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A Partial Eclipse of the Administrative State

A Case for an Executive Order to Rein in Guidance Documents and other
“Regulatory Dark Matter”

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Deterioration of checks and balances via regulatory overreach and over-delegation by Congress to agencies are central to most modern critiques of the administrative state. Less appreciated, though, is the extent to which administrative agencies can influence policy without going through the established rulemaking process.¹ While there are a few dozen laws enacted annually² alongside thousands of agency rules, agencies have issued reams of guidance documents consisting of general statements of policy³ and interpretive rules,⁴ as well as memoranda, interpretive bulletins, and other issuances—over the years that can carry regulatory weight.

Congress should both streamline such decrees and reaffirm that such policy making via guidance is not binding. However, given that congressional action is both slow and unlikely in the short term, the president should issue a new executive order to highlight and strengthen the review and control of sub-regulatory guidance documents. This can tie together the threads of regulatory elimination, restraint and disclosure already adopted by the administration by addressing stealth rulemaking that falls through the cracks.⁵

Over-delegation by Congress to agencies, overreach by those agencies, and court deference to that state of affairs have led to this proliferation of regulation. These concerns are central to modern critiques of the administrative state.⁶ In his 2014 book, *Is Administrative Law Unlawful*, Columbia Law Professor Philip Hamburger observes:

Administrative law ... has transformed American government and society. Although this mode of power is unrecognized by the Constitution, it has become the government’s primary mode of controlling Americans, and it increasingly imposes profound restrictions on their liberty. ... Although the Constitution lays out lawful avenues for issuing edicts that constrain the public, the government often takes other paths.⁷ ...

[A]dministrative power revives extralegal rulemaking, interpretation, dispensing, and suspending, and thus almost the entire regime of extralegal lawmaking once associated with absolute prerogative power. It thereby restores what constitutions barred when they located legislative power in their legislatures.” (p. 128)⁸

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The 1946 Administrative Procedure Act (APA, P.L. 79-404) established the public consultation rulemaking process (Section 553 rulemaking), which consists of advance notification of rulemaking to give the public the opportunity to provide comment on a published proposed rule before it is finalized in the *Federal Register*.⁹ Despite its purported safeguards, the APA’s rulemaking process allows for wiggle room via its “good cause” exemption, by which an agency may deem notice and comment for certain rules as “impracticable, unnecessary, or contrary to the public interest.”¹⁰ To worsen this weakening of checks and balances, the APA enables administrative agencies to influence policy and exert preferences and biases, without writing notice-and-comment regulations at all.¹¹

While there are a few dozen laws enacted annually¹² alongside several thousands of agency rules, thousands upon thousands more agency general statements of policy¹³ and interpretive rules,¹⁴ both commonly called “guidance documents,” have been issued over the years. The catalog of allegedly sub-regulatory decrees goes on, encompassing memoranda, notices, circulars, FAQs, administrator’s interpretations, bulletins, and other forms of “regulatory dark matter”—including even press releases and blog posts.¹⁵ Such guidance can subvert the APA as a safeguard against overregulation. Worse, such widespread use of guidance displays disregard for constitutional norms.

Assuming one can even locate them, such agency edicts are not supposed to be legally binding on the public, or even on the agencies themselves. Yet, agencies sometimes invoke or refer to guidance in correspondence or interaction with regulated entities. While businesses frequently request clarifying guidance,¹⁶ even the Administrative Conference of the United States (ACUS) acknowledges that “members of the public may feel bound by what they perceive as coercive guidance” and “sometimes find they have no practical escape from the terms of a policy statement.”¹⁷ Regarding the perception that guidance is non-binding, the Center for Regulatory Effectiveness notes, “Nothing could be farther from the truth; agency guidance is binding upon the regulated community until which time a party convinces senior management of the agency to the contrary.”¹⁸

In addition, a significant amount of both regulations and guidance is invalid, not having been submitted to Congress and to the Comptroller General of the Government Accountability Office (GAO) as required by the 1996 Congressional Review Act (CRA), which was intended to give Congress the opportunity to enact “resolutions of disapproval” to repeal certain agency rules.¹⁹ The submission must consist of “a copy of the rule” and a descriptive statement on whether or not it is considered “major”—defined as having estimated annual costs of \$100 million or more. For major rules, GAO must prepare a separate report, which it then incorporates into its database.²⁰ The CRA gives Congress 60 legislative days to review a final major rule and pass a resolution of disapproval, which gets expedited treatment in the Senate.²¹

In principle, the CRA represents the most significant semi-recent affirmation of congressional authority over regulation and the administrative state.²² However, until the Trump administration’s rejection of 15 rules, plus one guidance document, as of October 2018, only one rule had been rejected, early in President George W. Bush’s first term.²³ However, pruning back agency rules, or pausing their issuance, is only a first step toward

reining in the administrative state given agencies' inclination to resort to regulatory dark matter to influence policy.

An Executive Order to Get a Handle on “Regulatory Dark Matter.” The Trump administration has taken action to streamline some agency guidance, just as it did with respect to significant rules.²⁴ In particular, the administration strongly reaffirmed Office of Management and Budget (OMB) cost-benefit considerations, and implemented new regulatory “budgeting” considerations. Some Trump executive actions have built upon his Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” which:

- Established a one-in/two-out policy for implementing new rules, to require removal of at least two rules for every new one issued;
- Implemented a net freeze on net costs for regulation;²⁵
- Set up regulatory reform task forces to identify “outdated, unnecessary, or ineffective” regulations, those with costs greater than benefits, and those that inhibit jobs and job creation,²⁶ and
- Launched an executive branch reorganization plan.²⁷

In addition, the Trump White House has reinforced OMB review of “significant guidance documents,” as specified in the George W. Bush administration’s 2007 “Final Bulletin for Agency Good Guidance Practices.”²⁸

While interpretative rules and guidance are not subject to the Administrative Procedure Act’s notice-and-comment requirement, they are, as noted, subject to the formal submission requirement, at which they fare even worse than rules do.²⁹ Congress could stop agency overreach via regulation and guidance documents, but it has not. In the meantime, the president should supplement administrative actions already taken and issue a new executive order to strengthen review and control of sub-regulatory guidance.

The new order should incorporate lessons from President Ronald Reagan’s E.O. 12291 on OMB regulatory analysis and review of notice-and-comment rules, which in large part remain in effect.³⁰ While presidents often eliminate predecessors’ executive orders, orders addressing regulation have enjoyed staying power. A new order focused on guidance—with a proper management framework that is compelling and comprehensive—could greatly amplify executive oversight of agencies. Moreover, since revoking or easing guidance does not require going through the notice-and-comment process, as revoking a rule does, the streamlining enabled and encouraged via this order may become more important as the two-for-one low-hanging fruit is picked.

