

Comments on Proposed Bulletin for Good Guidance Practices

These comments are being submitted in response to OMB's proposed bulletin issued on November 23, 2005, regarding good practices for the issuance of agency guidance documents. The area of guidance documents has long been a gap in the oversight of agency decisionmaking. The OMB bulletin is an impressive step toward filling this gap.

Academics have long speculated that as the regulatory process grows more cumbersome, agencies will turn to less time consuming tools of policymaking such as the issuance of guidance documents.¹ While there has been no empirical work on the increased use of guidance by agencies as policymaking tools, anecdotal evidence certainly lends credence to the hypothesis that their use has increased.

Guidance documents as their name implies can play an important role distinct and different from regulations. Every interpretive question that comes before an agency does not require APA rulemaking to resolve. Both regulated parties and agencies can profit from judicious use of agency interpretations of existing laws and regulations. Concerns arise however when these guidance documents take the place of regulations; when agencies use them to set new policies. Without the checks of APA rulemaking such policies could get enacted without public comment or oversight by presidential appointees.

It is this latter category of agency guidance documents that the OMB proposal is presumably intended to impact. I believe the proposal is long overdue. In particular I would single out for praise, sections III (1) and III (2) which require the listing on the Internet of "significant guidance documents" and the opportunity for the public to provide feedback on such documents. I also heartily endorse the idea that senior agency officials must approve significant guidance documents (Section II (1)(b)) although I would recommend a definition of such officials.

There are some areas in which the proposal could be improved. In particular:

- Is there really a need for the category of "economically significant guidance documents? Can OMB provide any examples of guidance documents that have an annual impact on the economy of more than \$100 million (excluding documents that impact Federal expenditures and receipts)? If this is just a theoretical concern, then the additional category makes the bulletin more confusing and unwieldy.
- Who decides whether a guidance document is significant? This question is particularly important because sections ii., iii., and iv. of the definition of a "significant guidance document" are highly subjective. It is very easy to envision agency officials declaring very few guidance documents to be significant. While regular OMB oversight of the significance determination is likely to be impractical, there may be a role for the public here. The public could tell OMB

¹ See Thomas McGarity: Some Thoughts on DeOssifying the Rulemaking Process, 1992.

when they believe a guidance document is significant and OMB could ask agencies to respond to such comments.

- One of the most important qualities of a guidance document is its legal effect. I recommend that agency intentions for the legal effect of a document be added to Section II(2), the list of standard elements for each significant guidance document. While agencies can't be held responsible for how courts will use guidance documents, they can at least be expected to state clearly their intention as to how the document should be used. (this is mentioned in the preamble but is missing from Section II(2)).
- As mentioned above, the term "senior agency officials" should be defined.

In conclusion, this proposed bulletin is a positive step and a logical extension of OMBs oversight of the regulatory process.

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