Dear Ms. Echols:

Please find enclosed my personal recommendation for a new Executive Order on federal regulatory review. Thank you for the opportunity to comment and for your consideration.

Best regards,

Paul Noe
March 16, 2009

(Via Email: oira_submission@omb.eop.gov)

Attn: Mabel Echols  
Office of Information and Regulatory Affairs  
Records Management Center  
Office of Management and Budget  
Room 10102, NEOB  
725 17th Street, NW  
Washington, DC 20503

RE: Federal Regulatory Review

Dear Ms. Echols:

Thank you for the opportunity to participate in the dialogue to develop a set of recommendations to the President for a new Executive order on federal regulatory review. I am writing in my personal capacity as a citizen interested in government reform and a former employee of OMB’s Office of Information and Regulatory Affairs. Through my experience in government as well as the private sector, I strongly believe that there is a need for interagency review of significant guidance documents.

While the OMB Director’s recent Memorandum M-09-13 on review of guidance documents is encouraging, for the sake of transparency, accountability and effectiveness, I submit there is a need for language addressing OIRA review of guidance documents in the Executive order on regulatory review. Unlike President Reagan’s Executive Order 12291, which applied to legislative rules as well as interpretive rules and policy statements, President Clinton’s Executive Order 12866 on its face only applies to regulatory actions “which the agency intends to have the force and effect of law.” (Sec. 2(d)).

The Executive Branch and the public would greatly benefit from procedures to clarify the activity of various agencies on significant policy statements and interpretive rules, as well as the responsibilities of the agencies and OIRA. For similar reasons, I recommend that OMB continue to implement its Bulletin for Agency Good Guidance Practices.

I am attaching an article from the Yale Journal on Regulation in which I analyzed Executive Order 12866 and the precedent and need for formally extending it to guidance documents.

I appreciate your consideration.

Best regards,

[Signature]

Paul Noe

Attachment
Paul R. Noe & John D. Graham

Symposium:
Due Process and Management for Guidance Documents:
Good Governance Long Overdue

25 YALE J. ON REG. 103
Due Process and Management for Guidance Documents: Good Governance Long Overdue

Paul R. Noe

John D. Graham†

On January 18, 2007, President Bush signed amendments to clarify and strengthen Executive Order (E.O.) 12,866, which President Clinton had issued to update principles for inter-agency planning and review of regulations. The most important provisions of President Bush’s E.O. 13,422 clearly extend inter-agency review to guidance documents. E.O. 13,422 was reinforced by a Bulletin for Agency Good Guidance Practices issued by the Office of Management and Budget (OMB). Together, E.O. 13,422 and the OMB Bulletin establish the first government-wide “rules of the road” to manage the development and use of guidance documents.

OMB now has clear authority to review significant agency guidance documents, just as OMB reviews significant agency regulations. The agencies, in turn, are required to give OMB advance notice of their upcoming significant guidance documents. OMB will be responsible for ensuring that other interested agencies occasionally have notice and an opportunity to provide input into the most important guidance documents.

In the view of the authors, the outcry that followed the issuance of the Order and Bulletin was remarkable and unwarranted. On one hand, the two most controversial provisions in E.O. 13,422 (which are irrelevant to guidance documents) were edits to authorities already provided by the Clinton Order—edits that were unnecessary and unlikely to practically affect regulatory policy de-

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velopment. On the other hand, extending the existing regulatory review process to significant guidance documents is a beneficial and essential change—the most important change to the regulatory review process since President Reagan formalized it in 1981. This Essay briefly reviews the evolution of E.O. 13,422 and the OMB Bulletin and argues that their good guidance provisions were firmly supported by precedent and long overdue.

I. Background

President Reagan’s Executive Order 12,291, which firmly established OMB regulatory review, covered virtually all rules. E.O. 12,291 defined its scope by incorporating most of the definition of “rule” from the Administrative Procedure Act, which includes not only legally binding legislative rules (“regulations”), but also interpretive rules and policy statements (“guidance documents”). In theory, OMB’s authority under the Reagan Order was strikingly broad on two levels: First, it did not establish a “significance” threshold for OMB review. Second, the Order did not limit OMB review of guidance documents.