The executive branch must carry out and execute laws duly enacted by Congress. That is elemental in even the harshest critique of the administrative state. Trump’s E.O. 13771 explicitly stated: “Nothing in this order shall be construed to impair or otherwise affect ... the authority granted by law to an executive department or agency. ... This order shall be implemented consistent with applicable law.”³¹ It did not implement any arbitrary cuts in regulation. Rather, E.O. 13771 in a sense implemented a restoration of separation of powers in rulemaking by underscoring what a president and his agencies may *not* do.³²

Where Congress has not delegated power explicitly, a president may elect not to carry out discretionary rules, guidance, decrees, and proclamations of 400-plus agencies. It is increasingly apparent that agencies have not adhered even to the limited protections of the Administrative Procedure Act noted above, let alone the CRA.³³ In returning regulatory power to Congress, a well-crafted executive order on agency guidance and statements of policy would mark an important restoration of Article I constitutional order. The underlying principle of reform must be that if elected representatives decide that something needs to be regulated by the government to the extent that its powers of compulsion will be used, they should pass a law.

An Inventory of Regulatory Dark Matter. Much remains to be done in disclosing and articulating the costs of regulation—which can never be fully known, as they are merely rough estimates—and the same applies for guidance. Recognizing the potential burdens of guidance, in March 2018 the House Oversight and Government Reform (OGR) Committee released the report *Shining Light on Regulatory Dark Matter*.³⁴ This report is the most explicit official congressional treatment of overregulation via guidance since a series of hearings conducted by Sen. James Lankford (R-Okla.) in the 114th Congress³⁵ and since House Speaker Paul Ryan’s (R-Wisc.) 2016 “Better Way” task force report series, which sought a path for reforming rulemaking and the Administrative Procedure Act.³⁶ The OGR report presented the results of a survey of 46 executive and independent agencies for “a list of all guidance documents issued”³⁷ since January 2008, with detail on:

- The form of guidance;
- The issuing agency or office;
- An indication of whether the guidance was considered significant;
- An indication of whether the guidance was submitted to OIRA for review;
- An indication of whether the guidance was submitted to Congress and the GAO as required by the Congressional Review Act; and
- An indication of whether the guidance had been or would be reviewed by the agency’s Regulatory Reform Task Force if the agency was covered under Executive Order 13,771.³⁸

Agencies reported issuing over 13,000 guidance documents since 2008, with 536 of these acknowledged as “significant guidance documents.” The report’s gargantuan 3,745-page appendix aside,³⁹ there is still much we do not know about regulatory guidance effects and burdens. For example, of the 536 significant guidance documents, just 328 were submitted to OMB for review. Furthermore, only 189 guidance documents were submitted to the Government Accountability Office and to Congress as required by the Congressional Review Act, when at least 13,000 should have been.

House Oversight and Government Reform
Shining Light on Regulatory Dark Matter—Summary

- 46 Agencies, 13,000-plus guidance documents partially reported.
- 536 significant guidance documents.
- 328 submitted to OMB for review.

- 189 submitted to Congress and the Government Accountability Office as required by the CRA (all should have been).

Significant Guidance Documents in Effect
A Partial Inventory by Executive Department and Agency
(Contains subset online in partial fulfilment of OMB's 2007 "Good Guidance Practices")

2018	
Department of Agriculture	
Animal and Plant Health Inspection Service	1
Economic Research Service	5
Food and Nutrition Service	4
U.S. Forest Service	7
Food Safety and Inspection Service	16
USDA Total:	33
Department of Defense	
1	
Department of Education	
Adult Education	5
American Recovery and Reinvestment Act of 2009	9
Career and Technical Education	10
Civil Rights	34
Elementary and Secondary Education	67
Grants and Contracts	1
Higher Education	5
Special Education	29
Education Department Total:	160
Department of Health and Human Services	
Centers for Disease Control and Prevention	1
Centers for Medicare and Medicaid Services	0
Food and Drug Administration	0
Office of the Inspector General	0
HHS Total:	1
Department of Homeland Security	
National Infrastructure Protection Plan	1
U.S. Citizenship and Immigration Services	26
U.S. Coast Guard	7
Federal Emergency Management Agency	11
Transportation Security Administration	12
DHS Total:	57
Department of the Interior	
Office of Surface Mining Reclamation and Enforcement	3
Fish and Wildlife Service	2
DoI Total:	5
Department of Justice	
Antitrust Division	2
Civil Rights Division	10
Drug Enforcement Administration	8
Office of Justice Programs	10
U.S. Trustee Program	3

DOJ Total:	33
Department of Labor	
Employment and Training Administration	35
Mine Safety and Health Administration	2
DOL Total:	37
Department of Transportation	
Office of the Secretary	11
Federal Aviation Administration	38
Federal Transit Administration	7
plus FTA Circulars declared to qualify	28
Maritime Administration	9
National Highway Traffic Safety Administration	1
Trans. Total:	94
Department of the Treasury	2
Environmental Protection Agency	
Office of Air and Radiation	53
Office of Chemical Safety and Pollution Prevention	43
Office of Land and Emergency Management	50
Office of the Science Advisor	19
Office of Water	20
EPA Total:	185
TOTAL	1213

As of March, 2018. Not comprehensive; much gathered via searching “significant guidance” at agencies. Approach was to follow Unified Agenda agency listing supplemented with the Federal Register Index of agencies to capture subunits.

The above chart presents the author’s tally of at least 608 significant guidance documents in play as of March 2018, based upon scattered executive department and agency websites that elect to catalog “significant” guidance.⁴⁰ The primary source is some executive agencies’ continued compliance with the 2007 Office of Management and Budget memorandum from then-Director Rob Portman on Good Guidance Practices,⁴¹ and a flaccid yet noticeable carryover of the GGP’s under President Obama’s OMB Director Peter Orszag.⁴²

This compilation is in the same ballpark as the House Oversight Committee’s tally of “significant” guidance, but differences include this author’s tally omitting independent agencies and incorporating pre-2008 rules where they had been reported, some dating to the 1970s. There are also independent agency guidance and sub-significant guidance documents outstanding, which number in the thousands.⁴³ A recent GAO assessment of the Internal Revenue Service’s guidance document trove provides one example of the utility of disclosure and complexity-reduction.⁴⁴

Presumably, the House Oversight Committee will update its report. In the meantime, Sen. James Lankford, chair of the Subcommittee on Regulatory Affairs of the Committee on Homeland Security and Governmental Affairs (HSGAC), has a December 5, 2017 letter to OMB Director Mick Mulvaney (response still pending) that could help flesh out the guidance inventory.⁴⁵ In addition to being far more aggressive regarding the status of unsubmitted guidance documents, which it deems “Non-Effective Guidance,” the letter asked for agencies to deliver to the HSGAC subcommittee:

- “An inventory of all guidance documents” since January 25, 2007.
- “A statement citing the statutory or regulatory authority to issue such guidance.”
- “A statement as to whether each guidance was submitted to Congress pursuant to the requirements of the CRA.”

