing guidance to explain their regulations, to the extent that the regulated parties are held accountable and then believe that those guidance documents go beyond the regulations, that is where the difficulty occurs.

So, in terms of next steps, I think there are a number available. One that we talked about in our report is making sure that agencies have the internal controls, the management controls, in place to be very clear about the choices that they are making and who is signing off on those choices.

Certainly, additional oversight offers another possible next step. Our report looked at these four agencies and we simply do not know the extent to which what we found at these four agencies is or is not consistent with other Federal agencies.

And then certainly another option could be looking at the OMB memo and perhaps codifying certain aspects of that memo, to the extent it is appropriate Government-wide, and again, that is where there is no clear agreement on what action is necessary or appropriate.

Senator HEITKAMP. This becomes the age-old definitional process when the Supreme Court says, I know obscenity when I see it.

Ms. SAGER. Exactly.

Senator HEITKAMP. I cannot describe it for you, but I know it when I see it, and we all may have a different line in terms of where we think guidance may cross over to substantive rulemaking.

But, it makes it extraordinarily difficult, and one thing that I struggle with as a former tax regulator, I know the benefit of informal rulings. I know the benefit of a letter ruling in terms of creating certainty as a taxpayer moves forward, giving that taxpayer the ability to rely on a letter ruling so that they can, in fact, make economic decisions for their business.

If we move too far to prohibit guidance or to too narrowly define guidance, we may be, in fact, acting against the best interest of the regulated entities who desperately need to have this information.

And, so, I mean, I think one of the problems that I have had reading and thinking about this issue coming to this has really been definitional.

Ms. SAGER. Yes.

Senator HEITKAMP. And everybody has a different line, and we are going to have to kind of navigate that. But one thing we do not want to have happen is for people's relationship with a regulated agency to materially change as a result of a guidance and dramatically shift, because then we start thinking, that is not the right way to make that decision. This is probably something that needs a greater period of comment, more of a substantive rulemaking process.

And, so, we are going to continue to kind of work through this, and I hope, as the expert at GAO on this, that we might be able to rely on the expertise of that agency as we think about definitional changes or we think about what might, in fact, be the right response to some of these concerns.

Senator LANKFORD. Senator Ernst.

OPENING STATEMENT OF SENATOR ERNST

Senator ERNST. Thank you to all of our witnesses for being here today.

I am going to spend the bulk of my time getting into some of the specifics, but I wanted to express the frustration that I am hearing from so many of my constituents on some of these very issues that are in front of us today. I hear from them that they feel the government is really out to get them through some of these memorandums and changes.

And, as we look at the proposed guidances, like the ones that we have today, our farmers, our ranchers, and the industry in Iowa are finding them, the changes, to be economically significant and they are just really fueling skepticism and distaste for our government. And it seems no matter what the issue of the day is, this Administration seems to be making a habit of circumventing the American people and the right to comment before they make these changes. So, we need to really address that.

The memorandum, and you mentioned it, Ms. Maxwell, about the process safety management of highly hazardous chemicals and application of the retail exemption issued by the Department of Labor in July, it does reclassify the majority of traditional farmers' cooperatives in Iowa, and these farmer-owned businesses warehouse and distribute crop nutrients, including anhydrous ammonia, at hundreds of sites across the State. And, in fact, Iowa uses more anhydrous ammonia than any other State, as it is the most cost-effective form of nitrogen for farmers to utilize in producing the affordable food and fuel for a growing population.

The changes OSHA has made will be difficult, if not impossible, for the companies to implement within the 6-months provided for in the guidance and will yield little, if any safety benefits. Further, they will cost these retailers tens of thousands of dollars per site, and costs that will ultimately be passed on to the farmers, the family farms that they serve.

Unfortunately, since the Department of Labor did not go through the formal rulemaking process, these key stakeholders were not afforded the opportunity to comment on the impact these changes in regulation will have on their livelihoods.

So, going back to the anhydrous ammonia safety, the July 22 memorandum, what prompted the change in the retail exemption to do away with the 50 percent rule?

Ms. MAXWELL. Thank you very much, Senator, for your question. Let me talk a little bit about the process and what led to that, and because the Senators, I am sure, are aware, as well, that these guidance documents are now the subject of litigation. So, I can talk really about the process and probably not appropriately about the substance of the specifics of those.

As we all know, this was in response to this tragic explosion in West, Texas, right, that killed 15 people, injured hundreds more. Reuters reported $100 million in damage. West, Texas, will never be the same. And all of us, I know, are committed to preventing any such catastrophic tragedy from happening again. So, how do we work together to make that happen?

I think there really was a very robust stakeholder engagement process as we embarked on following that. This began with an Executive Order from the President, right, saying to look at the gaps, a careful look at the regulation, and a conclusion that the guidance was out of date.

We then embarked on a very robust stakeholder engagement process. We published a request for information (RFI) in the Federal Register that clearly forecast that we were looking at the retail exemption, that we were looking at the hazardous chemicals percentages, right——

Senator ERNST. OK.

Ms. MAXWELL [continuing]. So really communicated to the community, this is what we are looking at.

Senator ERNST. Right.

Ms. MAXWELL. We are publishing an RFI in the Federal Register.

Senator ERNST. And——

Ms. MAXWELL. We are getting these comments back.

Senator ERNST. I will stop you right there. One, then, it sounds like maybe we should have gone through the rulemaking process rather than doing a memorandum on this if we are engaging the public in such a manner.

Ms. MAXWELL. No, I think this is a case where we looked at the requirements for OMB on significant guidance. This did not meet those requirements, but we knew that this was a really important issue that would benefit from more public input, and so we pursued strategies that would get that. We also had meetings and webinars that involved, thousands of folks.

Senator ERNST. OK. And——

Ms. MAXWELL. So we really worked hard to get input.

Senator ERNST. And this was in response to the West, Texas——

Ms. MAXWELL. Yes.

Senator ERNST [continuing]. Explosion?

Ms. MAXWELL. Yes. Then——

Senator ERNST. That was determined to be ammonium nitrate, not anhydrous ammonia. Those are two entirely separate substances. So, again, my question would be, why the change in the 50 percent rule for a substance that was not even involved in that incident?

Ms. MAXWELL. Thank you for clarifying that it was in response to West, Texas, and other chemical explosions, but looking at we needed to have some common sense practical approach to make sure that we were actually implementing the intent of that PSM standard and those regulations, that we were giving clear guidance to the regulated community about what we need to be doing differently to keep people safe and to prevent an explosion like this from happening again.

Senator ERNST. OK. But, again, two separate substances, and we are responding to a situation that certainly needed some guidance to fill some gaps, but what the agency ended up doing was covering a whole other group of chemicals where there has not been incidents.

Ms. MAXWELL. And we were charged with looking at those regulations. Was the guidance actually effectuating Congress's intent, right, of these standards? There were gaps to be closed, and that is what we worked to do, and worked very hard over a 2-year process to have a lot of stakeholder engagement——

Senator ERNST. And, again——

Ms. MAXWELL [continuing]. Transparent——

Senator ERNST [continuing]. I guess my point would be back, then, if we are going through a 2-year process engaging the public, then it should be through a formal rulemaking process. If it is that lengthy, we are engaging thousands of people, they need the formalized rulemaking process. If we are taking that time, we might as well do it in a way that we are able to engage all of the stakeholders, especially when it is so economically impactful to their

livelihoods. But, again, it was done through a more informal process where the agency was able to determine that even substances that were not involved in such a significant accident are included. I guess that would be my point, that if we are taking the time to do this, it should be through formalized rulemaking.

Thank you, Mr. Chairman.

Senator LANKFORD. Senator Alexander.

OPENING STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thanks, Mr. Chairman. Thank you for including me in your hearing today. I appreciate it very much, and I congratulate you for your leadership on this subject, you and Senator Heitkamp both. It may not be the sexiest topic in Washington, but it is at home. I mean, I think in all of our States, at least in Tennessee, Washington, D.C., looks like a Mount Vesuvius of rules, regulations, guidances, spewing forth from all directions, and it is what I hear about as much as any other issue. So, thank you for the subject and thank you for your leadership.

Let me ask Ms. McIntosh about the Department of Education. In June of last year, at a hearing of our HELP Committee, Catherine Lhamon, the Assistant Secretary for the Office of Civil Rights in the Department was testifying, and this was the exchange we had.

"Alexander: Ms. Lhamon, you talk about something called guidance, and I have here about 66 pages of guidance under Title IX. Now, do you expect institutions to comply with your Title IX guidance documents?

"Lhamon: We do.

"Alexander: You do? What authority do you have to do that?

"Alexander: Why do you not go through the same process of public comment, rule and regulations that your Department is going through under the Clery Act?

"Lhamon: Well, we would if they were regulatory changes.

"Alexander: Why are they not regulatory changes? You require 6,000 institutions to comply with this, correct?

"Lhamon: We do.

"Alexander: Then who gave you the authority to do that?

"Lhamon: Well, with gratitude, you did when I was confirmed."

Now, Ms. McIntosh, do you believe that we gave Ms. Lhamon the authority to make Title IX guidance binding on 6,000 higher education institutions?

Ms. MCINTOSH. Thank you, Senator Alexander, for that question. As you know, I was not there during——

Senator ALEXANDER. I know, but I read the exchange.

Ms. MCINTOSH [continuing]. During that exchange. Let me assure you, I tried to be very clear in my opening statement that guidance that the Department issues does not have the force of law.

Senator ALEXANDER. But this is the Assistant Secretary of the Department with Title IX, which affects 6,000 institutions, 100,000 public schools, and she apparently has not gotten the word. Who is going to tell her?

Are you?

Ms. MCINTOSH [continuing]. As she knows and as I know, Title IX is the binding law that applies in the cases that you——

Senator ALEXANDER. So, guidance under Title IX is not binding, is that correct?

Ms. MCINTOSH. Guidance under Title IX is not binding. Guidance helps the many people who are subject to Title IX understand what they need to do to comply with the law.

Senator ALEXANDER. Right. Who is going to——

Ms. MCINTOSH. But it does not——

Senator ALEXANDER. Who is going to tell Ms. Lhamon this?

Ms. MCINTOSH. I have had the discussion with Ms. Lhamon and she is fully agreeing with——

Senator ALEXANDER. Well, did she just——

Ms. MCINTOSH [continuing]. the statement that I——

Senator ALEXANDER [continuing]. Have a lapse of memory that day?

Ms. MCINTOSH. I cannot speak to what happened that day.

Senator ALEXANDER. Well, let me pursue this. The Chairman mentioned a bullying guidance. Now, that is a guidance, right, under the Department?

Ms. MCINTOSH. Yes.

Senator ALEXANDER. On the website, it is not listed as a significant guidance, am I correct about that?

Ms. MCINTOSH. I do not have it on my list of significant guidance, but let me describe the process that——

Senator ALEXANDER. Well, before you do that, if it is a significant guidance, according to the Office of Management and Budget, there ought to be some input, right, from those affected?

Ms. MCINTOSH. The procedures for significant guidance are very clear in the OMB Bulletin——

Senator ALEXANDER. Right.

Ms. MCINTOSH [continuing]. And we follow those——

Senator ALEXANDER. But, apparently this was not a significant guidance. Now, that is odd to me, because bullying is a big subject. We have had a big debate on it in the U.S. Senate. We just passed in the Senate a reauthorization of higher education, Elementary and Secondary Act (ESEA), which got 81 votes, 83 if all the Senators had been there. It was bipartisan. And the one overriding subject that we agreed on both sides of the aisle was we did not want a national school board, and we did not have any agreement among ourselves on whether we should be telling 100,000 public schools what their discipline and bullying policies should be.

So, where does the Department of Education get the authority even to issue a guidance, or even a rule or regulation, on bullying? Where is that in the law if the U.S. Senate thinks that it is making the law on bullying or not?

Ms. MCINTOSH. Well, first of all, Senator Alexander, thank you very much for your leadership on the bipartisan work that the Senate has done toward a new ESEA bill. I think the bullying guidance that you are talking about stems from civil rights law that is also a law of Congress, and when——

Senator ALEXANDER. But it——

Ms. MCINTOSH [continuing]. When the bullying——

Senator ALEXANDER. It does not say anything about bullying, and you are talking about Title VI, is it, of the Civil Rights——

Ms. MCINTOSH. I think you would agree that bullying could be a serious problem and a civil rights issue——

Senator ALEXANDER. It is a serious problem, but the U.S. Senate does not agree that the Federal Government ought to be telling the local school what its bullying policy ought to be. So, how does the Department of Education get the right to make a guidance, which would be under Title IX, when the head of Title IX thinks everybody she issues a guidance to has to do what she says?

Ms. MCINTOSH. So, the Office of Civil Rights, according to the laws of Congress, gets complaints about civil rights violations from schools, from higher ed institutions, from students, all over the place. Some of those complaints relate to bullying, and it is up to the Office of Civil Rights to follow up on all complaints about civil rights violations——

Senator ALEXANDER. But, Ms. McIntosh—and my time is up—it is not up to the Office of Civil Rights to make a law when the Federal law does not say anything about bullying, and the U.S. Congress is still debating it. Then off she goes as a national school board telling 100,000 schools, whether they are a Native Alaskan school or whether they are in the mountains of Tennessee, this is how you ought to handle your discipline problems.

Ms. MCINTOSH. And, Senator, we did not make any new law or any new binding requirements with the bullying——

Senator ALEXANDER. Well, she says her edicts are binding and she issued a guidance on bullying, and to me, that is not appropriate.

Ms. MCINTOSH. And I have been——

Senator ALEXANDER. But my time is up, Mr. Chairman.

Senator LANKFORD. Senator Daines.