In practice, too, the breadth of OMB’s authority was unwieldy. Each year, agencies issue on the order of 4000 regulations, and the number of guidance documents is orders of magnitude larger. With several dozen staff, OMB’s Office of Information and Regulatory Affairs (OIRA) cannot hope to review more

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5 See Exec. Order No. 12,291, 3 C.F.R. 127, 127 (1981) (“‘Regulation’ or ‘rule’ means an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency . . . .”).


7 See, e.g., Peter L. Strauss, The Rulemaking Continuum, 41 DUKE L.J. 1465, 1469 (1992) (noting that the formally adopted rules of the Federal Aviation Administration are two inches thick, but the corresponding guidance materials, over forty feet; Part 50 of the Nuclear Regulatory Commission’s regulations on nuclear plant safety, in loose-leaf edition, is 3/16 of an inch, but the supplemental technical guidance is 9 3/4 inches; and the formally adopted regulations of the IRS occupy one foot of shelf space, but Revenue rulings and similar publications, about twenty feet); see also H. Comm. on GOV’T. REFORM, NON-BINDING LEGAL EFFECT OF AGENCY GUIDANCE DOCUMENTS, H.R. REP. No. 106-1009 (2000) (noting that between March 1996 through 1999, MARESA had issued 1225 guidance documents, EPA 2653, and OSHA 1641).
than a small fraction of these rules. Our understanding is that during the Reagan and G.H.W. Bush years, OMB rarely called in guidance documents for review and did not have an established practice for doing so. However, OIRA did routinely review large numbers of legislative rules in its early years.  

In 1993, President Clinton replaced the Reagan Order with E.O. 12,866, which limited OIRA review to “regulatory actions” that were “significant.” This was both wise and unwise. Given the vastness of federal regulatory activity and the limited resources of OIRA, it was eminently sensible to try to sort the significant agency activity from the insignificant. The problem is that while the Clinton Order applied to significant legally binding regulations, it neglected guidance documents. Indeed, while the Clinton Order is less than pellucid, it evidently curtailed the previous OMB authority over guidance documents. Former OIRA Administrator Sally Katzen has stated that “Executive Order 12,866 was written to apply only where agencies undertook regulatory actions that had the force and effect of law” and that she never reviewed a guidance document during her tenure in the Clinton administration. If that is the case, we believe that the Clinton Order was not only unclear but also fundamentally flawed.

II. The Foundation for Good Guidance Practices

There is a strong foundation for the good guidance practices reflected in the OMB Bulletin and E.O. 13,422. First and foremost, the Administrative

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8 A cursory review of the record shows that OIRA reviewed a much greater number of rules under E.O. 12,291 during the Reagan and Bush-41 years than under E.O. 12,866 during the Clinton and Bush-43 years. For example, under E.O. 12,291, OIRA reviewed 2637 rules in 1982 (79 were economically significant) and in 1990 reviewed 2137 (82 were economically significant). By contrast, under E.O. 12,866, OIRA reviewed 831 rules in 1994 (134 were economically significant) and in 2002 reviewed 609 rules (100 were economically significant). See Office of Mgmt & Budget, Review Counts, http://www.reginfo.gov/public/do/oeCountSearchl?action=last (last visited Dec. 14, 2007).

9 E.O. 12,866 applied to an “agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret or prescribe law or policy or to describe the procedure or practice requirements of an agency.” See Exec. Order No. 12,866, 3 C.F.R. 638, 641 (1993), reprinted in 5 U.S.C. § 601 (2000) (emphasis added).


Conference of the United States (ACUS)\textsuperscript{12} issued recommendations for the development and use of agency guidance documents.\textsuperscript{13} As far back as the mid-1970s, for example, ACUS recognized the importance of ensuring a notice and comment process for the most significant guidance documents.