For “Non-Effective Guidance” documents, Lankford, in his letter to Mulvaney, seeks clarification of agency plans regarding public comment, submission to GAO and Congress, and modification or withdrawal. Underscoring the constitutional challenges presented by unaccountable administrative state’s ability to punish, the letter also asks for “an inventory of all enforcement action taken by the agency based on such [Non-Effective] guidance.”⁴⁶

Administration Efforts to Tame Guidance to Date.

White House. President Donald Trump’s executive actions have slowed the pace of new regulation.⁴⁷ Trump began with a memorandum to executive branch agency heads from White House then-Chief of Staff Reince Priebus, “Regulatory Freeze Pending Review.”⁴⁸ That memorandum also applied to guidance documents, a unique development in executive branch regulatory oversight.⁴⁹ This was followed by E.O. 13771’s requirement to remove at least two rules for every new one issued and to cap regulatory costs for fiscal year 2017. Next, E.O. 13777, “Enforcing the Regulatory Reform Agenda,” established Regulatory Reform Officers and Regulatory Reform Task Forces at agencies to identify regulations that:

- Eliminate jobs or inhibit job creation;
- Are outdated, unnecessary, or ineffective; or
- Impose costs that exceed benefits.

Two memoranda from OMB’s Office of Information and Affairs (OIRA) with instructions for implementation of E.O. 13771 were also issued, covering guidance as well as rules.⁵⁰ In this manner, guidance documents were integrated into E.O. 13771 processes, with a “significant guidance document” defined in OMB’s FAQ on the order as having the same meaning specified in OMB’s 2007 “Final Bulletin for Agency Good Guidance Practices.”⁵¹

The administration claimed to exceed its two-for-one goal, attaining 22-for-one. Notably, of the 67 rules OMB reported to have eliminated in its initial December 2017 update, nine appear to be revocations or alterations of sub-regulatory guidance, notices, orders, or information collections, as seen nearby.⁵²

Completed EO 13771 Deregulatory Actions, 2017 (Involving orders, guidance, notices, or information collection changes)

Department of Health and Human Services

- (1) Food and Drug Administration (FDA) De Novo Classifications
- (2) Office of the National Coordinator for Health Information Technology Certification Program guidance
- (3) FDA Medical Device Notices

Department of Homeland Security

- (4) Equivalency Determination for “Marine Charts,” “Charts,” or “Maps,” “Publications,” and Navigation Functions—Notice of Availability of Navigation and Vessel Inspection Circular 01–16 Change 1
- (5) Hazard Mitigation Assistance Acquisition Projects: Hydraulic Fracturing and Horizontal Directional Drilling FEMA Policy 302-094-03
- (6) Jones Act Ruling Rescission

Department of Interior

- (7) Order No. 3346 “Revocation of the United States Fish and Wildlife Service Director’s Order No. 219 (Use of Nontoxic Ammunition and Fishing Tackle)”
- (8) OMB Control No. 1018-0101, Monitoring Recovered Species After Delisting—American Peregrine Falcon

Department of the Treasury

- (9) IRS Notice 2017-36, One Year Delay in Application of IRS’ 385 rule (§ 1.385-2)

Federal Agencies. Clearly, some revocations of rules or guidance can be quite obscure. On the other hand, some of the highest-profile guidance that agencies have withdrawn or revoked did not appear on the agencies’ two-for-one tallies. In some cases, streamlining may amount to “rules about rules,” or guidance for guidance, whereby agencies rewrite or reinterpret former policy in a manner intended to reduce burdens.

- The Department of Labor withdrew controversial Obama-era guidance on independent contracting and joint employment in a mere six-line press release.⁵³
- The Department of Education withdrew college admission guidelines,⁵⁴ special education policy documents,⁵⁵ and headline-grabbing transgender school facilities guidance issued jointly by the Obama Departments of Education and Justice.⁵⁶
- The Department of the Treasury’s Office of the Comptroller of the Currency revoked Obama-era guidance, “Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products,” on banks making “deposit advance” loans (bank-style payday loans).⁵⁷
- The Environmental Protection Agency withdrew policy, rooted in a 1995 memorandum, on classification for certain air pollutants.⁵⁸
- The Department of the Treasury, in a policy reinterpretation, now assures in a Memorandum of Agreement that OIRA will perform an expedited review of a certain portion of tax-related regulatory actions, which had been exempt from such oversight.⁵⁹

Streamlining and other policy changes aimed at liberalization can be controversial.⁶⁰ But the fact that revocations of guidance require extensive investigation to inventory and summarize is precisely the problem. Members of the public often learn about guidance (including relaxation of it) by happenstance, thus the case for disclosure—and an executive order in anticipation of legislation.

Department of Justice. The Department of Justice (DOJ) merits separate discussion. Attorney General Jeff Sessions issued a November 17, 2017 memorandum to all DOJ components on “Prohibition on Improper Guidance Documents” in policy making. Invoking the “blurred ... distinction between regulations and guidance documents,” the memo “prohibits the Department of Justice from issuing guidance documents that have the effect of adopting new regulatory requirements or amending the law ... and [preventing] the Department of Justice from evading required rulemaking processes by using guidance memos to create de facto regulations.”⁶¹ The memo also stated that in most cases, notice-and-comment rulemaking is appropriate “when purporting to create rights or obligations.”⁶²

“Principles” articulated for issuing guidance included identifying documents as guidance and disclaiming “any force of effect of law,” or binding effect, and not using “mandatory language” like “shall” or “must.” The memo also directed the Associate Attorney General to oversee assembling existing guidance “that should be repealed, replaced, or modified.” This exercise resulted in the elimination of 24 guidance documents, as announced in July 2018,⁶³ on top of 25 that had been withdrawn in 2017.⁶⁴

In the interim, a January 25, 2018 memorandum on “Limiting Use of Agency Guidance Documents In Affirmative Civil Enforcement Cases” asserted that those same principles “also should guide Department litigators in determining the legal relevance of other agencies’ guidance documents in affirmative civil enforcement.”⁶⁵ That is, since “Guidance documents cannot create binding requirements that do not already exist by statute or regulation ... the Department may not use its enforcement authority to effectively convert agency guidance documents into binding rules ... [nor] use noncompliance with guidance documents as a basis for proving violations of applicable law in ACE cases.”⁶⁶

In effect, this amounted to “an impressive form of self-abnegation” of power, as noted by former Obama OIRA Director Cass Sunstein, since Trump’s own agencies can no longer rely on post-DOJ-memo guidance in court.⁶⁷ While some left-of-center observers were dismissive, claiming that it “merely restated well-understood and otherwise uncontroversial black letter law,”⁶⁸ the concern has been a longstanding one on an official basis in the eyes of the Administrative Conference of the United States.⁶⁹ (The legal term “black letter law” refers to established principles of law that are generally known and not in dispute.⁷⁰) It remains so in the ACUS’ December 2017 “Recommendation” on “Agency Guidance through Policy Statements,” noted earlier.⁷¹

