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REGULATORY STUDIES PROGRAM

Public Interest Comment on
Proposed Bulletin for Good Guidance Practices¹
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The Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University is dedicated to advancing knowledge of the impact of regulation on society. As part of its mission, RSP conducts careful and independent analyses employing contemporary economic scholarship to assess rulemaking proposals from the perspective of the public interest. Thus, this comment on the Office of Management and Budget's Proposed Bulletin for Good Guidance Practices does not represent the views of any particular affected party or special interest group, but is designed to evaluate the effect of the Agency's proposals on overall consumer welfare.

I. Introduction

The Administrative Procedure Act of 1946 exempts "interpretive rules," which include guidance documents, from its public notice and comment procedures.² As the regulatory world has become larger and more complex, agencies have increasingly relied upon guidance documents as a non-binding means of explaining gaps and/or ambiguities in statutes and regulations. Recognizing both the growing importance of guidances and their potential as substitutes for regulations promulgated according to APA procedures, the Office of Management (OMB) has issued a Proposed Bulletin for Good Guidance Practices (GGP). Essentially, this bulletin outlines guidelines for the making of guidances and should bring much need transparency and accountability to the issuance of guidances.³

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² 5 U.S.C. § 553(b)(A) (2004).

³ Office of Management and Budget, Proposed Bulletin for Good Guidance Practices 1 (Nov. 23, 2005) [hereinafter GGP].

II. Discussion

A. Background: The Administrative Procedure Act

In 1941 The Final Report of the Attorney General's Committee on Administrative Procedure defined a federal agency as a government unit with "the power to determine... private rights and obligations,"⁴ and, using this definition, estimated that the federal government contained 51 "agencies." Of these 51, only 11 had existed prior to the end of the Civil War,⁵ while 35 had been created by statute between 1900 and 1940⁶ with 17 springing up in the 1930s.⁷ The rapid growth of federal agencies concerned those on both sides of the New Deal, and even President Franklin Roosevelt worried that administrative agencies with both legislative and judicial powers would eventually morph into a fourth branch of government.⁸ In response to the looming threat that executive agencies might soon bundle the jobs of legislator, judge, jury, and executioner into one, neat administrative package, Congress passed the Administrative Procedure Act (APA) in 1946.

The APA created a procedure for the promulgation of regulations. Agencies would have to inform the public of their organization, procedures, and rules, while also giving the public notice of new or changing rules⁹ and an opportunity to comment and participate in the rulemaking process¹⁰. In addition to increasing transparency in the rulemaking process, the APA also defined the scope of judicial review, allowing courts to invalidate regulations that had not been made without the appropriate process or exceeded the statutory authority granted the issuing agency by Congress.¹¹

While the APA was a landmark piece of legislation and has served to protect the public from secretive and arbitrary rulemaking, it does contain one very large loophole that has been abused in the past. The APA does not apply to all rules issued by agencies, and

⁴ THE FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, at 7 (1st Sess. 1941).

⁵ *Id.* at 8.

⁶ *Id.* at 9-10.

⁷ *Id.* at 10. It should not escape notice that the number of agencies created adds up to 52, rather than the total of 51 presented in the Final Report. This is due to the inclusion of the Treasury Department's short-lived Processing Tax Board of Review, which was enacted in 1936. Unfortunately for the Processing Tax Board of Review, the Supreme Court declared the statute authorizing it (the Agricultural Adjustment Act) unconstitutional, and the agency had ceased to exist by the time of the Final Report in 1941. *Id.* at 10 n. 9.

⁸ Franklin D. Roosevelt, Message from the President of the United States (Jan. 12, 1937), in REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT ON REORGANIZATION OF EXECUTIVE DEPARTMENTS, S. DOC. NO. 8, at 3 (1st Sess. 1937).

⁹ 5 U.S.C. § 553(b) (2004).

¹⁰ 5 U.S.C. § 553(c) (2004).

¹¹ 5 U.S.C. § 706 (2004).

exempts “interpretive” rules from the rulemaking procedures.¹² Known as “guidances,” these interpretive rulings are supposed to be non-binding on the public and can either pertain to routine day-to-day operations of the agency or good faith attempts by the agency to informally fill in or explain gaps or vague language in congressional statutes or its own regulations. The exemption for guidances makes perfect sense provided it is exercised in good faith. The general public does not need notice and comment on the procedures governing conduct in the EPA break room, nor does a formal rule need to be promulgated every time an individual inquires as to whether or not he or she is in compliance with a gray area within a statute or regulation. Furthermore, guidances can be quite helpful to persons or businesses struggling to understand complex or overly technical laws and regulations.¹³

However, while they are not binding and technically no substitute for administrative rulemaking, guidances can and have had the same effects as regulations while avoiding the APA’s protections.¹⁴ For example, in 1997 a Houston company requested information from OSHA regarding its policies on employees working from home.¹⁵ Two years later, OSHA issued a guidance to existing rules, which ruled that “the OSH Act applies to work performed by an employee in any workplace within the United States, including a workplace located in the employee’s home.”¹⁶ At the time some 15 million Americans regularly worked from home, and in order to continue doing so they would have to bring their domiciles into line with government workplace regulations. While technically not binding, the guidance sent employers into a panic, causing many to either cancel or freeze popular programs allowing employees to work from home.¹⁷

The APA contained many exemptions intended to ensure that the act would not unduly encumber the functions of government. However, years of experience have demonstrated that some of these exempted “interpretive rules” can reach beyond the mere function of government and weigh heavily upon the general public. While this may not have been as true at the enactment of the APA, the growth of the federal government has gradually increased the number and impact on the general public of interpretive rules, while denying them the opportunity for notice and comment. The dramatic rise in regulation

¹² 5 U.S.C. § 553(b)(A) (2004).