OPENING STATEMENT OF SENATOR DAINES

Senator DAINES. Thank you, Mr. Chairman, and I want to thank the Chairman as well as Ranking Member Heitkamp for coordinating this hearing and allowing a couple of adoptees here today, Senator Alexander and myself, to be on this dais and be part of this hearing.

I would completely agree with Senator Alexander's comments about what I hear back home in Montana. I hear more about regulations and concerns and ambiguity and the force of such an impact on the small businesses than I do about taxes as I travel every corner of our State. So, I applaud the Chairman and the Ranking Member for moving forward here with these discussions, because I do believe this matter of regulatory oversight and accountability is perhaps one of the most fundamental of Congress's responsibilities, and our dialogue here today is of great importance.

My concerns are that agencies oftentimes use these interpretive rules to expand regulations rather than merely provide clarification. Since interpretive rules are not required to undergo notice and comment, this often allows a channel for unvetted regulation to negatively affect unknowing small businesses. A more transparent and a more predictable process for widely promulgated interpretive rules would resolve this dilemma and, I think, encourage business growth and job creation.

A question for Ms. Maxwell. In your written testimony, you state that, and I quote, "effective regulations help achieve Congress's objective to invest in human capital, to build a skills infrastructure that supports business growth," and there does seem to be a positive link between regulatory transparency and job creation.

A restaurant franchisee business owner in my home State, from Billings, Montana, is named Brad Anderson. He has got Buffalo Wild Wings all over the State. He provides jobs to allow oftentimes college students the ability to make a wage and put themselves through college. They are great businesses. And, let me quote what Brad said to me.

He said, "Interpretive rules are changing the nuts and bolts operations of how restaurants operate. When the Department of Labor issues interpretive rules on a regular basis and unpredictability is the norm, you better believe it causes businesses like mine to think twice about considering automating processes over making the additional hire. Interpretive rules simply discourage job creation."

Ms. Maxwell, how do you reconcile the statement from your testimony with the economic reality my constituent is facing?

Ms. MAXWELL. Thank you, Senator, very much for your question. When I spoke in my opening testimony about the work that we do to invest in the skills infrastructure to make sure that workers have the skills they need to compete in the 21st Century global economy and that employers have the skilled workforce that they need, it speaks to the real diversity and range of the responsibilities of the Department of Labor. I think it speaks a little bit, even, to the diversity of all the different guidance documents, because we are a Department that enforces many labor standards, laws that are passed by the U.S. Congress, but we are also the Department that invests in the workforce system through the Employment and Training Administration. So, we have a really wide range of responsibilities that Congress entrusts in us to implement, and I really do think that speaks some to the range of the kind of guidance documents that you see.

Senator DAINES. Yes, but when I hear that these interpretive rules are incentivizing replacing these jobs with automation, does that suggest that DOL's regulations are, perhaps, ineffective as we think about trying to stimulate job growth?

Ms. MAXWELL. So, we work so hard, again, as we said earlier, to make sure that this guidance is not making any new requirements, right. That is against—we follow the rules. We follow the APA and the OMB Bulletin. Guidance is designed to meet the needs of stakeholders, to clarify expectations, to hear from them what we need to do better and differently.

And I would also say, Senator, an open door, like we would happily make time to hear from that constituent in your district and to hear about how any of our guidance documents are impacting them.

Senator DAINES. And we are going to be talking in a little bit about creating more transparency——

Ms. MAXWELL. Yes.

Senator DAINES [continuing]. And collaboration, particularly in the interpretive rulemaking, as well.

I have a question for Ms. Sager, and I am running out of time. Ms. Sager, you mentioned in your testimony the legal precedent prior to the March 9, 2015, Supreme Court *Perez* v. *MBA* decision, which overturned longstanding precedent to subject modified interpretive rules to notice and comment. Do you believe the *Perez* v. *MBA* ruling made the regulatory business environment more or less predictable?

Ms. SAGER. Thank you for the question, Senator Daines. The nature of the Perez decision is something that we did note in our report. GAO does not reinterpret legal rulings, but as we discussed in Senator Heitkamp's question as well as——

Senator LANKFORD. Ms. Sager, before you go on, is the light on on your microphone, there? It sounds a little—the light should be on.

Ms. SAGER. The green light is not coming on. Here we go.

Senator LANKFORD. There you go. It is on.

Ms. SAGER. All right. Thank you. Sorry about that.

Senator DAINES. But, in your opinion, as you look at it, do you think it made it—the business environment, the regulatory environment—more or less predictable?

Ms. SAGER. Well, the very nature of this entire topic is fraught with difficulty, to the extent there is something that is certain, it is that the regulations are binding. Agencies then have a tremendous amount of discretion in issuing guidance. That is by design, so that they have flexibility in getting information out to affected parties in a timely manner. By the same token, depending on how extensive the agencies' efforts are to communicate with stakeholders, stakeholders may or may not be aware of what guidance documents agencies are issuing or what their responsibilities are in complying with the guidance.

Senator DAINES. Yes. I can tell you, the feedback from the folks in the trenches who are trying to grow jobs and to make their small businesses work tell me he made it less predictable. And I have introduced a bill, the Regulatory Predictability for Business Growth Act, that would reinstate the previous court precedent, because I think the precedent actually helped provide better predictability in this process, and that is what we are going to be continuing dialogue on and hope to have a legislative fix to what happened in the court here earlier this year.

Ms. SAGER. Thank you.

Senator DAINES. I think I am out of time.

Senator LANKFORD. Let me explain again, we are going to open up all microphones. This will be more of a free-flowing conversation. Members need not have to wait on each other and time. Let us just have an open dialogue on some of this, and it will be the same for any of our witnesses, as well, for you to be able to interject at any point if you want to be able to add to the comment.

I want to make a quick comment on what Senator Daines just said and ask one question, and let me just open this up, as well. I do share some concerns on the *Perez* v. *Mortgage Bankers* decision, and I do not think I am alone on that. Let me mention a couple of things.

Justice Sotomayor made a comment where she said there may be times when an agency's decision to issue an interpretive rule rath-

er than a legislative rule is driven primarily by a desire to skirt notice and comment provisions. Justice Scalia made the statement, "To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime."

So, this is an issue that I have a concern, and it is one of the reasons we are having this hearing today, is to say we have to get ahead of this so that in the days ahead, we are very clear on what is a guideline, what is guidance, and what is a rule, and when do we go through notice and comment. We are still a Nation of the people, by the people, for the people, which would mean people should still have engagement with their government. If their government notifies people how they are going to run their business, rather than businesses work with government to be able to tell what is the best regulatory scheme, the whole thing is on its head.

So, let me also make a quick comment here just to be able to back up some from my questions earlier on this. Trying to get a complete list of guidance—and let me give you an example. A new compliance person comes in at a university. The previous person did not take good notes, and so you have a brand new compliance person that walks into a university. They can easily go to the Federal Register and be able to find all of the regulations, but looking up the "Dear Colleague Letters" from as far back as they want to go and trying to determine where all the guidance documents——

A new person comes into compliance at a fertilizer facility, at a retail or at a chemical plant, and they are trying to find it all. Where would they go to get all the previous guidance, and how far do they have to go back to get that?

It is one of the questions that Senator Alexander and I asked when we actually wrote to the Secretary of Education, saying, how do we get a complete list of guidance? Now, the challenge was, we asked all the different entities, give us all of your guidance so we can take a look at it. What we got back was a list of hyperlinks to websites that we got many of these different hyperlinks. They were not all connected to each other. There was no central location. Some of the hyperlinks did not work. They used all sorts of different terms, so you really could not tell what is a guidance and what is not a guidance on it.

And even one of the simple questions that we asked in our letter was, tell us any complaints that have come in about guidance, and shockingly, since 2007, Department of Education shared with Senator Alexander and I there had been no complaints on any guidance. We got nothing back as a complaint. So, while I find that striking, knowing some of my own fellow Oklahomans, we seem to find a lot of things to complain about when there is time to complain about something. I am stunned that 300 million Americans have no complaint on any guidance coming from the Department of Education.

So, let me ask the general question here, then we will just launch in. How would someone go get guidance so they know they have a complete, comprehensive, they have all guidance documents from either Education or Department of Labor? Where would they go to get that?

Ms. MCINTOSH. So, I will start. So, the new person in a university does not need to get all of the guidance that we have ever issued. They need to go and find the documents that are relevant to someone in that position, and they would find them on our website. All the significant guidance is clearly labeled and in one place on the websites relating to people from universities are references to other kinds of "Dear Colleague Letters" and guidance.

I would argue that it is most important that that person start with understanding which laws apply, because many of the guidance documents that we issue might not be relevant. What is relevant to them is what laws apply, and then the guidance can help that person sort out what they need to do.

I would also say that——

Senator LANKFORD. But, you said yourself earlier——

Ms. MCINTOSH [continuing]. It is very important—and let me add this one thing——

Senator LANKFORD. OK.

Ms. MCINTOSH [continuing]. That the GAO report does point out for many of our agencies that it can be a little difficult to get everything in one place, and as a result, we are 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.

And then the last thing I would say is that you asked about guidance documents and whether they close the door to public comment, and I would strongly disagree. Almost every guidance document either starts from a set of questions that come from constituents. In many cases, we engage with external audiences during guidance. And then every guidance document opens up another opportunity for comment and feedback, because all of our guidance documents have links to communicate back with us and we take all those additional questions and thoughts and work on whether we need to update or revise guidance or do a webinar, which is another form of guidance. So, it is a continuous process of back and forth with our constituents.

Senator LANKFORD. And I understand that. The challenge is, for a new person, new entity trying to actually get that information, the assumption is made, of course, everyone is keeping up to date with our guidance, that we have done this for years, and as new people move into different universities, or new people are in compliance in a different company, they do not have that previous experience and there is no centralized place to be able to go to find out what connects to them, and that is a major issue for us.

And there is an expectation, as you mentioned before, there are very few significant guidance documents. The agencies rarely put out something they call significant, and we will talk about that more, I am sure, in a moment. So, to say all the significant guidance is over here, they need to know all the guidance related to that.

Department of Labor, you want to get a chance to mention where they would go to be able to get guidance?

Ms. MAXWELL. Yes. Thank you very much for the question, Senator.

For starters, I would say I think the GAO audit did find that, actually, DOL does a pretty good job on most of the components' websites of clearly marking where things are, although I would also note, we take really seriously and are really committed to getting you the information that you need, and so if there were gaps in our response to you, we commit to following up with you to make sure that you have the information that you need in that regard.

And the piece that I would say to this question of how people find what they need and this question of the fullest of guidance documents, I would just draw on, I grew up in Omaha, Nebraska. I have not lived most of my life in the Beltway. I bring that perspective to my work every single day. And where I grew up and where most of my folks still live, people do not know the APA, they do not know the OMB bulletin, they do not know what is significant guidance compared to all this other guidance. It is just real people in a myriad of different situations that are running a business, or are a worker working in a business, or a State agency running a program, and they just want to understand, right, what their rights and responsibilities are.

Senator LANKFORD. Correct.

Ms. MAXWELL. They want to be in compliance, right. And that is the purpose of guidance, right. That is our purpose in that. People may or may not know to call it guidance, or I do not know that they would look on the website for guidance per se. It is absolutely our responsibility that we take really seriously that we do this well, that, absolutely, we are following the rules, but that we do it well, that we are hearing from the people that are affected by these programs, who are affected by these laws and regulations. They want to be in compliance. It is our obligation to help them be in compliance and for us to hear about when we do not get it right.

We are absolutely taking seriously some of the recommendations from GAO. There are some things we could do better on our websites to make it easier for people to find.

And then, I would also note, the website is certainly not the sum total of how we make that information available. We work really hard not just to wait for people to come to us, but for us to go out to people, to be in conversations. So, through listening sessions and our field staff in communication with folks, hearing from our investigators, who will tell us—our investigators have some of the most important information. This is not clear to people. We send those guidances out proactively through the newsletter, through e-mail blasts. Our agency heads go to trade association events to be in dialogue——

Senator LANKFORD. I am going to keep going. There are multiple conversations.

Ms. MAXWELL. Yes.

Senator LANKFORD. I get that. The challenge is trying to find it if you are the new person——

Ms. MAXWELL. Yes.

Senator LANKFORD [continuing]. If you are trying to get something started, and let me just give you a quick example of this, and I am going to open this up and have everybody else engage in the conversation.

We did go to the site and were able to look at the Department of Labor site, and it lists out where would you find agency guidance pages, and there is not even a link to get to OSHA guidance at all. So, there are things that we look at and say, either from this list OSHA does not have any guidance documents, or significant guidance documents, but there is not even a link to it at all. There is, Employment Benefits Security Assistance, Office of Federal Contract Compliance, Mine Safety, Wage and Hour Division, but nothing from OSHA, for instance.

Ms. MAXWELL. And, so, it is a great question and it speaks to some of the recommendations in the GAO report that we are working on. I think, intuitively, most of those documents have been housed on a particular agency website. So, if you are looking for OSHA, you go to the OSHA website. But, in part because of our dialogue with you and some of the questions that you are raising, we are looking at, do we need to create a new web portal, that would link the various——

Senator LANKFORD. Just some way to be able to get it all, because, again, we put these word clouds[1] up here, because when we got the information back from both of you and we went to all of those hyperlinks, we started asking the question, what is called guidance. These are the words that were used. And, so, again, people do not even know what is guidance. Is it a "Dear Colleague?" Is that a guidance document? What standard does this have? What enforcement does it have? It is that kind of stuff. So, we are going to have to find a way to be able to make it clear to someone who is new coming into this, the Federal Government is engaged in all of this.

And, again, I am hogging the time here.

Senator HEITKAMP. Well, and I want to follow up a little bit on Senator Alexander's direction and maybe this is just a really simplistic way of looking at this, but it seems to me that we pass a statute, that is binding. That has got the full force and effect of law. You go through a formal rulemaking process, full force and effect of the law.