A healthy effect of the DOJ move is that it could induce other agencies to lean toward notice-and-comment rulemaking instead of exploiting the guidance loophole.⁷² Former OIRA Director Sunstein maintained that guidance can be “exceedingly helpful,” but deemed the Associate AG announcement a “welcome move” against guidance inadvertently behaving as a “regulatory cudgel.”⁷³ The new DOJ polices, guidance in themselves, induced the New Civil Liberties Alliance to urge they be formalized in notice-and-comment rulemakings.⁷⁴

Congressional Efforts to Tame Guidance to Date. The enthusiasm to address guidance legislatively is hindered by a political environment in which few Democrats in Congress are

inclined to work with Republicans under Trump, despite the bipartisan pedigree of the significant regulatory reforms and proposals both past and present.⁷⁵ While regulatory reform legislation stalled in the Senate (apart from the CRA resolutions of disapproval early in the 115th), the House of Representatives passed the Regulatory Accountability Act of 2017,⁷⁶ and the Regulations from the Executive in Need of Scrutiny Act (REINS) Act to require congressional approval of the costliest agency rules.⁷⁷

Limited Use of the Congressional Review Act. Hundreds of Obama “midnight rules” were eligible for repeal under the CRA, but only 15 were eliminated. Likewise, there has been limited appetite for going after longer-standing guidance under the CRA. As emphasized, ostensibly non-binding guidance documents and statements of policy are “rules,” yet many, like some ordinary notice-and-comment rules, were never properly submitted to both houses of Congress and the GAO.

The CRA requires a “report” on all rules—comprising a copy of the rule, a “statement relating to it, and the effective date—[b]efore a rule can take effect.” [Emphasis added].⁷⁸ This reality has been known for decades. For example as the then-General Accounting Office (Now Government Accountability Office) affirmed to Congress in 1998:

We were concerned that regulated entities may have been led to believe that rules published in the Federal Register were effective when, in fact, they were not unless filed in accordance with [Congressional Review Act].
—General Accounting Office, March 1998.⁷⁹

One can find instances of GAO informing OIRA of rules published in the *Federal Register* over the years that were never filed with GAO.⁸⁰ By failing to submit rules—and guidance—to GAO, “the rulemaking agencies have arguably limited Congress’ ability to use the expedited disapproval authority that it granted itself with the enactment of the CRA.”⁸¹

Notable Legislative Proposals to Address Guidance. This elemental problem, the ungoverned and ungovernable nature of guidance, has yet to be adequately confronted. In the meantime, some reform proposals in Congress can help us make headway toward that goal.

- The House-passed Regulatory Accountability Act would “reform the process by which Federal agencies analyze and formulate new regulations and guidance documents,” codify elements of the regulatory review executive orders,⁸² and provide statutory definitions of “guidance” and “major guidance.” The latter would be similar to the traditional understanding of an action with an annual effect on the economy of \$100,000,000 or more.⁸³
- The Reforming Executive Guidance (REG) Act (H.R. 462), sponsored by Rep. Jason Lewis (R-Minn.), would formally subject significant guidance to the APA notice-and-comment procedures as well as (redundantly) the Congressional Review Act.⁸⁴
- The Regulations Endanger Democracy (RED) Tape Act, sponsored by Sen. Dan Sullivan’s (R-AK), would introduce a one-in, two-out requirement for regulations and guidance.⁸⁵

- The Regulatory Predictability for Business Growth Act would require interpretive rules and guidance intended to alter previously issued ones to undergo public notice and comment before taking effect.⁸⁶
- The House-passed Guidance Out of Darkness (GOOD) Act (S. 2296/H.R. 4809), introduced by Senate Homeland Security and Governmental Affairs Committee Chairman Sen. Ron Johnson (R-Wisc.) and Rep. Mark Walker (R-N.C.), would require agencies to conspicuously publish their guidance documents online.⁸⁷ The bill states: “On the date on which an agency issues a guidance document, the head of the agency shall publish the guidance document in accordance with sub section (c).
 - (c) SINGLE LOCATION.— “The head of each agency shall:
 - (1) Publish any guidance document issued by the agency in a single location on an online portal designated by the Director of the Office of Management and Budget
 - (i) A memorandum.
 - (ii) A notice.
 - (iii) A bulletin.
 - (iv) A directive.
 - (v) A news release.
 - (vi) A letter.
 - (vii) A blog post.
 - (viii) A no-action letter.
 - (ix) A speech by an agency official.
 - (x) An advisory.
 - (xi) A manual.
 - (xii) A circular.
 - (xiii) Any combination of the items described in clauses (i) through (xii).”

Congressional Appeals to GAO and OMB Regarding Unsubmitted Guidance. The Congressional Review Act will soon be a quarter-century old. Unfortunately, Congress has largely ignored its application to guidance. So it was a welcome development that the phenomenon of regulation via guidance gained attention in the 115th Congress, as some members sent letters to the Government Accountability Office inquiring into whether particular instances of guidance were “rules” for purposes of the CRA.⁸⁸

On March 31, 2017, Sen. Pat Toomey (R-Penn.) queried⁸⁹ the GAO regarding a 2013 “Interagency Guidance on Leveraged Lending” that had been issued jointly by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve, and the Federal Deposit Insurance Corporation.⁹⁰ The GAO’s October 19, 2017 reply to Toomey affirmed that the definition of “rule” is “broad, and includes both rules requiring notice and comment rulemaking and those that do not. The GAO wrote that it is “[c]lear the CRA covers general statements of policy,” and that the leveraged lending should have been submitted to Congress for an opportunity to review and disapprove.⁹¹

Toomey also inquired, in a separate letter also dated March 31, 2017,⁹² into the status of Consumer Financial Protection Bureau guidance on indirect auto lending, which that agency had issued in 2013. A December 5, 2017 GAO reply was likewise favorable: “CRA

requirements apply to general statements of policy.”⁹³ The notable development here was that the GAO determination resulted in a congressional resolution of disapproval overturning the indirect auto lending guidance, the first ever such use of the CRA.⁹⁴ Todd Gaziano of the Pacific Legal Foundation, a pioneer of efforts to address illegal rules under the CRA, characterized the significance of the congressional—as opposed to GAO or executive—affirmation of what should already have been “crystal clear.”⁹⁵

The first historic precedent established by what is now Public Law 115-172 is that all agency “guidance documents” that impact the public are within the definition of a “rule” that Congress can overturn using the CRA’s streamlined procedures—regardless of whether the guidance documents are published in the Federal Register. ... The second historic precedent established by Congress’s vote and the now-final law is that old rules not delivered to Congress as required by the CRA, whatever type, are not insulated from the CRA’s streamlined review procedures simply by the passage of time. ... The consequence for rulemakers’ failure to follow the rules that apply to them is not to protect their rules from congressional review.... Thus, the thousands of old rules never sent to Congress remain vulnerable to CRA rejection by simple majority vote of Congress.