¹³ See Cindy Skrzycki, *Finding a Way to Better Guidance*, THE WASHINGTON POST, Dec. 20, 2005, at D 1.

¹⁴ Although dating from 1992, an excellent list of the previous misuses of guidances can be found in Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?* 41 DUKE L.J. 1311, 1333-1355 (June 1992).

¹⁵ Letter from Mr. T. Trahan, CSC Credit Services, to Mr. John B. Miller, Director of Compliance, Occupational Safety and Health Administration (Aug. 21, 1997), available at <http://www.osha.gov/as/opa/foia/csc-letter.pdf>.

¹⁶ Letter from Richard E. Fairfax, Director Directorate of Compliance Programs, Occupational Safety and Health Administration, to Mr. T. Trahan, CSC Credit Services (Nov. 15, 1999) (withdrawn Jan. 5, 2000), available at http://www.osha.gov/as/opa/foia/hot_4.html.

¹⁷ See D. MARK WILSON, OSHA’S RETREAT DOES NOT END THE THREAT TO WORKING AT HOME, (The Heritage Foundation, Executive Memorandum No. 641, Jan. 10, 2000).

since the passage of the APA warrants a reevaluation of these exemptions and more explicit, transparent, and accountable practices for developing and implementing guidance documents. The 51 agencies the writers of the APA sought to make more accountable has now become 68.¹⁸ The number of persons writing, administering, and enforcing regulations has grown from 57,100 in 1960 to 240,838 in 2005,¹⁹ while government spending on regulatory activities rose from \$2.53 billion in 1960 to a projected \$36.87 billion in 2006.²⁰ As OMB notes in its draft guidelines:

As the scope and complexity of regulatory programs have grown, agencies increasingly have relied on guidance documents to inform the public and to provide direction to their staffs. As the impact of guidance documents on the public has grown, so too, has the need for good guidance practices (GGP)—clear and consistent agency practices for developing, issuing and using guidance documents.²¹

B. Recommendations by the Administrative Conference of the United States

Although abolished by Congress in 1995, the Administrative Conference of the United States (ACUS) made many recommendations regarding the exemptions contained in the APA. ACUS recommended removing the exemption covering rules promulgated in relation to “public property, loans, grants, benefits, or contracts.” ACUS concluded that although these rules mainly covered the internal workings of government, they “may nevertheless bear heavily upon nongovernmental interests. Exempting them from generally applicable procedural requirements is unwise.”²²

ACUS persistently recommended agencies keep the public informed of actions affecting them, regardless of whether or not they were required to by law:

Agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible. To this end, each agency which takes actions affecting substantial public or private interests, whether after hearing or through informal action, should, as far as is feasible in the circumstances, state the standards that will guide its

¹⁸ Susan Dudley and Melinda Warren, *Upward Trend in Regulation Continues: An Analysis of the U.S. Budget for Fiscal Years 2005 and 2006*, 27TH REGULATORS’ BUDGET REPORT (Mercatus Center at George Mason University, Arlington, VA and Weidenbaum Center at Washington University, St. Louis, MO), June 2005, at 2.

¹⁹ It should be noted that this number has spiked recently due to the hiring of thousands of Transportation Safety Administration baggage screeners. However, the 2000 total was still 175,087, or more than triple the 1960 figure. *Id.* at 5.

²⁰ *Id.* at 4. Figures presented in real (inflation adjusted) year 2000 dollars.

²¹ GGP, *supra* note 3, at 1.

²² *Elimination of Certain Exemptions from the APA Rulemaking Requirements*, ADMIN. CONF. OF THE U.S. RECOMMENDATION NO. 69-8, 1 C.F.R. s 305.69-8 (1969).

determination in various types of agency action, either through published decisions, general rules or policy statements other than rules.²³

Much to its credit, ACUS and many agencies recognized the power of guidance documents and their similarity to binding rules. The growing influence of guidance documents suggests that while their exemption may be the letter of the law under the APA, their growth has arguable pushed them into the APA's spirit and warrants submitting guidances to notice and comment procedures.