A guidance should not hurt you, right. A guidance should only help you be able to meet the requirements that are set out in the statute and in the substantive rule process. Where we are getting concerned here and what you are hearing is when guidance seems to hurt us. I mean, it should be instructive. It should be helpful in meeting the requirements.

But, we should know what those requirements are from both the statute and the substantive rulemaking, and when it seems like we cross that rubicon, when we stop thinking that this is helpful in interpretation and it seems to change the interpretation, or it changes what has been known historically to be the traditional kind of regulatory environment that Senator Ernst talked about, then we start thinking, that does not look like it is helpful interpretative, help me get through the morass of regulation.

Ms. MCINTOSH. Yes.

Senator HEITKAMP. This looks like it is a shortcut, right. It looks like it is a shortcut to changing the rule.

[1] The word clouds appear in the Appendix on page 69 and 70.

And, so, I am back, Ms. Sager, can you help me understand how we can make those delineations more certain, because when somebody, and, you had an exchange here, but when somebody at a very high level tells someone that an interpretive rule has the full force and effect of law, we are not really communicating what an interpretative, or not an interpretative rule, but what a guidance is, right. I mean, we all agree, hopefully, here that a guidance does not have the full force and effect of law, right? Can we all——

Ms. MCINTOSH. Yes.

Senator HEITKAMP. Let the record reflect we all agree on that. But, yet, it seems like it does. And, so, help me think about this in the context of how we can more clearly delineate what a guidance is.

Ms. SAGER. Thank you for the question. A couple of options are available. Certainly, I think this kind of oversight calls attention to the importance of the topic. Of course, in the absence of a congressional hearing, or a GAO study to evaluate a topic such as regulatory guidance over time, it is easy for this kind of layering on of guidance documents to happen.

You mentioned that you are regulatory geeks. Certainly at GAO, sometimes we might describe ourselves as internal control geeks, and what I mean by that is that as my written statement point out having a control process in place, even something as simple as having a periodic evaluation, the kind of retrospective review you have talked about for the regulatory process, having a similar kind of process in place for guidance documents where agency officials review the cumulative effect of their guidance documents, see if it is current, see if the links work, see what an affected party would be able to take away from that cumulative body of information, is very helpful.

So, for example, one of the components that we looked at in our report was the Office of Federal Contract Compliance Policy (OFCCP). They initiated a process such as this. It was actually a multi-year process. And in doing so, they eliminated 85 percent of the guidance documents that they had. And I use that as an illustration of the potential real value of just making sure that each agency has something like that in place, and not just at the Department level, but at every individual component.

Senator HEITKAMP. Something that provides internal control, some kind of written policy on this is what we are going to do to review, this is what we are going to do to find out if our—I mean, I would add to this FAQs. I mean, they can be extraordinarily helpful. I have used them in private life. But, yet, you kind of sometimes wonder if they have not crossed that line again. And, so, to have a review process where people really look at guidance in the framework of are these helpful to the regulated industry.

Ms. SAGER. Exactly, and thinking about yourself as a private citizen, as a small business owner, somebody coming into a particular topic area, perhaps not having full information, what lens would you look at that through? It can be extraordinarily helpful, having that regular review process.

Senator LANKFORD. Well, since we are jumping in here, can I just ask a quick follow up. How many agencies have a process where they are systematically going back through their guidance docu-

ments to be able to evaluate them, a retrospective review of their guidance?

Ms. SAGER. We did not hear many examples of that kind of systematic process, particularly having a written documentation of that process as well as the levels of review.

Senator LANKFORD. OK.

Senator HEITKAMP. That is one of your recommendations in your report, is that we actually look at written policies as it relates to guidance——

Ms. SAGER. Right.

Senator HEITKAMP [continuing]. That agencies have a responsibility to actually have their own, not just say we are APA compliant or we are OMB compliant, but to actually have a written policy as it relates to guidance.

Senator ALEXANDER. Let me ask, what was the agency that you described that got 85 percent?

Ms. SAGER. OFCCP, part of the Department of Labor.

Senator ERNST. I would like to jump in again and talk about some of the process, as well. So, we have all agreed today that the guidance is non-legally binding, and yet with the—I am going to go back to my folks in Iowa. The retail exemption memorandum that came out on July 22, it is requiring these retailers who are now reclassified to follow this regulatory process through reclassification, and OSHA has estimated that the cost of compliance for each of the retailers would be $2,100 per site to come into compliance.

But those retailers, those on the ground where the rubber meets the road, they have actually calculated it could cost up to $25,000 per retailer. And, again, that is significant cost. If you look at the retailers and the areas that they cover in Iowa, that is a big cost. That is a really big cost.

So, in light of that, is it possible to go back and have OSHA go through the proper rulemaking process so that it is enforceable? If we are truly trying to correct a problem, then why do we not go through the rulemaking process and make sure that we understand what it takes to go into compliance, open that up for public comment and review? Is that something that OSHA would be willing to do?

Ms. MAXWELL. So, I think in this case, we were really clear that we were following the APA and the OMB Bulletin in the course that we pursued on this guidance and that the RFI and the long public comment period was designed specifically to get that feedback. We are always, though, Senator, always open door and want to continue to be in dialogue with folks about this, and, in fact, it is partly why OSHA has a delayed enforcement policy around this, to give people more time to come into compliance and to give additional compliance assistance to those——

Senator ERNST. OK. Six months for compliance to bring these ag retailers—and, again, this is a manufacturing rule that is now extended to retailers where there is absolutely no manufacturing process. They are not mixing chemicals. They are distributors. And, so, I think whoever went ahead with this guidance maybe does not fully understand what these ag retailers do.

So, I am encouraging OSHA to open this up to formal rulemaking, and it sounds like—you said extended periods of time,

there was a lengthy comment process. It sounds like you are trying to get around rulemaking. It is a rulemaking process without the full enforcement of rulemaking, so, again, a way to circumvent actually reaching out to the American public and extending an invitation to everyone to comment on these practices and the cost to them in doing business.

My original point was, if you are doing that, why not formal rulemaking, where everyone can engage in an open dialogue and process and ensure that their comments are being heard? I think that seems very common sense.

Ms. MAXWELL. Thank you for your question, Senator, and I will just say this. We would never be circumventing the formal rulemaking process. It would not be appropriate and we would not do it. But we are totally committed to working with you and following up with you on this issue.

Senator ERNST. Thank you. I appreciate that.

Senator LANKFORD. Senator Ernst, can I make a comment on that, as well. Some of the challenge that we have on this as we look at it, these were entities that were exempted before that are now drawn into it. When you put out a request for information, exempted entities do not respond to that. They are exempted. They do not assume that, suddenly, they are going to be drawn in. If there is a request for information that goes out, if even I am a retailer and would even notice that—now, we can go through the process of how they would even know that. As shocking as it may seem, most Americans do not read Executive Orders and requests for information. As we mentioned before, they are living their lives and doing their businesses.

Ms. MAXWELL. Right.

Senator LANKFORD. Now, suddenly, you have a group of folks that were exempted that you are saying, we did an extensive 2-year comment period and we put out a request for information. If they were exempted, they would not think to respond to that, and now they are suddenly looped in.

Some of the challenge on this is when you do a guidance, it assumes, No. 1, there is not $100 million in impact.

Ms. MAXWELL. Right.

Senator LANKFORD. This has every appearance that it does have $100 million worth of impact across the country. And if you go down the list there, it also is not new or novel. It is not drawing in new people that were previously unaffected, which this does.

So, again, as I mentioned at the beginning, this is nothing about the rule itself or this guidance. This is about the process. And if we are going to do that, should we not actually go through the full process and to be able to say, new people are affected by this that were not previously affected. They did not have the opportunity to have notice and comment, and there was $100 million worth of impact, clearly, on the Nation with this. That sounds like that should go through the APA process.

And I know you say you are committed to doing the APA. We are looking at it and saying, this does not feel like it went through APA if you are those affected.

Senator HEITKAMP. And, if a guidance does not have the force and effect of law, how could it change my legal status, whether I

am exempt or not exempt? That is really what we are grappling with, and no one is—I mean, this is probably a topic for the Agriculture Committee, it is probably a topic for the Environmental and Public Works Committee (EPW). But it does illustrate for us this—if I think I understand the regulation and the law in a way that is adequate, I should never have to read your guidance. I should not care what your guidance says, because I can read and analyze.

And, so, what we are having here is that in order for them to even know that now they are not exempt and that that rule they were operating under, now they have an obligation, they have to read a guidance and that does not sit very well with people when we start with the premise that a guidance does not have any force or effect in law.

Do you see what I am saying, Mary Beth?

Ms. MAXWELL. I do, Senator. And, again, I would just speak to—I want to make sure that we are the most responsive to your concerns and get you the most accurate information. So, I do think one of the things I am going to want to do is follow up with colleagues so that we can share with you—I mean, this really was a very robust engagement process——

Senator LANKFORD. Right.

Ms. MAXWELL. We feel very confident about that——

Senator LANKFORD. You know what would be helpful?

Ms. MAXWELL [continuing]. But we understand we need to engage in that dialogue.

Senator LANKFORD. It would be helpful if we knew how that process worked, and right now, that is a black box to us. We know that somewhere in the agency, there is a discussion, is this going to be a guidance or a rule. We do not know how that works, because that will help us in this. So, if you could do this. If you could follow up for this particular rule, the three that I listed earlier in my first original questions, and we will follow up and get it written out to you. How did that process of the decision actually happen? Who was it that made the decision, this is going to be guidance, not a rule? And the process of how that decision was made.

Because one of the things that we have looked at and what GAO identified, as well, is there does not seem to be a clear list in several agencies—and some of your agencies do have it. The Department of Labor apparently has a very outdated system of how they actually go through the process of determining, is this going to be a guidance or is this going to be a rule and where is the check box, for instance, to say, $100 million worth of impact on the Nation, clearly, that goes into the rulemaking side. It is novel. This is something not previously discussed in a regulation. Clearly, that goes over. So, we are trying to figure out that.

So, could you help us determine what is the checklist and where do you go for that, and who is involved in that decisionmaking process?

Ms. MAXWELL. I absolutely commit to you, I will bring that back to the Department and we will——

Senator LANKFORD. Good. Ms. McIntosh, can you provide those?

Ms. MCINTOSH. We will follow up, but let me make it very clear one more time. We go through rulemaking when we need to create a new binding requirement. When there are no new binding re-

quirements and we are simply following up with questions or explaining existing rules or regulations, then we use guidance. And we have written procedures for our significant guidance and they are largely followed for other guidance, where we notice—we have a centralized process for reviewing guidance documents that often involves our General Counsel. We have many eyes on the question of whether this guidance was appropriately issued before it goes out. And if it is significant guidance, we give OMB the chance——

Ms. MAXWELL. Oh, yes.

Ms. MCINTOSH [continuing]. Again to make sure that we are properly following the rules. And as you, yourself, noted, we have not received complaints saying that we have issued guidance where we should have issued rules, and——

Senator LANKFORD. No, I said, we have not received from you——

Ms. MCINTOSH. Well, and we have——

Senator LANKFORD. I do not know. As far as I can tell——

Ms. MCINTOSH [continuing]. No examples where our guidance has been challenged in courts and we have been told we should have issued rules.

Senator LANKFORD. Let me just bring up a couple thoughts on that——

Ms. MCINTOSH. Mm-hmm.

Senator LANKFORD [continuing]. And, again, I do not want to hog all this time. We can have this open conversation.

The 2011 rule on dealing with the sexual assault disciplinary process, when the standard was changed from "clear and convincing" to "preponderance of evidence," professors at the University of Pennsylvania, Harvard professors, came out pretty quickly with op-eds saying there is some legally questionable stuff with this. That was an immediate challenge that came out.

When we look at the process of how that was done, that was a guidance that was put out. In fact, I think that was one of the famous "Dear Colleague Letters," here is a new set of guidance for you on something that changed a standard. Even the Department of Education put out a press release related to that saying that this is groundbreaking. Now, that implies to me this is something new, or this is a real change, whether you call it significant or not.

But, when you put out a guidance document saying this is groundbreaking and a press release, and you have professors coming out and saying, wow, I wish they would have gotten some input on this because there are some issues here—again, there are none of us that are disagreeing that universities need to have clear sexual assault policies. The question is how this was done. Was input actually engaged into the process? And when does this become regulatory and a rulemaking rather than guidance or a "Dear Colleague Letter?"

Ms. MCINTOSH. So, let me point out that the Office of Civil Rights gets hundreds of complaints alleging civil rights violations, and around the time of this particular piece of guidance, there was an escalating series of complaints, and as required by law, the Office of Civil Rights has to investigate and follow up on complaints and, at times, take enforcement action. Without guidance, then it

is more likely that universities would run afoul of the laws of Congress and we would have a "gotcha" moment.

Senator Heitkamp made a point a minute ago that guidance should not hurt people. Well, understanding and knowing how to comply with law and how to avoid running afoul of civil rights laws can reduce the "gotcha" moments, and that is what our sexual violence guidance was inclined—was intended to do, and we were hearing from universities that they needed help in this very complicated issue that involves many people and is a very serious problem.

Senator HEITKAMP. I think sometimes people who write press releases should be more controlled in what they say—— [Laughter.]

Because this should not have been new. It should have been clarification of responsibilities under the law. As a result of enforcement actions taken, we now see that this is something that might be helpful. People can agree or disagree, and if you disagree with the interpretation, you run the risk that you might be wrong in terms of whether that is a correct interpretation. But, you should never be acting like you are enforcing the guidance. Being guidance is not enforceable. That is what we are trying to get at here.