What about the future? The leveraged lending rule and all other “Non-Effective Guidance” documents are still out there. This correspondence is useful, but redundant. In principle, the GAO does not need to designate guidance as anything: Guidance documents are simply rules subject to the CRA, period. Furthermore, it would seem too great a concession to accept the premise that outstanding but never-submitted rules are valid and that Congress would need to affirmatively reject them.

Both GAO replies to Toomey were seven pages long and contained similar language affirming that policy statements are subject to CRA requirements—almost, but not quite, boilerplate. Each letter cited instances in prior Congresses in which GAO had reached the same conclusion regarding agency guidance and notices counting as a “rule” for CRA purposes. It is abundantly clear that any future queries will get the same answer.

In a related development, on November 2, 2017, House Financial Services Subcommittee Chairman Blaine Luetkemeyer (R-Mo.) wrote to financial regulatory agencies asking them to draw up a list of guidance issued over the past 20 years to determine whether it should be submitted to Congress for review.⁹⁶ Luetkemeyer subsequently sent regulators letters “urging them to ensure that guidance is appropriately treated as guidance,” as described in the accompanying news release.⁹⁷ To this, five financial regulatory agencies responded that they could confirm that “supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance.”⁹⁸

The problem with the precedent set by inquiries to GAO about particular instances of guidance is that it puts Congress in the position of regarding the status of a given guidance as an open question. The GAO letters have affirmed the existence of an out-of-control administrative state. Therefore, overturning never-submitted rules seems to artificially succumb to agency primacy, when in fact nothing has taken effect in the first place. (“Before

a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report.”) Should an agency wish to proceed on some long-ago unsubmitted guidance, it may “report,” but there would seem to be no need for Congress affirmatively to reject the non-effective, something the law already says is not in effect.⁹⁹ In affirmation of this interpretation, Curtis Copeland noted in a 2014 paper for the Administrative Conference of the United States that regarding unsubmitted rules that “technically none of them could take effect (even though the agencies issuing the rules are likely treating them as if they were already in effect.)”¹⁰⁰

Guidance subject to congressional review could go back decades, but the 115th Congress is on record behaving as if all guidance issued that never got properly submitted to GAO and Congress, as required by law, is “live” (rather than invalid) unless they step in and do something about it later, which rarely happens. To date, the Toomey initiative has been both the start and finish of revocation of similarly situated guidance. Critics’ concern that the use of the CRA on guidance could lead to repeal “overkill” is a non-issue.¹⁰¹

A Cornerstone Executive Order: Guidance for Guidance

[A]ny agency guidance issued without compliance with [Congressional Review Act] notification requirements never took effect and is illegal and unenforceable.

—Senator James Lankford, December 2017¹⁰²

Given the state of play in agencies and Congress covered above, a president should set the tone with an executive order addressing sub-regulatory guidance in order to elevate its prominence on the national and policy stage.¹⁰³ A president can instruct agencies to take initiative (particularly given existence of E.O. 13777 regulatory task forces), such as by directing their attorneys to adopt internal policies similar to that of the Sessions memorandum regarding limitation on the use of guidance documents.¹⁰⁴

There need to be rules about rules. A new emphasis on guidance would compensate for the diminishing marginal returns of the two-for-one policy, owing to the reality that rules cannot be killed by administrative action, only replaced with another rulemaking proceeding. Existing guidance can already be repealed to meet the requirements of E.O. 13771, but that should be more explicitly reaffirmed. For years, scholars, members of Congress, and the White House have called for OMB review of new guidance, for subjecting certain guidance to notice-and-comment procedures, and for good oversight principles generally.¹⁰⁵ Some of that need not wait for Congress to act.

There are other important executive order targets—apart from guidance—such as executive action to incorporate independent agencies’ major rules into the cost-benefit framework,¹⁰⁶ a move endorsed by a bipartisan group of former OIRA directors.¹⁰⁷ However, guidance is the least disciplined part of the administrative state. For that reason, we emphasize eclipsing regulatory dark matter via executive order. Some elements of any such order should also apply to notice-and-comment rules, in the interest of integration and longevity—thus the emphasis on incorporating the experience and lessons of Reagan’s E.O. 12291. Of course,

codification should be an end goal, but an executive order modeled along the lines described here can help get there.

Dark Matter Executive Order Management Framework. A comprehensive executive management program must accompany the executive order to establish permanency of reporting and oversight of guidance.

Start with a Moratorium. As the Center for Regulatory Effectiveness noted: “The flux surrounding the term guidance supports the need for a moratorium on any expansion of its use until the relevant issues are addressed.”¹⁰⁸ While formulating a comprehensive guidance order, Trump should issue a moratorium resembling his own initial Regulatory Freeze Pending Review¹⁰⁹ and Obama’s 2009 Regulatory Review moratorium.¹¹⁰ These are routine steps taken by presidents wishing to review their predecessors’ pending actions and to prioritize their own.

The moratorium should also apply to the preparation of guidance. Otherwise, agencies will simply stockpile it and release it upon lifting of the moratorium. Press releases, regulatory letters, warning letters, and other correspondence aimed at purported violators could be routed through agency counsel offices and examined to ensure legality, as occurred, for example, at the Food and Drug Administration during the Bush administration.¹¹¹

Ensure Timely Filing of Existing Regulatory Oversight Reports. The official annual reports issued by the executive branch on regulatory matters are chronically, unacceptably late. Timeliness is a prerequisite for executive disclosure and action. Guidance should be incorporated into all of them in the framing of any new executive order:

- *Information Collection Budget*¹¹² (nearly two years overdue)
- Twice-yearly *Unified Agenda of Regulatory and Deregulatory Actions* (and December *Regulatory Plan*)¹¹³ (traditional April and October slips)
- *Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*¹¹⁴ (2018 draft and 2017 final overdue)

With respect to the *Report to Congress*, an aggregate cost estimate is specified by statute, not merely the yearly tally and 10-year retrospective review that OMB now performs.¹¹⁵ Despite the impossibility of accurately calculating regulatory costs, the lack of an official reckoning of guidance documents’ impact is unacceptable, given their increasing use by agencies.¹¹⁶

Coordinate Aggressively with Executive Branch Reorganization Project and Task Forces. OMB guidance to agencies on evaluation of Regulatory Reform Officers and the Regulatory Reform Task Forces established under Trump’s E.O. 13777¹¹⁷ called for performance updates on “terminating, consistent with applicable law, any programs or activities that derive from or implement EOs, guidance documents, policy memoranda, rule interpretations, and similar documents, or relevant portions thereof.”¹¹⁸ Similarly, the White House undertook a high profile Executive Branch Reorganization effort during Trump’s first year—also via executive order—to address redundancies and consolidate, streamline, and even propose elimination of agencies.¹¹⁹ Given the ongoing need for administrative state

streamlining, the reorganization needs to be kept uppermost in mind and maintained and coordinated with the guidance project.¹²⁰ Fewer agencies with less scope would mean a lesser inventory of future guidance.