ACUS Recommendation 76-5 states:

Before an agency issues, amends or repeals an interpretive rule of general applicability or statement of general policy which is likely to have a substantial impact on the public, the agency normally should utilize the procedures set forth in the Administrative Procedure Act subsections 553(b) and (c) . . . . Where there has been no prior notice and opportunity for comment, the publication of an interpretive rule of general applicability or a statement of general policy . . . should include . . . an invitation to interested persons to submit written comments.\textsuperscript{14}

ACUS Recommendation 92-2 later added:

Agencies should not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures . . . . Policy statements of general applicability should make clear that they are not binding . . . Agencies that issue policy statements should examine, and where necessary, change their . . . procedures . . . to allow as an additional subject requests for modification or reconsideration of such statements.\textsuperscript{15}

In 1993, the American Bar Association (ABA) reaffirmed the ACUS recommendations on the use of informal notice and comment procedure for significant guidance documents.\textsuperscript{16} In 2001, the ABA further recommended that agencies "explore means to maximize the availability and searchability of existing law and policy on their websites" and include "their governing statutes, all

\textsuperscript{12} ACUS was a federal advisory agency charged with providing recommendations on administrative procedure issues. During its existence from 1986 to 1995, ACUS made over 200 recommendations on administrative procedure issues, and over 200 were adopted by agencies or by Congress. See Florida State University College of Law, ABA Administrative Procedure Database, www.law.fsu.edu/library/admin/acus/acuscoc.html (last visited Dec. 14, 2007).

\textsuperscript{13} See Recommendations of the Administrative Conference of the United States, Agency Policy Statements, Rec. 92-2, 1 C.F.R. § 305.92-2 (1992), available at http://www.law.fsu.edu/library/admin/acus/305922.html; AM. BAR ASS'N, ANNUAL REPORT INCLUDING PROCEEDINGS OF THE FIFTY-EIGHTH ANNUAL MEETING 57 (1993) ("The American Bar Association recommends that before an agency adopts a nonlegislative rule that is likely to have a significant impact on the public, the agency provide an opportunity for members of the public to comment on the proposed rule and to recommend alternative policies or interpretations, provided that it is practical to do so; when nonlegislative rules are adopted without prior public participation, immediately following adoption, the agency afford the public an opportunity for post-adoptions comment and give notice of this opportunity.").


\textsuperscript{15} Agency Policy Statements, Rec. 92-2, 1 C.F.R. § 305.92-2.

\textsuperscript{16} AM. BAR ASS'N, supra note 13.
agency rules and regulations, and all important policies, interpretations, and other like matters which members of the public are likely to request."

In 1997, the Food and Drug Administration (FDA) created a guidance document distilling its good guidance practices (GGP). Following the FDA's publication of its original GGP, Congress then mandated by law certain aspects of the 1997 GGP document in the Food and Drug Administration Modernization Act of 1997 (FDAMA). In FDAMA, Congress detailed basic elements of good guidance practices and required the FDA to issue new GGP as regulations.

In the legislative history of FDAMA, Congress expressed particular concern about public knowledge of, and access to, FDA guidance documents; the lack of a systematic process for adopting guidance documents and for allowing public input; and inconsistency in the use of guidance documents. Recognizing that those same concerns apply to other agencies as well, OMB used the FDA regulations mandated by Congress as a model for its government-wide Good Guidance Practices.

Finally, though ACUS and the ABA do not have formal positions specifically addressing OMB review of guidance documents, they produced long-standing recommendations supporting presidential oversight of rulemaking as an essential element of good government.

In sum, the good guidance provisions of E.O. 13,422 and the OMB Bulletin are firmly rooted in the recommendations of leading authorities that have stood for decades. If anything, the Order and Bulletin modestly implement

20 Id. (establishing FDA good guidance practices as law). The FDAMA also directed the FDA to evaluate the effectiveness of the 1997 GGP document and then to develop and issue the regulations specifying the FDA's policies and procedures for the development, issuance and use of guidance documents. The FDA conducted an internal evaluation soliciting FDA employees' views on the effectiveness of GGP and asking whether FDA employees had received complaints regarding the agency's development, issuance and use of guidance documents since the development of GGP. FD found that its GGP had been beneficial and effective in standardizing the agency's procedures for development, issuance and use of guidance documents, and that FDA employees had generally been following GGP. The FDA then made some changes to its existing procedures to clarify its GGP. See Administrative Practice and Procedures: Good Guidance Practices, 21 C.F.R. § 10.115 (2007).
those recommendations. For example, E.O. 13,422 established a more streamlined review process for guidance documents than used for regulations. Likewise, the OMB Bulletin requires pre-adoption notice and comment only for potentially “economically significant” guidance, whereas the FDA, as well as ACUS and the ABA, would do so for all significant guidance.24

III. The Need for Good Guidance Practices

We support prioritizing regulatory review based on significance as President Clinton’s E.O. 12,866 did, but we have no doubt that guidance documents can be quite significant and have been neglected.