At times policy statements and interpretive rules are barely distinguishable from substantive rules for which notice and comment is required. For that and other reasons many agencies have often utilized the notice-and-comment procedures set forth in section 553 of the Act, without regard to whether their pronouncements fall into one category or another. This is, in general, beneficial to both agencies and potentially affected elements of the public. Providing opportunity for comment upon interpretive rules and policy statements of general applicability, sometimes before and sometimes after their adoption, makes for greater confidence in and broader acceptance of the ultimate agency judgments.²⁴

Before an agency issues, amends, or repeals an interpretive rule of general applicability or a statement of general policy which is likely to have substantial impact on the public, the agency normally should utilize the procedures set forth in the Administrative Procedures Act subsections 553(b) and (c), by publishing the proposed interpretive rule or policy statement in the Federal Register, with a concise statement of its basis and purpose and an invitation to interested persons to submit written comments, with or without opportunity for oral presentation. If it is impracticable, unnecessary, or contrary to the public interest to use such procedures the agency should so state in the interpretive rule or policy statement, with a brief statement for the reasons therefore.²⁵

ACUS also recognized that sometimes necessity dictates that rules or guidances be issued without the notice and comment. However, even in these situations where notice and comment have been bypassed legally and with good cause, ACUS still recommended that agencies conduct a period of notice and comment following enactment.

Where there has been no prepromulgation notice and opportunity for comment, the publication of an interpretive rule of general applicability or a statement of general policy, even one made effective immediately, should include a statement

²³ *Articulation of Agency Policies*, ADMIN. CONF. OF THE U.S. RECOMMENDATION NO. 71-3, 1 C.F.R. s 305.71-3 (1971).

²⁴ *Interpretive Rules of General Applicability and Statements of General Policy*, ADMIN. CONF. OF THE U.S. RECOMMENDATION NO. 76-5, 1 C.F.R. s 305.76-5, 41 FR 56769 (Dec. 30, 1976).

²⁵ *Id.*

of its basis and purpose and an invitation to interested persons to submit written comments, with or without opportunity for oral presentation, within a following period of not less than thirty days. The agency should evaluate the rule or statement in the light of comments received. Not later than sixty days after the close of the comment period, the agency should indicate in the Federal Register its adherence to or alteration of its previous action, responding as may be appropriate to significant comments received.”²⁶

Even after noting that courts had found that agencies had used the good cause exemption “with due regard to Congress’ admonition that exemptions from section 553 requirements be construed narrowly,” ACUS still recommended that agencies provide some sort of ex-post notice and comment for rules promulgated under the good cause exception.²⁷

OMB’s Good Guidance Practices come very close to the recommendations made by ACUS. GGP are very careful to exclude their applicability to activities, such as formal regulatory rulemaking, administrative adjudication, and Federal expenditures and receipts, which are governed by their own more elaborate procedures. Furthermore, the GGP exceptions are reasonable and so far within the internal workings of government that they are less likely to have an impact on the public.

III. Conclusion and Recommendation

While the GGP are excellent ideas and provide procedure where previously there had been none, they might be made better with a few, minor alterations.

The definition of “significant guidance document” includes a guidance document that may “[r]easonably be anticipated to lead to an annual effect of \$100 million or more or adversely affect in a material way the economy or sector of the economy.”²⁸ While the intent of the definition is clear, it could be sidestepped. Since guidance documents are not binding, then one could easily argue that even the most burdensome guidance would cost nothing. Therefore, for purposes of cost evaluation, it might be advisable to treat the guidance document as if it was a binding rule when measuring its economic impact.

The proposed standard elements of a guidance document include avoiding the use of “loaded” terms that might lead a reader to believe the document is binding. While prohibiting the use of words such as “shall,” “must,” “required,” or “requirement,”²⁹ is certainly very helpful, their mere exclusion may not be enough to thoroughly communicate to the reader that the guidance is non-binding. Perhaps the inclusion of prominent, specific language (maybe in a color other than the body of the document),

²⁶ *Id.*

²⁷ *The “Good Cause” Exemption from APA Rulemaking Requirements*, ADMIN. CONF. OF THE U.S. RECOMMENDATION NO. 83-2, 1 C.F.R. s 305.83-2, 48 FR 31181 (July 7, 1983).

²⁸ GGP, *supra* note 3, at 4.

²⁹ *Id.* at 5.

which explicitly states that the guidance is not binding and does not carry the force of law would be appropriate to ensure that unwitting members of the public do not mistake the guidance for a binding document.

While OMB's GGP provides for extensive notice and comment during the drafting of guidances, it does not provide for a period between the time the final draft is issued and when it goes into effect.³⁰ OMB's language suggests that major changes made in a draft guidance prior to its final release may escape notice and comment. A small time period (perhaps 30 days) would allow the public to become aware of the guidance before it takes effect.

The Office of Management and Budget should be applauded for developing practices designed to bring additional accountability and transparency to the promulgation of guidances. Although they are legally non-binding, guidances can have effects similar to those of formal rulemaking and adjudication. The proposed GGP are consistent with recommendations of ACUS on this subject, as well as practices in place by at least one federal agency (the Food and Drug Administration).³¹ They should ensure greater public awareness of the role and impact of new guidance documents, as well as appropriate review and public participation. Particularly with the above mentioned additions, they should also ensure that guidances are not improperly treated as binding requirements.

³⁰ *Id.* at 6-7.

³¹ *Id.* at 3.