Dark Matter Executive Order Principles and Provisions. In its specifics, the executive order needs to address disclosure and inventory of guidance, CRA reporting expectations, and the restoration of legitimate powers and bounds in a comprehensive manner

Plank 1: Reaffirm Already “Official” Procedures for Guidance Oversight. A new guidance executive order should reference, affirm, reinforce and extend prior efforts such as:

- 2007 George W. Bush E.O. 13422, which in addition to underscoring the identification of a genuine need for regulation, added “and guidance documents” to the term “regulation” for purposes of some OMB oversight;
- 2007 OMB “Final Bulletin for Agency Good Guidance Practices,” which required, “among other things, agency procedures for the approval and use of guidance, standard elements in guidance, including avoiding inappropriate mandatory language, and public access and feedback procedures.”¹²¹ The latter intended to allow public input on the designation of guidance deemed significant.
- 2017 Administrative Conference of the U.S. recommendations, which prominently states that agency general statements of policy do not bind the public, who are free to take alternative lawful approaches.¹²² These criteria are already the law of the land, but then so is the requirement to submit rules and guidance; thus the need for executive affirmation.
- The remedies listed in the House Government Reform and Oversight Committee’s 2018 *Shining Light* report, which include enforcing CRA compliance and establishing online repositories for guidance, as well as legislation codifying guidance practices.¹²³

Many of these items appear in legislative proposals discussed above but should now be incorporated into a new executive order. They can help form the basis for internal management of the program, along with a revisiting of E.O. 12291 architecture and history.

Plank 2: Improve Disclosure of Specific Guidance and Summary Statistics. Quantifying the unquantified—such as knowing the percentage of unreported and unreviewed guidance by category and agency—matters. Yet, disclosure need not await legislation. The posting online of individual guidance documents and inventories of significant and secondary guidance for executive and independent agencies should be required on agency websites as well as in central format. A report card-style template could also capture inventory and historical information.¹²⁴ The OGR *Shining Light* report, for example, highlights guidance both submitted and not submitted to Congress or the GAO, as required by the CRA.

Revoked guidance also needs to be tracked and disclosed, as this is often difficult to find, embedded in agency press releases and other issuances. Just as we can tell what regulations Trump has eliminated, we similarly should be able to readily see which guidance documents have been eliminated or are in the process of being eliminated. Making dark matter interactive in the regulatory and review databases on Regulations.gov, FederalRegister.gov,

and Reginfo.gov would be a sensible step as well. There are typically several dozen final rules issued weekly, for which Congress could potentially issue a resolution of disapproval, along with an unknown amount of guidance. Observers should readily be able to see if burdens have been reduced or increased. In that regard, the executive order should assure that agencies indicate which of the few dozen or so regulations issued each week are regulatory, and present the same for guidance.

Plank 3: Incorporate Guidance into the Regulatory Plan and Unified Agenda for Federal Regulatory and Deregulatory Actions. Federal agencies present their regulatory priorities in the twice-yearly *Regulatory Plan and Unified Agenda for Federal Regulatory and Deregulatory Actions*.¹²⁵ OMB cost-benefit review and the recently created Regulatory Task Force structures do not apply to independent agencies, but Unified Agenda reporting does.¹²⁶ The new executive order can unilaterally extend this biennial reporting requirement to executive and independent agency guidance as well as rules. As a supplement to the expanded disclosure in Plank 2, incorporating guidance into the regulatory planning and prioritization processes will enable better oversight generally, especially when and if a separate executive order or legislation eventually extends cost analysis to independent agencies.¹²⁷ With incorporation into the Unified Agenda, the president can ensure that some identifiable individuals “own” issued regulation and guidance, and that OMB, the Congress, and the public are not surprised anymore by guidance documents and the trajectory they take.

Plank 4: Designate Guidance as “Regulatory” or “Deregulatory.” Along with incorporation of guidance in the Unified Agenda, better terms are needed to capture guidance with regulatory effect, guidance that simplifies, and guidance providing mere information. Most importantly, the executive order campaign needs to better capture additive versus subtractive guidance. There is a ready mechanism for doing this. Trump’s E.O. 13771 presented a need to explicitly classify and designate rules as either “regulatory” or “deregulatory” in order to comply with the rule-in, rules-out process. As a result, the Unified Agenda database, post-EO 13371, now features classifications of every agency rule as “regulatory,” “deregulatory,” or otherwise.¹²⁸ This process will yield important trackable data about regulation as time passes.

Similar disclosure is warranted for guidance. The executive order implementing this could take numerous approaches, but guidance classifications like “Deregulatory in Nature” or “Specifically Intended to Reduce Cost” added to the Unified Agenda, along with regulatory and deregulation, could be highly instructive.

Plank 5: Modify the CRA Reporting Template to Clearly Designate Guidance, Not Just Rule Types. In clarifying to agencies their guidance submission duties, the president can ensure that the notification report to Congress and GAO accompanying guidance documents is more meaningful. During the Clinton administration, in 1999, Congress directed OMB to issue guidance to agencies on how to properly comply with the CRA reporting mandate.¹²⁹ A March 30, 2009 memorandum to agencies from then-OMB Director Jacob J. Lew, “Guidance for Implementing the Congressional Review Act,” included a standard form for “Submission of Federal Rules Under the Congressional Review Act,”¹³⁰ which remains in use and available on the GAO website.¹³¹ However, designation of ordinary rules, let alone

guidance documents, is ambiguous, offering merely a choice between “major” and “non major,” and establishment of priority as a binary choice between:

- Economically Significant; or Significant; or Substantive, Nonsignificant, or;
- Routine and Frequent or Informational/Administrative/Other

This cannot work. Along with a proliferation of rule types, there are too many varieties of guidance to cope with meaningfully on such a form.¹³² In fact, apart from “Other,” there is simply no obvious outlet for agencies to report guidance. The administration can update this inadequate form to better reflect guidance (and rules). When that update occurs, however, Congress must be ready for the blizzard of guidance documents it will need to review.¹³³