And, so, when the guidance changes what seems to be the legal relationship, then it goes beyond what a guidance should do. We need to make sure that what we are doing with all of this body of work is not taking shortcuts, and that is why we are here. We are trying to figure out how not just these two agencies, but all agencies actually are not shortcutting the process that is set out in law that is providing the regulated Americans the opportunity to at least weigh in and access their government.

And, this is like everything else. I think we have probably been pretty aggressive as a Committee looking at all of these issues, and every time we turn around, what we see is a body of problems that are historic. And we have got to not only try and delineate what the process is going forward, but we have to deal with all of that stuff in the back.

And, so, like the Chairman said on the front end, we are not doing an oversight hearing on your regulation. We are trying to figure out——

Ms. MAXWELL. Yes.

Senator HEITKAMP [continuing]. How some of this became guidance when it seems to us that some of it might have been better done in a substantive rulemaking, or better done in the bullying process by Congress. As Senator Alexander said, this was a big debate, and, in fact, a bullying amendment——

Senator ALEXANDER. It is still going on.

Senator HEITKAMP. Right. And a bullying amendment failed on the floor of the Senate to get enough votes to actually be included. So, it then becomes, for us, to sit down—and I understand and appreciate that bullying can, in fact, be a civil rights violation, so then you end up with that problem, which is enforcement is put ahead of public policy. We do not like that any more than we like guidance being put ahead of public policy decisions.

But, I am trying to, once again, figure out how we can be instructive without throwing the baby out with the bathwater, because if, in fact, I now have someone who says, well, boy, I used to get these

notices and they were really helpful in implementing. Now the agency says, because Heidi Heitkamp and James Lankford were mean, evil members of this Committee, we no longer get this guidance. We do not want that. We do not want things that are helpful to be changed. But, we do want a clear delineation, or as clear of a delineation as what we can get, on expectations between us and the agencies on what constitutes guidance.

Senator ALEXANDER. Mr. Chairman, if I could weigh in on that just for a minute, say I am the compliance officer at Maryville College in my home town and one of 6,000 colleges and universities, and I get a guidance telling me that in a sexual assault case we are dealing with clear and convincing evidence, that makes a change in whether it is clear and convincing or a preponderance of the evidence, and I hear an Assistant Secretary of Education tell the Chairman of the Education Committee that she expects everybody to follow that, to me, that is a change in the law that, in the first place, should not have been made by guidance, and in the second place, should not be enforced.

In a practical sense, if I am the compliance officer at Maryville college, I am not going to take the risk of not following that guidance. I am going to assume that that is the law, and it is not supposed to be.

Let me shift over to the Labor Department, if I may, Mr. Chairman, just for a second. On August 27, the National Labor Relations Board (NLRB) created a big fuss in a case called the Browning-Ferris case, and it got into the area of what we call joint employer. And for those who are worried about the case, the joint employer issue means that, for the first time, in my view, since 1984, the NLRB said that a franchisee, let us say a McDonald's franchisee, and a McDonald's franchiser are a joint employer if—and it created a new standard for that, in my view, by saying that indirect control—let me get the exact word, a new standard by saying if the corporate entity, McDonald's, exercises direct or indirect control over, say, pay or working conditions, or even has the unexercised potential to do that, then McDonald's and the McDonald's franchisee are treated as a single employer.

And the problem with that for 780,000 franchises across the country is that encourages McDonald's to own all their own stores in all the small towns in America, and the big towns, too. You have fewer franchise opportunities, fewer contractors, because the big boys and girls do not want to run the risk of delegating all that to a franchisee. So, that is a big change in the labor law.

Yet, the day before, there was a draft guidance from the Department of Labor instructing OSHA and its investigators to look at the same new test for joint employer that was leaked out to Politico. Now, OSHA is supposed to be looking at health and safety violations, I thought.

So, I guess I have two questions, Ms. Maxwell. One is, is that draft guidance something that you plan to make final? And, second, if you are going to change the OSHA law, which goes back to 1970, to say instead of looking at health and safety, you suddenly want to have your investigators looking at a test for whether a franchisee and a franchisor are joint employers, do you not think that ought to be a change in the law that Congress makes or at

least a rule or a regulation? How could it possibly be done in a guidance?

Ms. MAXWELL. Thank you, Senator, for your question, and I certainly cannot speak to any decision that the NLRB made about this or about the Ferris case.

Senator ALEXANDER. Kind of suspicious if they made the decision one day and this was leaked the day before from OSHA. It looks like a coordinated effort to change the law, to me, but go ahead.

Ms. MAXWELL. So, actually, for over 10 years, the case law under the OSH Act has explicitly recognized that there is a concept of joint employment that applies, and there are many different work arrangements, so that when OSHA is going to a workplace to protect the health and safety of workers, they do have to look at these different work arrangements. There are temporary workers, there are subcontractors, franchising arrangements come into that, and there are elements of joint employment that could be implicated in that.

Senator ALEXANDER. Well, wait just a minute. We are talking about health and safety, right? Is that not what OSHA is interested in?

Ms. MAXWELL. Yes. Absolutely.

Senator ALEXANDER. And you have a multi-employer test that you sometimes may use, especially with contractors, and you may say that this contractor and this contractor, and one might be a franchisor or one might be a franchisee, but it does not make any difference whether one has control over working conditions or pay or menus in that restaurant, does it? Why would you be looking at whether the franchisor is looking at the menu if all you are caring about is health and safety?

Ms. MAXWELL. All we were doing in this, and I would say this was not a guidance document, this was a draft document of questions to teach investigators the kinds of things that they should be looking for. This is really important, because you need investigators having a consistent approach when they are going into a workplace and asking questions. That is what it was designed to do. And it was for that investigator to be able to be asking concrete questions about what they are seeing——

Senator ALEXANDER. But since when did OSHA get in the business of trying to figure out whether you are a joint employer or not? Why does OSHA care about that? Why is OSHA not interested in health and safety? My father was the first Chairman of the OSHA Board in Tennessee. He was a safety director for many years. He was interested in health and safety, not whether a franchisor is in charge of a franchisee. Why would your investigators be looking at that?

Ms. MAXWELL. So, there are some—OSHA absolutely is work—their focus is the health and safety of those workers, and in asking those questions, it is simply trying to better understand who is responsible for the health and safety of those workers. And if this is a topic that you would like to do additional follow up with us on, we are committed to having more of a conversation with you about that.

Senator ALEXANDER. Well, I would like to do a lot of follow up on the joint employer rule, because I think it is the biggest attack

on the opportunity for small businessmen and women in this country to make their way into the middle class that we have seen in a long time, and to have OSHA perhaps through guidance join in with the NLRB is even more of a threat to—well, several hundred thousand franchisees and millions of contractors across the country.

Mr. Chairman, that is all I have.

Senator LANKFORD. No, I would have to agree. This is something we have had a hearing on and have conversations on, as well, in Appropriations, where Senator Alexander and I also serve together. The concern on this is how many people that this really affects.

Ms. MAXWELL. Mm-hmm.

Senator LANKFORD. We have millions of Americans that want to start a business that now, suddenly, every franchiser is deciding, I am not sure I want to have that. We have millions of Americans that are self-employed that suddenly they are at risk in this. And you have every company that does temporary work that has helped people that are currently unemployed get employment that are suddenly at risk with a change in NLRB. And, so, yes, the enforcement of this and the process of this had better be right or it will do serious damage to the economy and to millions of Americans that are either trying to start a business for the first time or to actually get employment for the first time.

Ms. MAXWELL. Mm-hmm.

Senator LANKFORD. And, so, I know that exceeds where we are as far as the rule, but I can tell you, there will be a lot of attention to that, because that rule as it stands now, and that conversation about that from the NLRB, could have some of the most significant long-term impact on our economy that we have had in quite a while and changing how we do business as America and how people actually get out of the middle class and actually start businesses and be able to have the opportunity to rise. That closes the door to rising, and that is a serious problem.

Let me go over to Education and get a chance to bring this up, as well, and I have several other questions we will try to run through quickly. When we talked about the bullying standard, that guidance changed the prior test of bullying from "severe, pervasive, and objectionably offensive" to behavior—this is the change—that is "severe, pervasive, or persistent." Now, that is a pretty significant shift on that, to say there is a three-part test to now to say there is the one-part test on it, and if any one of these, then this triggers into bullying on that.

Tell me about the input that you received in advance of that, and again, the notice and comment that went out, and I understand people were contacting saying there is bullying at the school. I get that. It is the solution that I am trying to get the input on. How did that happen?

Ms. MCINTOSH. So, I cannot speak to the details of that point you made about one standard versus another, but what I can say is that when we issued that guidance document, it was first in response to what the Office of Civil Rights was seeing from complaints about bullying coming from all over the country, what enforcement decisions they were making according to the laws of Congress, and the guidance was intended to help schools comply with

the law and, therefore, reduce bullying and avoid having to be in a position of enforcement.

Senator LANKFORD. By the way, I do not have any doubt, we want kids to be out of an environment that is dangerous for them.

Ms. MCINTOSH. Right.

Senator LANKFORD. There is no question on that. Again, we are back to process.

Ms. MCINTOSH. Right. So, in terms of the process, any guidance document that we issue, and that one, I am confident can say went through multiple layers of review within our agency, including many different lawyers making very certain that no new requirements were being created by that piece of guidance, and it was cleared internally. That was not, I think, a significant document, so I do not know. It may have had OMB review, but it was not required to have OMB review.

Senator LANKFORD. Again, we are back to the same question on this——

Ms. MCINTOSH. But let me make——

Senator LANKFORD. Hold on for just a moment.

Ms. MCINTOSH. Mm-hmm.

Senator LANKFORD. The statement, it does not add any new criteria on it, there is a three-standard test that changed to a one-standard test.

Ms. MCINTOSH. Right.

Senator LANKFORD. So, you literally had entities that were—previously, let us say, two of those were met, but not three. They are not affected. Now, they are affected.

Ms. MCINTOSH. Right.

Senator LANKFORD. So, you are changing not only the standard there, but you are changing the number of people that are affected. Does that make sense?

Ms. MCINTOSH. So——

Senator LANKFORD. That is a change, where someone who is not under it now suddenly is under it by a shift, by design.

Ms. MCINTOSH. So, I cannot speak to the details on that. I would be very happy to follow up in writing with a clear answer about that particular part of the guidance and why we determined that it was a proper use of guidance.

Senator LANKFORD. OK. So, here is what I would like to be able to walk through. It is this, how do we actually get to this spot, and it is who does this.

Ms. Sager, if we are going to have a clear set of guidance to agencies on how to do guidance—I know OMB attempted to do this, I think it was in 2007, if I remember correctly. They attempted to be able to put a structure together to say, if you are going to do guidance, it is going to be under this. Has that been revised since 2007?

Ms. SAGER. No. We met with OIRA officials as part of our review and the OMB memo, M–07–07, the OMB bulletin on guidance practices was still in effect.

Senator LANKFORD. OK. So, let me just go through some basics, the basics you had mentioned before. Is it legally binding? If it is legally binding, clearly, that goes over in the regulatory side from there.

Ms. SAGER. Yes.

Senator LANKFORD. Is it novel, I think has been listed there, as well. So, is this something new, correct?

Ms. SAGER. Right.

Senator LANKFORD. Is it $100 million worth of economic impact.

Ms. SAGER. Right.

Senator LANKFORD. OK. Then let us go through a couple of things. Does it expand a rule, or is it just reinterpreting a rule.

Ms. SAGER. Yes.

Senator LANKFORD. Are we on track with that? Does it affect new entities. Is that clearly put out there, so if someone who is previously not regulated is now looped in so now they are regulated.

Ms. SAGER. That could be considered part of the novel or legal policy, yes.

Senator LANKFORD. OK. If they are changing a discretionary issue to a mandatory. In other words, if it used to say "may" and now it says "shall."

Ms. SAGER. Then that is something that should be subject to OMB OIRA review.

Senator LANKFORD. OK. All of those things—I think we should be able to get a clear list to be able to come back and say, here is how we can make sure that everyone knows, because at the end of the day, I do not find a lot of Americans that say, do you know what I really want? I want an unsafe working environment.

Ms. MAXWELL. Right.

Senator LANKFORD. I want unsafe schools. No one says that. But what I do hear all the time from entities, and I would say that I hear it from university folks from a lot, this simple phrase. Make it stop. Every time I turn on my computer in the morning, there is a new set of guidance that are coming down to me. There is a new hint coming down to me of something else to do, and I cannot run my university anymore because I am hiring so many compliance people, and they feel they cannot complain because those are the folks that also control a lot of their Federal funding and a lot of grants, and so they are in this weird catch-22.

They have no problem complaining to the Department of Labor, I am confident, because they do not get all their funding from the Department of Labor and their accreditation and everything else is not connected to this group of individuals. With Education, it is, and I hear an awful lot from university folks that are concerned that there are all these guidances that, No. 1, they had no input on, but they also feel like they really cannot come back and complain.

Ms. MCINTOSH. So, our door is wide open to everyone in the university community. Our Secretary has made it very clear that he wants all of us to be in touch with our constituents. I know that——

Senator LANKFORD. Which I would highly commend.

Ms. MCINTOSH [continuing]. We have many forums where we hear directly from university personnel and we take all those very seriously. So, we certainly do understand universities' worries about burden and worries about making it easy for them to comply with the laws of Congress, but I think that is enough.

Senator LANKFORD. The cumulative effect, as it is with your agency in requirements for promulgating rules and everything else, stacks up and slows everything down. The cumulative effect for them has the same thing. So, this is not just an issue of a law that has been passed, because for many of these issues, there is new guidance over a law that is 30 and 40 years old. It is a new interpretation. It is a new understanding. It is a new enforcement process that goes in, and that is their concern, is that this is not coming out of a new statute. This is a new understanding of a statute that is 20 or 30, 40 years old.