Although guidance documents may not properly carry the force of law, they are a key component of regulatory programs. As the breadth and complexity of regulatory programs has grown, agencies increasingly have relied on guidance documents to provide direction to their staff and to the public. That direction is essential to operating regulatory programs.

Nonetheless, concerns have persisted over the years about agency guidance practices. On one level, there are basic concerns about due process and fairness—the need for greater transparency, opportunity for comment, and accountability in issuing guidance. There also have been concerns about the need for coordination and management of guidance documents so they are coherent within and across agency programs and do not conflict with the priorities of the President. Finally, there is growing concern that guidance documents often are being used in lieu of regulations—without observing the procedural safeguards for regulations. As the D.C. Circuit observed:

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on... Law is made, without

24 See FDA Good Guidance Practices, 21 C.F.R § 10.115(g) (2007) (pre-adoption notice and comment for “Level 1” guidance documents); Recommendations of the Administrative Conference of the United States, Interpretive Rules of General Applicability and Statements of General Policy, Rec. 76-8, 1 C.F.R. § 305.76 (1992), available at http://www.law.fsu.edu/library/admin/sec/30576.html (pre-adoption notice and comment for nonlegislative rules “likely to have a substantial impact”); AM. BAR ASS’N, ANNUAL REPORT INCLUDING PROCEEDINGS OF THE FIFTY-EIGHTH ANNUAL MEETING 57 (1993) (same). While the OMB did not go so far as to mandate pre-adoption notice and comment for all significant guidance, the OMB encouraged it. As it stated in the preamble to its Bulletin:

Although this Bulletin does not require agencies to provide notice and an opportunity for public comment on all significant guidance documents before they are adopted, it is often beneficial for an agency to do so when they determine that it is practical. Pre-adoption notice and comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial.

72 Fed. Reg. at 3438. Perhaps in the future after the Bulletin has been successfully implemented, its scope could be expanded consistent with this precedent.
notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.\textsuperscript{25}

It should be noted that whether or not guidance documents are “spurious rules”\textsuperscript{26} subject to legal challenge, as a practical matter guidance can have coercive effects or lead parties to alter their conduct. As OMB explained in the preamble to the Bulletin:

For example, under a statute or regulation that would allow a range of actions to be eligible for a permit or other desired agency action, a guidance document might specify fast track treatment for a particular narrow form of behavior but subject other behavior to a burdensome application process with an uncertain likelihood of success. Even if not legally binding, such guidance could affect behavior in a way that might lead to an economically significant impact. Similarly, an agency might make a pronouncement about the conditions under which it believes a particular substance or product is unsafe. While not legally binding, such a statement could be reasonably anticipated to lead to changes in behavior by the private sector or governmental authorities such that it would lead to a significant economic effect.\textsuperscript{27}

Because such impacts—while perhaps more remote and attenuated—can be as significant as the impacts of regulations, it is reasonable that the Bulletin establishes a presumption of pre-adoption notice and comment for “economically significant” guidance and that E.O. 13,422 facilitates interagency review of significant guidance.

Prior to the issuance of E.O. 13,422 and the Bulletin on Good Guidance Practices, OMB had received scores of examples of problematic guidance and agency practices in response to its 2002 request for comments on problematic guidance,\textsuperscript{28} other requests for regulatory reform nominations,\textsuperscript{29} and the public comments on the proposed Bulletin.\textsuperscript{30} The supporters of good guidance practices were as diverse as the Ornithological Council, homebuilders, funeral directors, the farming community, large and small business, educational organizations, and state and local government.

\textsuperscript{25} Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (striking down emissions monitoring guidance as requiring notice and comment through legislative rulemaking procedures).

\textsuperscript{26} See supra note 11.