Plank 6: Future Guidance—Affirm that Future Agency Guidance is Null Unless Submitted to GAO and Both Houses of Congress. That CRA submission requirements apply to general statements of policy is undeniable, yet are often ignored in practice. Therefore, it is appropriate for an executive order to generalize based upon what we know from GAO’s responses to Sen. Toomey and from findings in the OGR’s *Shining Light* report. An executive order should declare that future guidance not properly presented to and received by Congress will be regarded as invalid. As noted, GAO declared as much in 1998, and Sen. Lankford did so in 2018. In other words, the order needs to clarify the CRA’s primacy in a prominent way, by serving notice that unsubmitted guidance is to be considered null and void. Such future guidance is relatively simple to address—without submission and report, no guidance exists. The executive order need merely affirm that agencies, including independent agencies, must properly submit guidance for it to be regarded as valid.¹³⁴

Plank 7: Past Guidance—Affirm that Prior Improperly Issued Guidance Will not be Regarded In Effect Unless Agencies Formally Submit It. Congress has yet to address the ramifications of the fact that guidance documents that agencies treat as operative in the administrative universe but never reported to Congress and GAO are technically illegal and null. The sweeping, seismic implications must be confronted. The passage of time only worsens the necessary reckoning, so some process is needed now. An executive order clause deeming prior unsubmitted (not just future) guidance invalid can light the fuse. That this may be regarded aggressive only underscores the extent of the problem.

If guidance improperly assumed valid is deemed valuable or essential by agencies, the executive order can state that the administration will consider a congressional approval of that particular piece of guidance. The president could make it known that Congress could also submit a package of similarly situated guidance to the president for approval. Otherwise, a concerned agency merely needs to perform the initial submission; the same one it should have done in the first place.

Plank 8: Secure a Comprehensive Compendium of All Validly Issued Guidance. The executive order should trigger creation of a compendium of the guidance that has been properly reported by each agency. To identify and properly address questionable guidance, the GAO (or agencies or OMB) should be directed by the president (if not by Congress) to provide a complete catalog of agency guidance documents that were properly submitted for review

pursuant to the requirements of the CRA. *Anything not in the new compilation has not to date been properly submitted and has not “take[n] effect.”*

Once established, the compendium would incorporate each year’s new guidance. Whether the “Compendium of Federal Guidance” gets ultimately prepared by GAO, OMB, or the Congressional Research Service can be hashed out legislatively. In the meantime, the *Shining Light* report provides a head start, were the job to fall to OMB. The oversight committee—in demonstrating that much guidance was not properly submitted to or reviewed by OMB—has generated a large preliminary database.¹³⁵ For notice-and-comment rules, a simple comparison can be made between rules finalized in the *Federal Register* and whether they appear in GAO’s database.

Guidance is tougher to address than rules, but as it stands, the eventual list of affirmatives is sure to contain a mere fraction of the universe of guidance documents agencies now treat as effective. The president could also reinforce DOJ investigation of whether fines and penalties have involved invalid documents.

Plank 9: Disallow Guidance without Congressional Approval. The president can go beyond the submission requirement for guidance in instances where guidance is not mandated by statute. During the 2012 presidential campaign, Republican nominee Mitt Romney supported “a law, similar to the REINS Act ... that would require all ‘major’ rules ... to be approved by both houses of Congress before taking effect. Trump supported REINS as well,¹³⁶ but Romney went further: “If Congress declines to enact such a law, a President Romney will issue an executive order instructing all agencies that they must invite Congress to vote up or down on their major regulations and forbidding them from putting those regulations into effect without congressional approval.”¹³⁷ Some sub-regulatory guidance, particularly that with significant economic impact or of a controversial nature, could be addressed in this manner. A president is constitutionally required to faithfully execute the law; there is no such requirement for optional guidance.

Plank 10: Ban the Initiation of Certain Federal Agency Guidance, Especially in Frontier Sectors. Agencies all too often seem eager to issue guidance to affect policy regarding nascent industries where their authority to do so is unclear (examples include Federal Communications Commission net neutrality rules promising future guidance, and a Federal Aviation Administration rule promising vast amounts of guidance with respect to drones).¹³⁸ Rather than seek to “guide” novel industries that are still coming into existence, it is preferable to liberalize the sector or industry to allow for innovation and the development of market discipline.¹³⁹

If guidance does appear in new sectors, there should be congressional authorization as noted in Plank 9, or at the very least, prominent CRA submission of the guidance. Stopping agencies’ unauthorized preemptive steering of new technologies, business models, and contractual arrangements via guidance is fundamental to addressing the administrative state’s continual expansion. If government oversight is imposed upon in some novel area—such as in “vehicle to infrastructure” communications or Federal Aviation Administration

oversight of commercial space activity—Congress should legislate rather than allow for open-ended agency regulation and guidance.

Agency “expertise” should be directed, not at “governing,” but at introducing these new realms into the voluntary institutions of property, contract, and liability, while ensuring that the necessary market disciplines are capable of emerging; regulation can tend to shut these out. Agency declarations that its guidance represents its “current thinking” should be of secondary concern; the current thinking of innovators is far more valuable.¹⁴⁰

Plank 11: Require Public Notice and Comment Procedures for Guidance. An executive order should require agencies to implement notice-and-comment rulemaking for significant guidance documents—effectively treating some guidance as normal rules.¹⁴¹ Plank 1 on reaffirming guidance procedures already in place or sporting a track record shows the extensive pedigree of this idea. But a new executive order needs to be as explicit as possible, to seek permanence for more formal treatment of guidance not yet achieved, and cement a basis for future legislation.

Just as a president can insist that agencies use formal rulemaking procedures rather than notice and comment to enhance scrutiny of traditional rules, one can insist upon greater use of notice-and-comment for guidance documents. If guidance were to remain largely exempt from the process, agencies can use it to get around issuing formal regulations that would need to be reviewed by OIRA, such that one might expect to observe an increase in the amount of guidance. Similarly, guidance can be a means for improperly inducing regulated parties to make changes, such that when regulations are eventually issued, the costs may be deemed as “lower” since some may have been nudged into “premature” compliance.¹⁴²

Plank 12: Liberally Deem Guidance “Significant” and Escalate Formal OMB Review of It. Like the establishment of principles for notice and comment, an executive order should elevate the OMB economic analysis and review of guidance documents. Economic analysis for significant and economically significant guidance has been implemented before (as noted in Plank 1), as well as proposed in legislation.

Limitations aside, OMB should compile costs and highlight burdens to the extent possible. The OMB director can be authorized to flag guidance—for example by deeming guidance “major” or “significant”—in order to activate formal OMB review and other purposes, as prior policy has allowed (for example, Ronald Reagan’s E.O. 12291 for rules¹⁴³ and George W. Bush’s E.O. 13422 for significant guidance documents).

While “interpretative rule” is defined in statute, such is not the case for general “significant guidance.” Rather, certain varieties of guidance have been defined by executive order, by OMB bulletin, and by agencies at their own discretion.¹⁴⁴

One problem with limiting OMB to “major” rules and guidance is that directives not deemed major may in fact be highly significant in the real world, such as the FCC’s net neutrality rule governing the broadband industry.¹⁴⁵ Streamlining regulation to meet the stipulation of one-in, two-out can be aided by reducing costly guidance as well, and getting

a handle on those burdens would mean more OMB analysis. More generally, extending OMB review to more systematically include guidance is a necessary, though not sufficient, condition for administrative oversight in the absence of more overarching reforms restoring congressional authority.