That is what we have to be able to find the balance for, just simply for this one thing, that people know that they can actually have input in their government and they know how to do it, and they do not suddenly show up and say, last week, I was not affected by this regulation and now suddenly I am hearing that I am affected by it and I did not even have anyone to be able to talk to and I did not know it was coming. That is the unaffected party in this.

So, let me just walk through a couple of things and we will follow up in writing to walk through this process, trying to determine a complete list of guidance that people can access, where that would come from, trying to determine when people have a question or a concern about a guidance, how would they voice that. How would they express that before the guidance comes out and then actually after the guidance is out, how that would actually change, because it is one thing to say, here is the guidance, and someone responds back to you and says, this is nonsensical. Now you have to either go through a guidance for the guidance, or you have to be able to revise it when it might have been better to just let people know in advance and so they can be engaged on that.

How often do we actually review guidance and the process of that? What would be advisable to when we do that? Who makes the final decision on guidance? And the simple statements of, when do we know what is the process of making that decision? Where is the checklist? If any of these are a "yes," then we know this cannot be guidance, this has to be a rule, and to be able to go through the process and who actually does that.

And then here is one that is difficult for us, the cost-benefit, because some of these guidances obviously have a clear cost that is attached to it, as well, and my perception is, and you can correct me if I am wrong on this, for most of these guidance documents, there is not a cost-benefit analysis that is run on this. There is an estimation, maybe internally, to say this probably will not cost very much, but when you do "probably will not cost much" times 6,000 universities, that is a lot of money, or we are at times multi-thousands of different entities of retail or chemical manufacturing locations, that gets up in a hurry. There is this $100 million figure that is sitting out there.

For any of the rules or the guidance documents that I mentioned before on some of the process management, did any of those go through a cost-benefit analysis before they were actually put out, those guidance documents?

Ms. MAXWELL. Cost-benefit analysis is a really specific term that is used in the process of rulemaking.

Senator LANKFORD. So, was there an estimation on the cost or effect? There is this sense of $100 million of effect on the economy that is out there that is a pretty clear bright line. Was there a thought of how much this would cost on the economy?

Ms. MAXWELL. I think we were very clear that it was well below that $100 million, but in the interest of getting you a more accurate answer, let me go back and check with my colleagues on that——

Senator LANKFORD. OK, let us do, and what I would like to know is how that determination was made that it was well below the $100 million figure. There are several entities that are out there that have seen this and have in some way been extremely concerned that this does exceed $100 million worth of cost and it would be economically significant to be able to make that change. So, I think that is a fair question to ask when they, again, find out one day that there is suddenly a very expensive rule that is going to cost them and their consumers a tremendous amount of money for something they wish they would have had input on, and could have had input on if it was actually a rule, which is part of the issue here, that people want to know if it is going to have this binding effect, if it is going to actually change something, if I used to be exempt and now I am not exempt, if I used to have flexibility and now I cannot have flexibility, and the old rule that I had that gave me flexibility, now I am non-compliant on and I have got make this shift and it is going to have this cost. Those do have real life effects.

So, again, no one is arguing on safety issues, but we are arguing on process to be able to make sure that we can get that.

Let me give one more thing. As you all are walking through your entities, how do you define "significant guidance" versus just "guidance," because both your agencies have very few rules that you declare significant. What is the bright line for you on what is significant and non-significant?

Ms. MCINTOSH. So, in Education, we follow the procedures that are laid out in the Bulletin for determining what is significant guidance, and we have an internal check process to make sure that we are properly classifying our guidance as significant or otherwise. And I know of no case where someone has complained that we should have labeled something significant guidance.

Ms. MAXWELL. That is the same for us. It is a legal question that is done in consultation with the Solicitor and with OMB, and I think the reason, actually, Senator, that you see so few examples of significant guidance on our list is because, typically, when something is going to have that great of an impact, we are pursuing notice and comment rulemaking.

Senator LANKFORD. Correct.

Ms. MAXWELL. Significant and guidance is really the exception, not the rule.

Senator LANKFORD. Correct, and should be, by the way.

Ms. MAXWELL. Yes.

Senator LANKFORD. And I would agree with that. When you get into something that is significant guidance, it does beg the question very quickly, why is this not just a reg, and to be able to go through this process.

The last question that I know of, and I am asking staff on this in just a moment, as well, but non-policy issuance versus policy issuance. How do you actually determine what is a non-policy guidance and what is a policy guidance? Do you have a point of demarcation on that internally, because there seems to be, when I went through some of the guidance-type documents to say, well, this one is not a policy one. This one is a non-policy one.

Ms. MAXWELL. I am not sure I understand the question.

Ms. MCINTOSH. I am not familiar with——

Senator LANKFORD. OK.

Ms. MCINTOSH [continuing]. Those terms and do not know if we use those.

Senator LANKFORD. I was not, either, on that one, and that is why I wanted to pull it out and say, I am finding some things that say, well, that was a non-policy issue, to be able to find out if there is a separate set of standards. We will follow up on that, as well, and see if we can get any other detail on that one, as well.

Hold on for just a moment.

[Pause.]

I appreciate the conversation on this. I had promised to keep you here 5 hours, and I am sorry I did not fulfill that promise. [Laughter.]

I am actually a little short on this today.

We will follow up in writing. I am going to leave the record open for up to 15 days for other Members to be able to submit questions or statements for the record.

I really do appreciate the witnesses coming and your preparation. This is the beginning of a journey for us, and as you notice from GAO, we had asked them to actually pull through four different agencies. You all just got the lucky draw of being the two that got a chance to be here today to walk through the process. This is an issue governmentwide. We do have to solve this, because I can tell you, over and over again, Americans are saying, I am getting guidance things that I do not know what to do with that seems to be a new obligation that I am trying to figure out, where did this come from, and just the sheer volume of them and the number of layers from multiple entities that actually do regulations for them are causing some major issues for them. So, this is one we will continue to stay on and we will work with other agencies, as well as follow up with you all in the days ahead on it. So, I appreciate very much your testimony today.

This hearing is adjourned.

Ms. MAXWELL. Thank you.

Ms. SAGER. Thank you.

Ms. MCINTOSH. Thank you, Senator.

[Whereupon, at 1:03 p.m., the Subcommittee was adjourned.]

APPENDIX

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Regulatory Affairs and Federal Management, Committee on Homeland Security and Governmental Affairs, U.S. Senate

For Release on Delivery
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REGULATORY GUIDANCE PROCESSES

Agencies Could Benefit from Stronger Internal Control Practices

Statement of Michelle A. Sager
Director, Strategic Issues

GAO-15-834T

GAO Highlights

Highlights of GAO-15-834T, a testimony before the Subcommittee on Regulatory Affairs and Federal Management, Committee on Homeland Security and Governmental Affairs, U.S. Senate

Why GAO Did This Study

Regulatory guidance is an important tool agencies use to communicate timely information about regulatory and grant programs to regulated parties, grantees, and the public. Guidance provides agencies flexibility to articulate their interpretations of regulations, clarify policies, and address new issues more quickly than may be possible using rulemaking. The potential effects of guidance and risks of legal challenges underscore the need for consistent processes for the development, review, dissemination, and evaluation of guidance.

This statement discusses four key questions addressed in GAO's April 2015 report on regulatory guidance: (1) what it is; (2) how agencies use it; (3) how agencies decide whether to use guidance or undertake rulemaking; and (4) steps agencies can take to ensure more effective guidance processes. To conduct that work, GAO reviewed relevant requirements, written procedures, guidance, and websites, and interviewed agency officials.

What GAO Recommends

GAO is making no new recommendations in this statement. In the April 2015 report, GAO recommended steps to ensure consistent application of OMB requirements for significant guidance and to strengthen internal controls in guidance production processes. The agencies generally agreed with the recommendations.

View GAO-15-834T. For more information, contact Michelle Sager, (202) 512-6806 or sagerm@gao.gov.

September 23, 2015

REGULATORY GUIDANCE PROCESSES

Agencies Could Benefit from Stronger Internal Control Practices

What GAO Found

What is regulatory guidance? One of the main purposes of guidance is to explain and help regulated parties comply with agencies' regulations. Even though not legally binding, guidance documents can have a significant effect on regulated entities and the public, both because of agencies' reliance on large volumes of guidance documents and because the guidance can prompt changes in the behavior of regulated parties and the general public.

How do agencies use regulatory guidance? The four departments GAO reviewed—Agriculture (USDA), Education (Education), Health and Human Services (HHS), and Labor (DOL)—and the 25 components engaged in regulatory or grant making activities in these departments used guidance for multiple purposes, such as clarifying or interpreting regulations and providing grant administration information. Agencies used many terms for guidance and agency components issued varying amounts of guidance, ranging from about 10 to more than 100 guidance documents each year. Departments typically identified few of their guidance documents as "significant," generally defined by the Office of Management and Budget (OMB) as guidance with a broad and substantial impact on regulated entities.

How do agencies determine whether to issue guidance or undertake rulemaking? According to officials, agencies considered a number of factors when deciding whether to issue a regulation or guidance. However, the key criterion in making the choice was whether they intended the document to be binding; in such cases agencies proceeded with regulation.

How can agencies ensure more effective guidance processes that adhere to applicable criteria? All four departments we studied identified standard practices to follow when developing guidance but could also strengthen their internal controls for issuing guidance.

- Agencies addressed OMB's requirements for significant guidance to varying degrees. Education and USDA had written departmental procedures for approval as required by OMB. DOL's procedures were not available to staff and required updating. HHS had no written procedures. In addition, USDA, DOL, and Education consistently applied OMB's public access and feedback requirements for significant guidance, while HHS did not.
- In the absence of specific government standards for non-significant guidance—the majority of issued guidance—the application of internal controls is particularly important. The 25 components GAO reviewed addressed some control standards more regularly than others. For example, few components had written procedures to ensure consistent application of guidance processes. However, all components could describe standard review practices and most used tools to document management approval of guidance. Not all components conferred with external nonfederal stakeholders when developing guidance. Finally, nearly half of the components GAO reviewed did not regularly evaluate whether issued guidance was effective and up to date.

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

Thank you for the opportunity to discuss our report on regulatory guidance processes, which we issued earlier this year.[1] Regulatory guidance is an important tool that agencies use to communicate timely information about the implementation of regulatory and grant programs to regulated parties, grantees, and the general public. Guidance can take a variety of formats and names including directives, interpretive memorandums, fact sheets, and Dear Colleague letters. The Office of Management and Budget (OMB) defines the term "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.

Guidance documents provide agencies valuable flexibility to clarify their requirements and policies, and to address new issues and circumstances more quickly than may be possible using rulemaking. Although not legally binding, guidance documents can have far-reaching effects. Guidance documents can vary—by type, purpose, and amount—among agencies and subcomponents of the same agency, and have often been reported to outnumber regulations in terms of the number of documents issued annually.

My remarks today highlight answers to four key questions addressed in our April 2015 report on regulatory guidance processes:

1. What is regulatory guidance?
2. How do agencies use regulatory guidance?
3. How do agencies determine whether to issue guidance or undertake rulemaking?
4. How can agencies ensure more effective guidance processes that adhere to applicable criteria?

To conduct that work, we reviewed guidance processes at 25 components that engaged in regulatory or grant-making activities in four

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

departments—Agriculture (USDA), Education (Education), Health and Human Services (HHS), and Labor (DOL).[2] The scope of that review focused on guidance issued to external parties that explained regulatory and grant-related requirements and other policies. We reviewed agencies' written procedures, guidance documents, and websites. We also interviewed department and component officials on guidance practices. We selected and applied four government-wide internal control standards to guidance processes.[3] We identified both opportunities for improved internal controls related to guidance and highlighted agency practices that could be applied to guidance processes in other agencies. We conducted the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. More details on our methodology can be found in our report.

Mr. Chairman, agencies must exercise diligence when using guidance. Although guidance documents are not legally binding, they can affect the actions of stakeholders and other interested parties, as well as agencies' staffs, because guidance articulates agencies' interpretations and policy choices. The potential effects of these documents—and the risks of legal challenges to agencies—underscore the need for consistent and well-understood processes for the development, review, dissemination, and evaluation of guidance.

Our April 2015 report found that agencies and their components used guidance for multiple purposes. Further, we also found that all four departments identified standard practices to follow when developing

[2]These components were within the jurisdiction of the requesting committee, the House Committee on Education and the Workforce. See appendix II for a list of the components we reviewed.

[3]GAO, *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: November 1999). Revised standards will be effective beginning with fiscal year 2016. See *Standards for Internal Control in the Federal Government*, GAO-14-704G (Washington, D.C.: September 2014). We applied four of the five standards of internal control to guidance processes. We determined that the internal control we did not apply to guidance processes in this review—assuring an adequate control environment—was less applicable to our review of specific guidance production processes.

guidance. However, stronger application of internal controls would help ensure that guidance processes achieve desired results and prevent errors. Components primarily relied on websites to disseminate guidance, but could do more to improve online access, such as making guidance documents easier to find and ensuring that they are current. We recommended that HHS and DOL ensure consistent application of OMB requirements for guidance. We also recommended that USDA, Education, HHS, and DOL strengthen the use of internal controls in guidance production processes and improve online guidance dissemination. All four agencies generally agreed with the recommendations.

