

United States Senate

WASHINGTON, DC 20510-2101

May 7, 2015

The Honorable Thomas E. Perez
Secretary
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Dear Secretary Perez:

As Chairmen of the U.S. Senate Committee on Health, Education, Labor and Pensions (HELP Committee) and the Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, we write to request information about the Department of Labor's (DOL) use of guidance documents.

The Administrative Procedure Act (APA) requires federal agencies to follow certain procedures before issuing a regulation. In general, the agency must issue a notice of proposed rulemaking, allow a public comment period, and respond to the public's comments. Interpretive rules, commonly known as guidance or non-legislative rules, are exempt from the APA's notice and comment requirements because they do not have the force of law. Indeed, the Administrative Conference of the United States describes guidance as "nonbinding statements of interpretation, policy, and advice about implementation" of statutes or regulations.¹ Similarly, the Supreme Court's recent decision in *Perez v. Mortgage Bankers Association* makes clear that guidance is meant to "advise the public" and "do[es] not have the force and effect of law."²

We are concerned, however, that federal agencies are increasingly using guidance that appears to create new requirements without the benefit of notice and comment but with the expectation that the public comply. At a HELP Committee hearing last June, Catherine Lhamon, the Assistant Secretary for the Office for Civil Rights at the Department of Education, testified that the Department of Education expects institutions of higher education to comply with its guidance.³ Yet, guidance is not intended to be binding.

We are concerned that agencies may be issuing guidance to avoid regulatory requirements. According to regulatory scholars, "agencies take creative steps to bypass the APA" and "use [guidance] in instances where they might want to change the behavior of the regulated public but

¹ Administrative Conference of the U.S., Admin. Conf. Recommendation 2014-3, Guidance in the Rulemaking Process, June 6, 2014.

² 575 U.S. __ (No. 13-1401, 2015) at 3.

³ <http://www.help.senate.gov/hearings/hearing/?id=0b51c18f-5056-a032-5268-c16c292050b5>.

for reasons of time, political sensitivity, or constraints on resources, they might find the usual regulatory procedures too burdensome.”⁴ In *Perez v. Mortgage Bankers Association*, the Supreme Court echoed this reality stating, “there may be times when an agency’s decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions [of the APA].”⁵ If, as the Court noted, an agency does issue guidance or revise existing interpretive rules without adhering to notice and comment procedures, it is possible that agencies are doing so without accountability to the public, as the APA contemplated.

In 2007, the Office of Management and Budget (OMB) issued a Final Bulletin for Agency Good Guidance Practices that established procedures for the use of significant guidance documents and cautioned that “rules which do not merely interpret existing law or announce tentative policy positions but which establish new policy positions that the agency treats as binding must comply with the APA’s notice-and-comment requirements, regardless of how they are initially labeled.”⁶ Pursuant to the bulletin, each agency must designate an office “to receive . . . complaints by the public that the agency is not following the procedures in [the] bulletin or is improperly treating a significant guidance document as a binding requirement.”⁷ Guidance is significant when, among other things, it has a “broad and substantial impact” on regulated parties.⁸

To inform the Committees about DOL’s use of guidance and the public’s response, please provide the following information by May 29, 2015.

- 1) A list of all guidance issued on or after July 24, 2007, that have been the subject of a complaint that DOL is not following the procedures outlined in OMB’s Final Bulletin for Agency Good Guidance Practices.
- 2) A list of all guidance issued on or after July 24, 2007, that have been the subject of a complaint that DOL is improperly treating a guidance document as a binding requirement.
- 3) A list of all guidance, including guidance not deemed significant, issued on or after July 24, 2007, that have been the subject of a complaint or written comments that DOL should have engaged in APA notice and comment rulemaking instead of issuing guidance.
- 4) Provide the complaints or written comments and all documents and communications referring or relating to the complaints or written comments referenced in requests one through three.

⁴ John D. Graham & James W. Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, Harvard Journal of Law & Public Policy, Spring 2014.

⁵ 575 U.S. __ (No. 13-1401, 2015) at 12.

⁶ Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3433 (Jan. 25, 2007).

⁷ *Id.* at 3440.

⁸ *Id.* at 3435.

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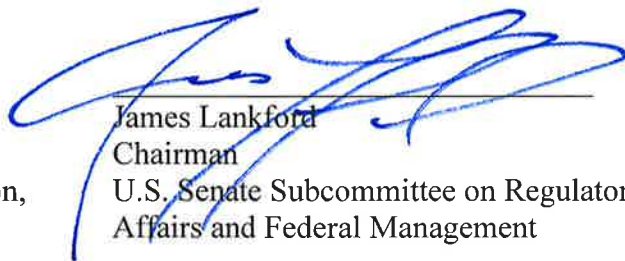
- 5) A list of guidance issued on or after July 24, 2007, that has been overturned by a court of law, including guidance that has been overturned in which an appeal is pending.
- 6) From July 24, 2007, to present, all documents and communications referring or relating to a decision to issue guidance on a topic instead of proceeding with notice and comment rulemaking under the APA.
- 7) The number of guidance documents issued on or after July 24, 2007, broken down by year, sub-agency, and whether or not the guidance is significant.
- 8) A list of all guidance currently in draft form and the date the draft was issued.
- 9) A list of all guidance that has been withdrawn on or after July 24, 2007.

If you have any questions about this request, please have your staff contact Kristin Nelson, HELP Committee Senior Oversight & Investigations Counsel, at (202) 224-6770. Thank you for your attention to this matter.

Sincerely,



Lamar Alexander
Chairman
U.S. Senate Committee on Health, Education,
Labor and Pensions



James Lankford
Chairman
U.S. Senate Subcommittee on Regulatory
Affairs and Federal Management

cc: The Honorable Patty Murray
Ranking Minority Member
U.S. Senate Committee on Health, Education, Labor and Pensions

The Honorable Heidi Heitkamp
Ranking Minority Member
U.S. Senate Subcommittee on Regulatory Affairs and Federal Management