



March 12, 2009

Mr. Peter R. Orszag
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Dear Mr. Orszag,

We are writing in reply to the February 26, 2009 request for comments for a new Executive Order on Federal Regulatory Review, published in the Federal Register at 74 FR 8819. We are professors of law and of public policy who specialize in the study of the federal administrative process. We have written and published a number of empirical studies on the federal regulatory process, including a number of analyses of OMB review in particular. In this letter we offer one recommendation for your consideration.

Recommendation: We recommend that the President's new Executive Order on Federal Regulatory Review establish within OMB an "Agency Guidance Document Clearinghouse."

The Agency Guidance Document Clearinghouse would serve as a publicly accessible repository for all federal agency guidance documents. The Executive Order would require all agencies to submit their guidance documents to OMB in a timely fashion. OMB would in turn post this information on a publicly accessible website.

We define "agency guidance documents" as any document issued by a government agency that clarifies or explains agency policies or agency interpretations of statutes in ways designed to influence and structure the behavior of regulated entities or the public at large, but which is not a legally binding "rule" within the meaning of Section 553 of the Administrative Procedures Act (APA).

In our view it is highly desirable for OMB to play a role in collecting and making public in a centralized repository agency guidance documents that are intended to, or that do in fact, have quasi-legal effects but which do not go through the APA-proscribed notice and comment process. As it stands, agency use of guidance documents is highly non-transparent, as guidance documents are not generally required to be published, either in the Federal Register or elsewhere. This possibility raises issues of equity, as all members of the public are not given equal opportunity to influence agency statements of policy that may have something approaching the force of law, even if they are not, formally speaking, legally binding. Agency use of guidance documents as substitutes for regulation also has the potential to increase regulatory uncertainty, as regulated entities have trouble anticipating or influencing changes in agency positions, or even of identifying what the controlling agency position on a given issue is.

We recognize that there are costs to the collection and dissemination of this information. However, in our view, the public benefits outweigh the expected costs in this case. Moreover, we believe that our recommendation accords with President Obama's repeated calls for greater transparency in the work of the federal government.

Thank you in advance for consideration of this recommendation. If we can be of assistance in any way during the development of the new Executive Order on Regulatory Review, then please do not hesitate to contact us.

Sincerely,

Jason Webb Yackee
Assistant Professor of Law

Susan Webb Yackee
Assistant Professor of Public Affairs
& Political Science