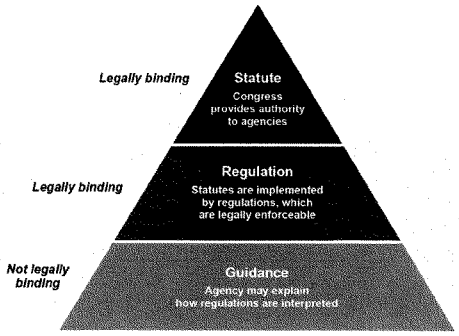
Regulatory Guidance Is a Tool for Agency Communication

One of the main purposes of guidance is to explain and help regulated parties comply with agency regulations. As shown in figure 1, guidance may explain how agencies plan to interpret regulations. Agencies sometimes include disclaimers in their guidance to note that the documents have no legally binding effect on regulated parties or the agencies. Even though not legally binding, guidance documents can have a significant effect on regulated entities and the public, both because of agencies' reliance on large volumes of guidance documents and because the guidance can prompt changes in the behavior of regulated parties and the general public.[4] Nevertheless, defining guidance can be difficult. To illustrate that difficulty, several of the components told us that they do not consider many of the communication documents they issue to the public to be guidance.[5]

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

[5]For the purposes of our review, we examined agency processes for guidance that ranged from interpretive (such as explaining how to comply with a statute or regulation) to informational (such as hazard alerts and toolkits).

Figure 1: Hierarchy of Statutory and Regulatory Authority



Source: GAO analysis of agency authority. | GAO-15-834T

Regulations and guidance documents serve different purposes. The Administrative Procedure Act (APA) established broadly applicable requirements for informal rulemaking, also known as notice and comment rulemaking. Among other things, the APA generally requires that agencies publish a notice of proposed rulemaking in the *Federal Register.* After giving the public an opportunity to comment on the proposed regulation by providing "written data, views, or arguments," and after considering the public comments received, the agency may then publish the final regulation. To balance the need for public input with competing societal interests favoring the efficient and expeditious conduct of certain government affairs, the APA exempts certain types of rules from the notice and comment process, including "interpretative rules" (we will refer to these as interpretive rules in this statement) and "general statements of policy." Regulations affect regulated entities by creating binding legal obligations. Regulations are generally subject to judicial review by the courts if, for example, a party believes that an agency did not follow required rulemaking procedures or went beyond its statutory authority.

Despite the general distinctions between regulations and guidance documents, legal scholars and federal courts have at times noted that it is not always easy to determine whether an agency action should be issued as a regulation subject to the APA's notice and comment requirements, or

is guidance or a policy statement, and therefore exempt from these requirements.[6] Among the reasons agency guidance may be legally challenged are procedural concerns that the agency inappropriately used guidance rather than the rulemaking process or concerns that the agency has issued guidance that goes beyond its authority. On March 9, 2015, the Supreme Court held that an agency could make substantive changes to an interpretive rule without going through notice and comment under the APA. This decision overturned prior federal court rulings that had held that an agency is precluded from substantively changing its interpretation of a regulation through issuance of a new interpretive rule without notice and comment.[7] Other concerns raised about agency use of guidance include consistency of the information being provided, currency of guidance, and whether the documents are effectively communicated to affected parties.

Departments Considered Few of Their Guidance Documents as Significant under OMB's Definition

An OMB Bulletin establishes policies and procedures for the development, issuance, and use of "significant" guidance documents.[8] OMB defines "significant guidance documents" as guidance with a broad and substantial impact on regulated entities.[9] Pursuant to a memorandum issued by the Director of OMB in March 2009, OMB's Office of Information and Regulatory Affairs (OIRA) reviews some significant

[6] *See* Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 5th Edition (Chicago, Illinois; American Bar Association, 2012) pp. 63-77; David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L.J. 276, 278-79 (2010); Stuart Shapiro, *Agency Oversight as "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 Harv. J.L. & Pub. Pol'y 523, 528 (2014). *See, e.g.*, Iowa League of Cities v. EPA., 711 F.3d 844 (8th Cir. 2013).

[7] Perez v. Mortgage Bankers Assn., 575 U.S. ____, 135 S. Ct. 1199 (2015).

[8] Office of Management and Budget, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432 (Jan. 25, 2007).

[9] Specifically, OMB defines significant guidance documents are those that may reasonably be anticipated to (1) lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended.

guidance documents prior to issuance. All significant guidance documents, whether reviewed by OIRA or not, are subject to the OMB Bulletin. "Economically significant guidance documents" are also published in the *Federal Register* to invite public comment. Non-significant guidance is not subject to the OMB Bulletin, and any procedures for developing and disseminating it are left to agency discretion.

Selected departments considered few of their guidance documents to be significant as defined by OMB. For example, as of February 2015, agencies listed the following numbers of significant guidance documents on their websites: Education, 139; DOL, 36; and USDA, 34.[10] We were unable to determine the number of significant guidance documents issued by HHS. In contrast, some of the agencies issued hundreds of non-significant guidance documents. All selected components told us that they did not issue any economically significant guidance. OIRA staff told us they accepted departments' determinations of which types of guidance meet the definition of significant guidance.

Agencies Issued a Wide Variety of Guidance Serving Multiple Purposes

Agencies Used Many Terms for Non-significant Guidance

The selected components we reviewed differed in both the terminology they used for their external non-significant guidance documents and in the amounts of non-significant guidance they issued. We found the components used many names for these guidance documents—for example, Education components' guidance documents included FAQs and "Dear Colleague" letters, while DOL components used varied terms including bulletins, "Administrator Interpretations," directives, fact sheets, and policy letters.

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

The components issued varying amounts of guidance ranging from 10 to more than 100 documents issued by a component in a single year. Component officials said a component's mission or the types of programs it administers can affect the number of guidance documents issued. Officials from DOL's Bureau of Labor Statistics (BLS) told us their agency, as a non-regulatory component, rarely issues guidance. They said BLS has issued about 10 routine administrative memorandums each year related to the operation of two cooperative agreement statistical programs. In contrast, DOL Occupational Safety and Health Administration (OSHA) officials told us they have regularly issued guidance to assist with regulatory compliance, and could easily produce 100 new or updated products each year to provide guidance to stakeholders. Although the DOL Office of Workers' Compensation Programs has regulatory authority, officials told us that they have not frequently issued guidance because their authorizing statutes have not changed recently and their programs focus on administering benefits.

Agencies Issued Non-significant Guidance Serving Multiple Purposes

Agencies have used guidance for multiple purposes, including explaining or interpreting regulations, clarifying policies in response to questions or compliance findings, disseminating suggested practices or leadership priorities, and providing grant administration information.

Explain or Interpret New, Immediate, or Upcoming Regulations

Component officials told us they used guidance to summarize regulations or explain ways for regulated entities to meet regulatory requirements. For example, Education officials told us that they often follow their regulations with guidance to restate the regulation in plainer language, to summarize requirements, to suggest ways to comply with the new regulation, or to offer best practices.

In a few cases, components used guidance to alert affected entities about immediate statutory requirements or to anticipate upcoming requirements to be promulgated through the rulemaking process. Education officials told us they often used guidance to help their field office staff understand and apply new statutory requirements. While this may provide timely information about new or upcoming requirements, it may also cause confusion as details are revised during the rulemaking process. Officials from USDA's Food and Nutrition Service (FNS) told us that when a new statute becomes effective immediately and there is little ambiguity in how the statute can be interpreted, they use a "staging process." In this process, they issue informational guidance so their stakeholders are aware of and consistently understand new requirements before the more time-consuming rulemaking process can be completed. Other officials

told us that in rare instances, they have issued guidance while a proposed rule is out for comment. They noted that statutory deadlines for implementation may require them to issue guidance before issuing a final rule.

Component officials cited instances in which they used guidance to provide information on upcoming requirements to be promulgated through regulation to those affected. In one example, HHS's Office of Child Care within the Administration for Children and Families issued recommendations to its grantees to foreshadow future binding requirements. In that case, the office issued an Information Memorandum in September 2011 recommending criminal background checks. It later published a proposed rule in May 2013 to mandate the background checks.[11]

Clarify Policies in Response to Questions or Compliance Findings

Multiple component officials told us that they used guidance to clarify policies in response to questions received from the field, or regional office input about questions received from grantees or regulated entities. Officials at Education's Office for Civil Rights and OSHA told us that they often initiated guidance in response to findings resulting from their investigatory or monitoring efforts, among other things.

Distribute Information on Suggested Practices or Leadership Priorities

Component officials also told us that they used guidance to distribute information on program suggestions (sometimes called best practices). In particular, we heard this from component officials who administered formula grants in which wide discretion is given to grantees, such as states. Officials at Education's Office of Postsecondary Education told us that component leadership initiates guidance related to priorities the administration wants to accomplish. One example they cited was a Dear Colleague letter explaining that students confined or incarcerated in locations such as juvenile justice facilities were eligible for federal Pell grants.

Provide Guidance on Grant Administration

Components that administered grants also issued procedural guidance related to grant administration. For example, BLS issued routine administrative memorandums to remind state partners of federal grant reporting requirements and closeout procedures. In other examples, DOL

[11]Administration for Children and Families, *Information Memorandum*, CCDF-ACF-IM-2011-05 (Sept. 20, 2011); 78 Fed. Reg. 29,441 (May 20, 2013).

provided guidance on how to apply and comply with Office of Disability Employment Policy grants.

Agencies Weighed Various Factors When Choosing Whether to Issue a Regulation or Guidance

Officials considered a number of factors before deciding whether to issue guidance or undertake rulemaking. Among these factors, a key criterion was whether officials intended for the document to be binding (in which case they issued a regulation). Officials from all components that issue regulations told us that they understood when guidance was inappropriate and when regulation was necessary and that they consulted with legal counsel when deciding whether to initiate rulemaking or issue guidance. According to DOL officials, new regulations may need to be issued if components determined that current regulations could not reasonably be interpreted to encompass the best course of action, a solution was not case specific, or a problem was widespread. An Education official told us that Education considered multiple factors, including the objective to be achieved, when choosing between guidance and regulations. Similarly, HHS's Administration for Community Living officials told us that they considered a number of factors, including whether the instructions to be disseminated were enforceable or merely good practice. For example, when Administration for Community Living officials noticed that states were applying issued guidance related to technical assistance and compliance for the state long-term care ombudsman program differently, they decided it would be best to clarify program actions through a regulation, as they could not compel the states to comply through guidance. Officials believed that a regulation would ensure consistent application of program requirements and allow them to enforce those actions. They issued the proposed rule in June 2013 and the final rule in February 2015.[12]

FNS officials told us that the decision to issue guidance or undertake rulemaking depended on (1) the extent to which the proposed document was anticipated to affect stakeholders and the public, and (2) what the component was trying to accomplish with the issued document. OIRA staff concurred that agencies understood what types of direction to regulated entities must go through the regulatory process.

[12]78 Fed. Reg. 36,449 (June 18, 2013) (proposed rule). 80 Fed. Reg. 7704 (Feb. 11, 2015) (final rule).

Agencies Can Ensure More Effective Guidance Processes through Consistent Adherence with OMB Requirements and Stronger Internal Controls

Agencies Did Not Always Adhere to OMB Requirements for Significant Guidance

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

We made recommendations to HHS and DOL to better adhere to OMB's requirements for significant guidance. Both agencies concurred with those recommendations. Without written procedures or wide knowledge of procedures for the development of significant guidance, HHS and DOL may be unable to ensure that their components consistently follow other requirements of the OMB Bulletin and cannot ensure consistency in their processes over time. Further, because agencies rely on their websites to disseminate guidance, it is important that they generally follow requirements and guidelines for online dissemination for significant guidance.

Stronger Application of Internal Controls for Guidance Processes Could Achieve Desired Results and Prevent Errors

In the absence of government-wide standards for the production of non-significant guidance, officials must rely upon internal controls—which are synonymous with management controls—to ensure that guidance policies, processes, and practices achieve desired results and prevent and detect errors. We selected four components of internal control and applied them to agencies' guidance processes (see appendix I). Departments and components identified diverse and specific practices that addressed these four components of internal control. However, the departments and components typically had not documented their processes for internal review of guidance documents. Further, agencies did not consistently apply other components of internal control. Some of the selected components identified practices to address these internal controls that we believe could be more broadly applied by other agencies. Wider adoption of these practices could better ensure that components have internal controls in place to promote quality and consistency of their guidance development processes.

To improve agencies' guidance processes, we recommended that the Secretaries of USDA, HHS, DOL, and Education strengthen their components' application of internal controls by adopting, as appropriate, practices developed by other departments and components, such as assessment of risk; written procedures and tools to promote the consistent implementation and communication of management directives; and ongoing monitoring efforts to ensure that guidance is being issued appropriately and has the intended effect. USDA, Education, HHS, and DOL generally agreed with the recommendations.

Determine Appropriate Level of Review to Manage Risk

Although no component can insulate itself completely from risks, it can manage risk by involving management in decisions to initiate guidance, prioritize among proposed guidance, and determine the appropriate level of review prior to issuance. In addition, if leadership is not included in discussions related to initiation of guidance, agencies risk expending resources developing guidance that is unnecessary or inadvisable.

At a few components, officials told us that leadership (such as component heads and department-level management) decided whether to initiate certain guidance, and guidance did not originate from program staff for these components. For example, guidance at DOL's Employee Benefits Security Administration related to legal, policy, and programmatic factors were proposed by office directors and approved by Assistant Secretaries and Deputy Assistant Secretaries. In most other cases, ideas for additional guidance documents originated from program staff and field offices or from leadership, depending on the nature of the guidance.

Education officials told us that component program staff and leadership work together to identify issues to address in guidance.

At most components, officials told us that they determine the appropriate level of review and final clearance of proposed guidance, and in many cases guidance was reviewed at a higher level if the document was anticipated to affect other offices or had a particular subject or scope. Risk was one factor agency officials considered when determining the anticipated appropriate level of review and final clearance of proposed guidance. For example, officials at the Employee Benefits Security Administration told us that the need for department-level clearance depended on various factors, including likely congressional interest, potential effects on areas regulated by other DOL components, expected media coverage, and whether the guidance was likely to be seen as controversial by constituent groups. A few agencies reported they considered two other factors in making this decision: whether guidance was related to a major priority or would be "impactful."