As OMB detailed in the preamble to the Bulletin, such concerns have been raised for years by many authorities, including Congress,\(^{31}\) the courts,\(^{32}\) the Executive Branch,\(^{33}\) the ABA,\(^{34}\) scholars,\(^{35}\) and the regulated community.\(^{36}\)

In July 2007, after a rider to block funding for implementation of E.O. 13,422 was attached to a House appropriations bill, the regulated community swiftly reacted to oppose a similar Senate provision. Sixty-four trade associations representing most of the American economy opposed the rider, including big and small business, agriculture, education and other interests.\(^{37}\) The primary motivation evidently was to preserve the good guidance practices reflected in the Order and Bulletin.\(^{38}\) In addition, the Director of OMB sent a let-
ter to the appropriators threatening a veto recommendation for any provision that would prohibit funding or restrict implementation of E.O. 13,422.  

The rider was dropped before the Senate appropriations committee markup, but the rider still had strong support. Following a debate on the Order and Bulletin at the annual meeting of the ABA Section of Administrative Law and Regulatory Practice, the Section sent letters to Congress opposing defunding of the Bulletin and the good guidance provisions of the Order. Ultimately, the House rider was chopped from the final consolidated appropriations act.

In the day-to-day operations of the Executive Branch, there is a need for ground rules to address ignorance and confusion about what agencies are doing on important guidance documents. Likewise, there is a need to demarcate the authority and responsibilities of OMB and the agencies. E.O. 13,422 clarifies while streamlining the traditional review process. For guidance documents, the agencies need only provide OMB with an advance list of upcoming significant guidance (not the guidance itself, nor an economic analysis). OMB can call in for review only the small share of guidance documents that merit consideration by its limited staff and the other interested agencies. This avoids needless burdens on the agencies and OMB.

Finally, clear OMB authority over guidance documents is necessary to preserve OMB’s authority over regulations. Otherwise, the dysfunction diagnosed by the D.C. Circuit in Appalachian Power could occur in the regulatory review process. An agency could issue “regulations containing broad language, open-ended phrases, ambiguous standards and the like.” Such skeletal regulation might pass through interagency review without raising concerns. However, the agency could then follow with guidance “expanding the commands in the regulations” and so forth to a degree that would have raised concerns in the interagency review process—or in Congress—had the details appeared in the regulations from the start. Indeed, the dearth of clear OMB authority could explain how Appalachian Power occurred.

From that perspective, E.O. 13,422 can be viewed as part of a larger movement by the three constitutional branches of the government—the Legisla-

39 Letter from Rob Portman, Director, Office of Mgmt. & Budget, to the Honorable Robert C. Byrd, Chairman, Comm. on Appropriations (July 12, 2007) (on file with the author).

40 See Durbin Votes to Block Funds for White House Regulatory Review Order, INSIDE EPA, Aug. 22, 2007 (on file with the Yale Journal on Regulation).

41 See Letter from Michael Astracan, Chair of the ABA Section of Administrative Law and Regulatory Practice, to Senators Richard Durbin and Sam Brownback (Nov. 8, 2007) (on file with the author). The letter does not take a position with respect to the controversial provisions of E.O. 13,422. See also supra note 3.


43 Appalachian Power Co. v. EPA, 208 F.3d 1015, 1019 (D.C. Cir. 2000).

44 Id.
The three branches of government—legislative, executive, and judiciary—are the traditional executive—to assert authority over the so-called "Fourth Branch of Government."

IV. Conclusion

Controversy has been with us since the inception of centralized review of rules, and doubtless it will continue. Nonetheless, it is our hope that a close consideration of the relevant language and practical significance of E.O. 13,422 and the OMB Bulletin will mitigate those concerns. Formally extending the regulatory review process to guidance documents was much needed and long overdue.

45 Congress asserted direct supervisory power and "veto" authority over agency rules—both regulations and guidance documents—in the Congressional Review Act of 1996. See 5 U.S.C. § 804(3) (2000) (incorporating the APA's definition of "rule"). As discussed above, in FDAMA Congress legislatively mandated FDA's pre-existing good guidance practices. See supra notes 18-21 and accompanying text.

46 See supra notes 11 & 25 and accompanying text.