Maintain Written Policies and Procedures for the Production of Non-significant Guidance

Control activities (such as written procedures) help ensure that actions are taken to address risks and enforce management's directives. Only 6 of the 25 components we reviewed had written procedures for the entire guidance production process, and several of these components highlighted benefits of these procedures for their guidance processes. These components included HHS's Administration for Children and Families Office of Head Start and five DOL components. The DOL Mine Safety and Health Administration's written procedures contained information officials described as essential to the effective and consistent administration of the component's programs and activities. OSHA officials reported that their written procedures were designed to ensure that the program director manages the process for a specific policy document by considering feedback and obtaining appropriate concurrence to ensure that guidance incorporates all comments and has been cleared by appropriate officials. The Deputy Assistant Secretary resolves any disagreements about substance, potential policy implications, or assigned priority of the document.

In contrast, Education's Office of Innovation and Improvement and Office of Elementary and Secondary Education and DOL's Veterans' Employment and Training Service had written procedures only for the review and clearance phase. Components without written procedures said they relied on officials' understanding of the guidance process. In these cases, officials told us that the guidance process was well understood by program staff or followed typical management hierarchies.

Officials from all components could describe standard review practices to provide management the opportunity to comment and ensure that its comments were addressed by program staff. Nonetheless, documented procedures are an important internal control activity to help ensure that officials understand how to adequately review guidance before issuance.

Ensure Communication during the Guidance Development and Review Process

Most selected components had guidance practices to ensure either intra-agency and interagency review (or both) of guidance documents before issuance. Obtaining feedback from management, internal offices, the public, and other interested parties is essential to ensuring guidance is effective.

- Intra-agency communications. To ensure that management concurrence was recorded, most components we reviewed used communication tools, such as electronic or hard-copy routing slips, to document approval for guidance clearance or to communicate with management and other offices about proposed or upcoming guidance. In particular, officials at 20 components used a routing slip to document management concurrence.
- Interagency communications. Most component officials told us that they conferred with other affected components or federal departments to ensure consistency during the development of guidance.
- External stakeholders. Officials told us that feedback from external nonfederal stakeholders often served as the impetus for the initiation of guidance, and more than half of the selected components cited examples in which they conferred with external nonfederal stakeholders during the guidance development process. At OSHA, for example, external stakeholders were not involved in developing directives or issuing policy, but assisted with developing educational, non-policy guidance, such as hazard alerts.

Regularly Evaluate Whether Issued Guidance is Effective and Up to Date

Nearly half of the components we reviewed did not regularly evaluate whether issued guidance was effective and up to date. Without a regular review of issued guidance, components can miss the opportunity to revisit whether current guidance could be improved and thereby provide better assistance to grantees and regulated entities. DOL's Office of Labor-Management Standards officials told us they had not evaluated the relative success of existing guidance and therefore did not often revise guidance.

A few selected components had initiated or established a process for tracking and evaluating guidance to identify necessary revisions. For

example, in November 2011, officials at DOL's Office of Federal Contract Compliance Programs initiated a 2-year project to review their directives system to ensure that they only posted up-to-date guidance. As a result of the project, in 2012 and 2013 officials identified necessary updates to guidance, clarified superseded guidance, and rescinded guidance where appropriate. Officials told us that these actions reduced the original number of directives by 85 percent. Officials also told us that they did this to ensure that their guidance was more accurate and correct, and the actions resulted in officials posting only relevant and current guidance information on the component's website. Officials told us they now routinely monitor their directives about once a year and review other guidance documents each time they issue new regulations or change a policy to decide if they need to revise them. DOL's Employment and Training Administration used a checklist to review a list of active guidance documents and identified whether to continue, cancel, or rescind the guidance. In addition, officials indicated which documents were no longer active on their website. Lastly, DOL's Mine Safety and Health Administration also ensured that program officials periodically reviewed and updated guidance documents and canceled certain guidance.

Chairman Lankford, Ranking Member Heitkamp, and members of the Subcommittee, this concludes my prepared remarks. I look forward to answering any questions you may have.

GAO Contact and Staff Acknowledgments

For questions about this statement, please contact me at (202) 512-6806 or sagerm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals making key contributions to this testimony were Tim Bober, Assistant Director, Robert Gebhart, Shirley Hwang, Andrea Levine, and Wesley Sholtes.

Appendix I: Application of Select Internal Control Standards to Agencies' Guidance Processes

Component of Internal Control	Application to Guidance Processes
Risk Assessment Internal control should provide for an assessment of the risks the agency faces from both external and internal sources. Once risks have been identified, they should be analyzed for their possible effects.	Agencies should assess the level of risk associated with potential guidance at the outset to determine 1. the legal implications of the use of guidance based on available criteria, and 2. the appropriate level of review. Some agencies have found it helpful to categorize proposed guidance at initiation to determine different types and levels of review.
Control activities Internal control activities help ensure that management's directives are executed. Control activities are the policies, procedures, techniques, and mechanisms that enforce management's directives. They help ensure that actions are taken to address risks. The control activities should be effective and efficient in accomplishing the agency's control objectives.	The agency should maintain written policies, procedures, and processes to ensure that once the appropriate level of review has been determined, agency officials understand the process to adequately review guidance prior to issuance. Written policies and procedures should designate: 1. the appropriate level of review to maintain appropriate segregation of duties, and 2. the means by which management can comment on the draft guidance and program staff can address those comments.
Information and communication Information should be recorded and communicated to management and others within the entity who need it. In addition to internal communications, management should ensure there are adequate means of communicating with, and obtaining information from, external stakeholders who have a significant impact on the agency achieving its goals.	*Internal communications:* Agencies should have procedures in place to get feedback from management and other internal offices on guidance to be issued. For example, they should have a written mechanism (such as a routing slip) to document management review and associated comments and suggestions. *External communications:* Agencies should provide a means, via an e-mail box or contact person, for the public and interested parties to comment on the guidance, ask questions about the guidance, and facilitate two-way feedback and communication.
Monitoring Internal control should generally be designed to ensure that ongoing monitoring occurs in the course of normal operations.	Processes should be established to collect feedback on both the substance and clarity of guidance, to communicate this feedback to the appropriate officials, and to maintain applicable feedback to inform future guidance and revisions of guidance.

Source: GAO analysis of application of internal control standards (as shown in GAO, *Standards for Internal Control in the Federal Government* GAO/AIMD-00-21.3.1 (Washington, D.C.: November 1999)) to guidance processes based on discussions with agency officials and subject specialists (including legal scholars, OMB staff, and Food and Drug Administration officials). | GAO-15-834T

Appendix II: Components Included in Our Review

Department	Components
United States Department of Agriculture (USDA)	Food and Nutrition Service
Department of Education (Education)	Office for Civil Rights
	Office of Career, Technical, and Adult Education
	Office of Elementary and Secondary Education
	Federal Student Aid
	Office of Innovation and Improvement
	Office of Management
	Office of Postsecondary Education
	Office of Special Education and Rehabilitative Services
Department of Health and Human Services (HHS)	Administration for Children and Families' Office of Child Care
	Administration for Children and Families' Office of Head Start
	Administration for Community Living
Department of Labor (DOL)	Bureau of International Labor Affairs
	Bureau of Labor Statistics
	Employee Benefits Security Administration
	Employment and Training Administration
	Mine Safety and Health Administration
	Occupational Safety and Health Administration
	Office of Disability Employment Policy
	Office of Federal Contract Compliance Programs
	Office of Labor-Management Standards
	Office of Workers' Compensation Programs
	Veterans Employment and Training Service
	Wage and Hour Division
	Women's Bureau

Source: GAO analysis of the *Federal Register* and the *Catalogue of Federal Domestic Assistance*. | GAO-15-834T

STATEMENT OF
MARY BETH MAXWELL
PRINCIPAL DEPUTY ASSISTANT SECRETARY
OFFICE OF THE ASSISTANT SECRETARY FOR POLICY
U.S. DEPARTMENT OF LABOR

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

LEGISLATIVE HEARING ON EXAMINING THE USE OF AGENCY REGULATORY GUIDANCE

Wednesday, September 23, 2015

Mr. Chairman, Ranking Member Heitkamp, and members of the Subcommittee, my name is Mary Beth Maxwell, and I am the Principal Deputy Assistant Secretary and head of the Office of the Assistant Secretary for Policy 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 guidance that informs the regulated community and all of our stakeholders of their rights and responsibilities under the numerous 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, and workers' compensation programs. The laws that we administer and enforce cover 10 million employers and 125 million workers.

The Department takes seriously our responsibility to develop regulations that implement these laws in order to effectuate Congress's intent in enacting them. Effective regulations 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 the safety and security in the workplace.

In addition to the regulations that the Department develops, consistent with E.O. 12866, E.O. 13563, and the Administrative Procedure Act's notice and comment process, the Department also issues guidance to a wide range of stakeholders who want and need more clarity about how to interpret our regulations. This guidance can include answers to day-to-day questions about how these rules apply to specific circumstances, or sometimes just lists of examples of promising practices for compliance and implementation.

As I will describe today in more detail, we strive to issue guidance that is both responsive and accessible to a broad range of our stakeholders. Unlike notice-and-comment rulemaking, we use guidance to further clarify requirements already set out in statutes and regulations. As a result, we often issue guidance using processes that maintain our flexibility to respond quickly to emerging challenges. We also use technology both to inform our guidance and to disseminate it to the widest range of stakeholders. While we take pride in our efforts to provide guidance, we are always seeking opportunities to improve as well.

Issuing Responsive, Accessible Guidance for a Broad Range of Stakeholders

The Department seeks opportunities to issue guidance that is both responsive and accessible to the broadest range of our stakeholders. Employers, workers, job seekers, and retirees regularly seek guidance, and the Department welcomes opportunities to provide such guidance because everyone is better off when they understand both the laws that affect them and the resources that may be available to assist them.

The Department believes that its stakeholders are best served by the development of broad guidance applicable to a variety of scenarios, not just individual responses to inquiries that are dependent on a particular set of facts. We certainly consider the letters and phone calls that we receive from the public and from Members of Congress to inform what guidance is necessary and useful, and we also utilize advisory committee reports, listening sessions with stakeholders, 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 issues guidance to play a number of different roles, including clarifying regulations, providing information on promising practices, providing assistance on grant administration, responding to specific stakeholder questions that have broad application, providing information on the Department's current priorities and initiatives, and directing stakeholders and the regulated community to the resources that we have available to help them comply with the laws that you have entrusted to us to enforce. Sometimes we combine these efforts to inform a range of stakeholders about broader legislative or regulatory updates. For example, we have developed a range of resources to describe our final rule extending minimum wage and overtime rights to most direct care workers, including fact sheets, frequently asked questions, step-by-step self-assessment tools, and archived webinars explaining various aspects of the rulemaking. Together, these resources address the needs of a variety of audiences, from workers to family-employers to state 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 and responsibilities under the Family and Medical Leave Act that together lay out the most common types of requests for FMLA leave and the factors that employers must take into account in deciding how to respond 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 concrete tips about how miners can stay safe while working around conveyors.

Maintaining Flexibility to Respond to Emerging Challenges

Another important aspect of the Department's guidance is that we must maintain the flexibility to be able to provide timely assistance that is responsive to stakeholder questions or other current challenges. For example, since last fall, the Occupational Safety and Health Administration has been participating in and coordinating worker safety and health aspects of the domestic response to the 2014 Ebola outbreak. OSHA and its partners released numerous 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.

Guidance documents that do not rise to the level of significant guidance under OMB's 2007 Bulletin on Good Guidance Practices are cleared and reviewed at an appropriate level, depending on the audience, complexity, and impact. In addition, draft guidance documents may be circulated for clearance among other interested component agencies for example, the Women's Bureau or the Office of Disability Employment Policy for guidance documents related to their areas of expertise.

In developing these sorts of guidance products, we are not generally required to utilize notice-and-comment rulemaking procedures. Public input regarding these documents is nonetheless valuable, and 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.

Of course, there are situations in which we more formally seek public comments on a guidance document because, for example, of its significance. We are pleased that the Government Accountability Office'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."[1] For example, this past spring, the Department published for public comment our proposed guidance to assist contracting agencies and the contracting community in applying the requirements of President Obama's Fair Pay and Safe Workplaces Executive Order, including evaluating the severity of labor law violations. The proposed guidance was published alongside the Federal Acquisition Regulatory Council's proposed regulations implementing the Executive Order, with concurrent comment periods, providing the regulated community with a full 90 days to assess the two packages together and weigh in on the full implementation picture.

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

As these examples demonstrate, the Department remains committed to developing and maintaining a strong set of policies and practices for providing the public and stakeholders with critical and time-sensitive information through guidance.

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 multi-agency 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.[2]

While we focus on agency-specific guidance, we know that many visitors, especially workers and small business owners, to our website 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. 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, asking questions and providing responses. 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.

Pursuing Opportunities to Improve

We are always committed to finding ways to improve. As such, building upon helpful recommendations from GAO, we are reviewing and updating our written procedures for the internal review and approval of significant guidance documents. The Department is also taking steps to strengthen our component agencies' application of internal controls to the issuance of guidance more generally. The Department convened an internal working group comprised of senior policymakers from the Department's component agencies. The working group began sharing best practices to promote more consistent application of internal controls in the Department's guidance production process. We are now compiling a list of leading examples of how our component agencies ensure that guidance is developed and vetted with appropriate feedback and review; the resulting list will be disseminated to the Department's relevant leaders. Finally, the Department is continuing to identify and, where appropriate, implement website improvements and customer satisfaction metrics to help ensure that the public can more easily access and comment on our guidance documents. As a start, we plan to launch a new web portal

[2] GAO Report at 35-37.

that will help the public find guidance documents published by each of our component agencies. The objective of all of these efforts is to help our stakeholders in understanding and complying with the laws that are relevant to them.

Conclusion

The Department remains committed to our broad efforts to develop and disseminate accurate, timely, and helpful guidance that informs the employers, workers, retirees, the workforce system, and all of our stakeholders of their rights and responsibilities under the numerous laws that we administer and enforce. We look forward to continuing a dialogue with you to discuss other ideas for improving our process. Meanwhile, the Department will continue to provide swift, systematic, 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.

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

on "Examining the Use of Agency Regulatory Guidance"

September 23, 2015

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

I appreciate the opportunity to be here today to testify about the Department of Education's issuance of guidance.

Guidance is an important tool the Department uses to communicate timely and consistent information to the diverse groups we serve – students, parents, teachers and other educators, States, schools and school districts, institutions of higher education, advocates, and the general public. In particular, we use guidance to promote transparency by helping explain to our partners how they can comply with statutes and regulations. Guidance is often provided in response to questions from the public that we believe have broad implications, and by answering them, we can provide all interested parties with important assistance. We communicate with the public through a variety of forms, including in-person forums and conferences, grantee conferences, technical assistance sessions, the Department's webpage, publications, reports, and letters. Guidance documents are another important tool used to communicate. As confirmed in the Government Accountability Office ("GAO") report, the Department is careful to follow established processes and procedures when issuing significant guidance.

Guidance documents provide useful information about the statutes, regulations, and programs we administer and about good practices in the field in order to respond to stakeholders' questions, to help them understand and comply with statutory and regulatory requirements, and to have places to look for best practices. The usage of guidance in this manner is distinguished from the Department's rulemaking process, which is used if new, legally binding rules are 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 appreciates the opportunity to hear from members of the public because of the many circumstances when their viewpoints can assist the Department as it develops and updates guidance. The Department regularly receives both formal and informal feedback from stakeholders on our guidance and takes into account public feedback when developing and updating guidance.

Significant Guidance

During the previous Administration, the Office of Management and Budget ("OMB") released a Bulletin ("the Bulletin") establishing policies and procedures for the development, issuance, and

use of significant guidance documents. The Department adheres fully to the Bulletin regarding good guidance practices. 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 also went through an exhaustive review of guidance documents issued before the 2007 Bulletin, to ensure that the appropriate documents were included on the list of significant guidance documents.

The GAO found 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."

In line with the 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 document in this link provides information regarding the date the significant guidance was issued, 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. This document not only contains significant guidance distributed since the Bulletin was established in 2007, but also lists nearly 80 significant guidance documents issued prior to 2007 and prior to the establishment of the guidelines.

Development of Guidance

The Department has established a formal clearance process for significant guidance that adheres to the OMB's 2007 Bulletin. Guidance that does not meet the OMB Bulletin's definition of "significant guidance" is left to agency discretion for procedural development. Because of variance in the importance and scope of guidance that does not meet the Bulletin's definition of "significant," procedures also may vary slightly among different offices within the Department. We encourage all offices that want to issue guidance to go through several levels of internal review for clarity, consistency, and effectiveness. Program offices also may informally engage external stakeholders to seek their views and/or expertise during the guidance drafting process.

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. Several 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 confirmed by the recent GAO study, the Department makes 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 that we can support our grantees and stakeholders. If legally binding programmatic changes are required, however, the Department uses the rulemaking process to implement those.

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 Bulletin, the public can submit comments on significant guidance through a designated e-mail address. In many circumstances, the Department receives feedback for 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 Innovation and Improvement administers a grantee satisfaction survey that solicits feedback about grant guidance dissemination. Another office within the Department, the Office of Management, currently has posted on the web draft guidance regarding the disclosure of student medical records under the Family Educational Rights and Privacy Act and is soliciting public input on that draft. Again, for significant guidance, the Department maintains an e-mail address to allow the public to submit comments on the document. We also provide a contact when we issue guidance to provide the public with a way to submit feedback about the Department's guidance and/or our practices.

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. We've appreciated receiving the GAO report and have reviewed GAO's recommendations. Based on those recommendations we are currently in the process of reviewing procedures of Department offices for the development and production of all guidance, "significant" or other. We will provide to offices standard protocols that they can use to clarify management roles, document management review, and approval of guidance. The Department will also review its presentation of guidance on the Department's website and identify best practices to improve the online presentation and accessibility of guidance documents.

Conclusion

The Department is committed to ensuring that guidance is used 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 on Good Guidance Practices and are committed to working toward implementing 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.

nacd
National Association of
Chemical Distributors

Advancing Stewardship, Creating Connections

Statement of Mat Brainerd
Chairman & CEO, Brainerd Chemical Company, Inc.
Chairman, National Association of Chemical Distributors
On behalf of the National Association of Chemical Distributors
Before the Senate Subcommittee on Regulatory Affairs and Federal Management
Hearing titled "Examining the Use of Agency Regulatory Guidance"
September 23, 2015

Chairman Lankford, Ranking Member Heitkamp, and Members of the Regulatory Affairs and Federal Management Subcommittee:

Thank you for allowing me to submit this statement today for the Regulatory Affairs and Federal Management Subcommittee hearing: "Examining the Use of Agency Regulatory Guidance."

I am the Chairman and CEO of Brainerd Chemical Company, Inc. and Chairman of the National Association of Chemical Distributors (NACD). Brainerd Chemical, headquartered in Tulsa, Oklahoma, first opened in 1959 and I have been the owner since 1979, when I took over from my father. We have 88 full-time employees at two facilities located in Oklahoma, one facility located in North Carolina and a third party warehouse located in Dallas, Texas. Brainerd Chemical serves over 3,000 customers in 40 states and multiple industries including: agriculture, aerospace, transportation, food processing, glass, oil and gas, personal care and water treatment.

NACD and its nearly 440 member companies are vital to the chemical supply chain providing products to over 750,000 diverse companies such as aerospace, agriculture, cosmetics, detergents, electronics, automotive, plastics, paints and coatings, pharmaceuticals, food ingredients, water treatment and more. They make a delivery every seven seconds while maintaining a safety record that is consistently better than all manufacturing combined. NACD members, operating in all 50 states through nearly 1,600 facilities, are responsible for more than 175,000 direct and indirect jobs in the United States. NACD members are predominantly small regional businesses, many of which are multi-generational and family owned. The typical chemical distributor has 26 employees and operates under an extremely low margin.

On June 5, 2015, the U.S. Occupational Safety and Health Administration (OSHA) issued an enforcement memorandum, effective immediately, which substantially expanded the universe of chemical manufacturers and distributors subject to the Process Safety Management (PSM) standard. For such a major change to its regulations, OSHA should have invited public comment and conducted a cost-benefit analysis through a formal rulemaking process.

The PSM standard requires manufacturers and distributors to develop and implement a PSM program any time they have a threshold amount of a highly hazardous chemical involved in a process, including storage. Appendix A to PSM lists the highly hazardous chemicals and the minimum threshold amount for each material that triggers PSM requirements. Unless a

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specific percentage is stated in Appendix A, OSHA applies a "commercial grade" standard where threshold levels only apply to pure or "commercial grade" chemicals.

OSHA's June 5 memorandum, however, simply replaced OSHA's prior policy with a portion of an Environmental Protection Agency Clean Air Act rule. Under the new memorandum, if the total weight of a chemical without a specified concentration under PSM's Appendix A is at one percent or greater, the processor will now be required to use the one percent calculation to determine whether a threshold quantity of the chemical is present.

Under this change, a large number of chemical distributors that were not covered under the prior "maximum commercial grade concentration" will now be covered under the one percent interpretation. Eighty-five percent of NACD members have less than 100 employees meaning this change will have wide sweeping and costly impacts on small businesses across the country. In a recent survey, NACD members indicated that this change will impose substantial new regulatory burdens on them, with costs ranging from $20,000 to up to $1 million per member company, depending on their products and operations.

These changes by OSHA of PSM will bring significant impact to my company. Although Brainerd Chemical maintains PSM operating procedures on three chemicals, the new standard would add five additional PSM operation procedures with a minimum of thirteen additional processes. The preparation of these additional PSM operating procedures is extremely complex, consisting of 14 elements for a PSM plan, and will require substantial manpower and additional financial resources.

Thank you again for the opportunity to provide these comments regarding the impact OSHA's change will have on Brainerd Chemical and other members of NACD. I hope it has provided helpful insight regarding the significant impact this memorandum will have on small businesses and the chemical distribution industry.

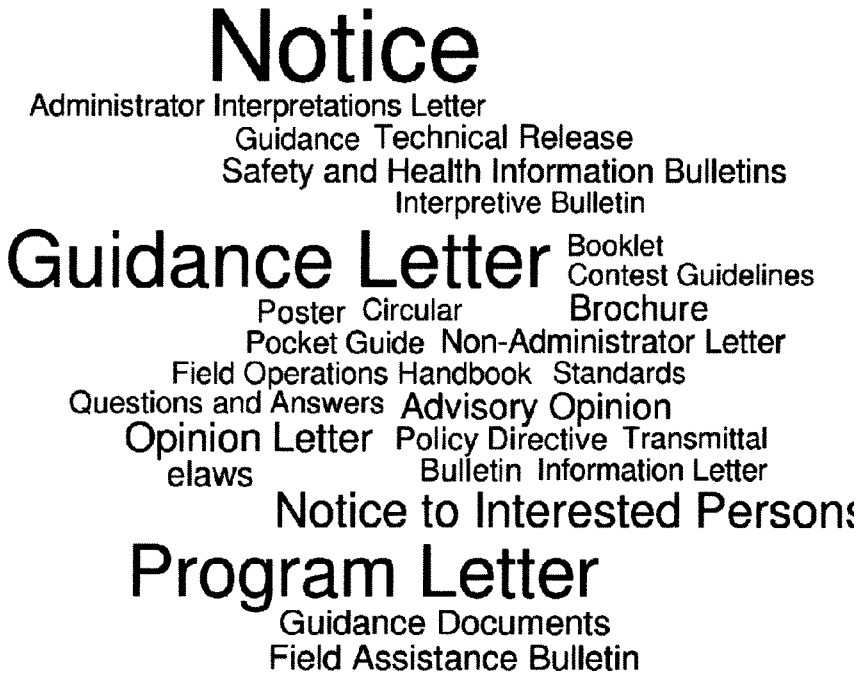
Sincerely,

Mat Brainerd

Department of Education

Policy Guidance Memorandum
Policy Letter
Policy Guidance
Publications - General
Guidance and Notices Program Memo
Memorandum Best Practices
Joint Guidance FAQ
Nonregulatory Guidance Annual Report
PDF Document Notices
Guidance Letter
Guidance
General Information and Guidance
Policy Memorandum
Documents - General
Dear Colleague

Department of Labor



GAO U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

November 6, 2015

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

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

Michelle A. Sager

Michelle A. Sager
Director, Strategic Issues

Enclosure

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

"Examining the Use of Agency Regulatory Guidance"
September 23, 2015

Subcommittee on Regulatory Affairs and Federal Management

On Characteristics of Guidance

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

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

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

requirements, the guidance changes were difficult to keep up with and led to increased confusion about the requirements.[2]

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

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

On Maintaining Up-to-Date Information for the Public

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

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

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

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

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

On the Role of OIRA

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

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

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

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

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

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

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

On Solutions and Oversight over the Guidance Process

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

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

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

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

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

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

"Examining the Use of Agency Regulatory Guidance"
September 23, 2015

Subcommittee on Regulatory Affairs and Federal Management

Questions from Senator Lankford

On the Decision to Initiate Guidance and Relevant Controls

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

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

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

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

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

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

> (1) have a $100 million annual effect on the economy OR adversely affect certain aspects of the economy (a sector, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities);

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866."

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

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

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

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

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

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

On Adherence to OMB Guidelines for Guidance

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

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

Answer: The recent GAO report highlights areas where the Department has strong practices for developing guidance. GAO recognized that the Department has "consistently applied OMB Bulletin requirements for public access and feedback for significant guidance."[1]

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

On PSM: recognized and generally accepted good engineering practices

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On PSM: retail exemption

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Answer: See response to 4(a) above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On Labor's Plans for Rulemaking on PSM Standards

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

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

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

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

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

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

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

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

On a checklist to decide to proceed with guidance

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

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

On Conferring with Regulated Entities

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

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

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

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

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

On Adherence to OMB Guidelines for Guidance

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

Answer: The recent GAO report highlights areas where the Department has strong practices for developing guidance. GAO recognized that the Department has "consistently applied OMB Good Guidance Bulletin requirements for public access and feedback for significant guidance."[2]

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

On Maintaining Up-to-Date Information for the Public

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

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

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[2] *Id.*

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

On Progress Made in Answer to GAO's Report

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

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

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

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

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

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[3] *Id.* at p.104.

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

Answer: The Department appreciates the recommendation.

Questions from Senator Alexander

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Questions from Senator Daines

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

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

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

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

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

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

"Examining the Use of Agency Regulatory Guidance"
September 23, 2015

Subcommittee on Regulatory Affairs and Federal Management

Questions from Senator Alexander

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

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

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

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

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

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

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

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

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

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

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

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

"Examining the Use of Agency Regulatory Guidance"
September 23, 2015

Subcommittee on Regulatory Affairs and Federal Management

On the Decision to Initiate Guidance and Relevant Controls

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

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

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

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

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

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

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

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

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

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

On OCR sexual harassment guidance

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

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

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

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

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

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

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

On OCR bullying/harassment guidance

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

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

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

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

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

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

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

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

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

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

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

On OCR school discipline guidance

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

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

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

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

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

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

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

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

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

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

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

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

On Adherence to OMB Guidelines for Guidance

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

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

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

On Conferring with Regulated Entities

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

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

On Maintaining Up-to-Date Information for the Public

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

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

On Progress Made in Response to GAO's Report

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

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

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