Conclusion. The administrative state by nature is always and everywhere prone to expansion. Bringing regulation and guidance under control and strengthening democratic accountability will require reining in the bureaucracies that enable and sustain rule by unelected professed experts. Executive power can be used to reduce regulatory flows, at least temporarily.

Guidance creates a loophole for regulation. And to date, much guidance has not been properly reported to Congress, which should nonetheless streamline as much as the CRA allows; there is no statute of limitations for Congress to address unsubmitted rules and guidance. Congress must eventually assume its proper role, but presidents can ameliorate the guidance problem via an executive order that should:

- Incorporate already existing but unenforced policies to govern guidance;
- Expand disclosure and transparency;
- Apply requirements defining valid guidance and create new strictures for it;
- Nullify certain existing guidance in favor of Congressional approval;
- Restrain the issuance of new guidance; and
- Require notice-and-comment and OMB review for guidance.

Guidance merits the same high-level, formal executive branch treatment rules receive, in a new effort adopting the same quality control and seriousness that enabled the longevity of the seminal Reagan E.O. 12291. The recently issued Department of Justice “guidance for guidance” memoranda can be an integral part of putting together a comprehensive executive plan covering guidance documents and policy statements government-wide. In addition, the order should be formulated to tie together the various threads of the executive regulatory reform program already implemented by the Trump administration, with an eye toward eventual legislative reforms.

It is important to address guidance even if some more traditional variant of regulatory reform is to occur. When government increasingly dominates vast sectors of human enterprise and seeks to expand into new ones, as it does now, it need not trouble itself with such formalities as issuing regulations at all. Over time, agencies discouraged from issuing traditional rules (whether by executive order or regulatory reform legislation) would tend to shift toward sub-regulatory guidance as a workaround.

If Congress sees a flurry of new reports on guidance documents in part triggered by a new executive order, that may be the impetus for it to finally take steps to scale down the administrative state more broadly by addressing the issue of over-delegated power. If Congress wants a new rule or guidance, it can vote to enact it. It is long past time to rein in agency overreach from regulatory dark matter. We must, one way or another, learn whether guidance is governable.

Notes

¹ Administrative Procedure Act, P.L. 79-404, <https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf>, or <http://www.legisworks.org/congress/79/publaw-404.pdf>.

² Available at Public Laws website, <https://www.congress.gov/public-laws/114th-congress> and from U.S. Government Publishing Office, Public and Private Laws website, <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW>, and GovTrack website, [https://www.govtrack.us/congress/bills/browse?status=28,29,32,33&sort=-current_status_date%20-%20current_status%5b%5d=9#sort=-current_status_date¤t_status\[\]=28](https://www.govtrack.us/congress/bills/browse?status=28,29,32,33&sort=-current_status_date%20-%20current_status%5b%5d=9#sort=-current_status_date¤t_status[]=28).

³ Defined as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power,” in Attorney General’s Manual on the Administrative Procedure Act, p. 30 (footnote 3), https://books.google.com/books?id=e1A_AAAAIAAJ&focus=searchwithinvolume&q=%22to+advise+the+public+prospectively%22.

⁴ “Interpretative rules,” now more commonly interpretive, are defined as “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers,” in Attorney General’s Manual on the Administrative Procedure Act, p. 30 (footnote 3), https://books.google.com/books?id=e1A_AAAAIAAJ&focus=searchwithinvolume&q=%22to+advise+the+public+prospectively%22.

⁵ John D. Graham and James W. Broughel, “Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act,” *Harvard Journal of Law and Public Policy*: Federalist Edition, Vol. 1, No. 1 (2014), http://www.harvard-jlpp.com/wp-content/uploads/2010/01/Graham_Broughel_final.pdf. Graham and Broughel, “Confronting the Problem of Stealth Regulation,” *Mercatus on Policy*, Mercatus Center, April 13, 2015, <http://mercatus.org/publication/confronting-problem-stealth-regulation>.

⁶ Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014). See also Hamburger’s discussion on administrative law in a summer 2014 *Washington Post* blog series, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/14/prof-philip-hamburger-columbia-guest-blogging-on-his-is-administrative-law-unlawful/>. David S. Schoenbrod, *Power Without Responsibility: How Congress Abuses the People through Delegation* (New Haven, Connecticut: Yale University Press, 1993). F. H. Buckley, *The Once and Future King: The Rise of Crown Government in America* (New York: Encounter Books, 2014). See also Ilya Somin book review in *The Independent Review*, Volume 19, Number 4, Spring 2015. <http://www.independent.org/publications/tir/article.asp?id=1056>.

⁷ Hamburger, *Is Administrative Law Unlawful?* p. 1.

⁸ *Ibid.*, p. 128.

⁹ 5 U.S. Code §553, <https://www.law.cornell.edu/uscode/text/5/553>.

¹⁰ *Ibid.*

¹¹ Administrative Procedure Act, P.L. 79-404, <https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf>, or <http://www.legisworks.org/congress/79/publaw-404.pdf>.

¹² Available at Public Laws website, <https://www.congress.gov/public-laws/114th-congress> and from U.S. Government Publishing Office, Public and Private Laws website, <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW>, and GovTrack website, [https://www.govtrack.us/congress/bills/browse?status=28,29,32,33&sort=-current_status_date%20-%20current_status%5b%5d=9#sort=-current_status_date¤t_status\[\]=28](https://www.govtrack.us/congress/bills/browse?status=28,29,32,33&sort=-current_status_date%20-%20current_status%5b%5d=9#sort=-current_status_date¤t_status[]=28).

¹³ Defined as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power,” in Attorney General’s Manual on the Administrative Procedure Act, p. 30 (footnote 3), https://books.google.com/books?id=e1A_AAAAIAAJ&focus=searchwithinvolume&q=%22to+advise+the+public+prospectively%22.

¹⁴ “Interpretative rules” (now more commonly interpretive) are defined as “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers,” in Attorney General’s Manual on the Administrative Procedure Act, p. 30 (footnote 3). https://books.google.com/books?id=e1A_AAAAIAAJ&focus=searchwithinvolume&q=%22to+advise+the+public+prospectively%22.

¹⁵ Clyde Wayne Crews Jr., “Mapping Washington’s Lawlessness: A Preliminary Inventory of Regulatory Dark Matter 2017 Edition, *Issue Analysis* 2017 No. 4, March 2017, <https://cei.org/content/mapping-washington%E2%80%99s-lawlessness-2017>.

¹⁶ For example: “To be sure, guidance can and often does play a beneficial role in regulatory programs. When properly used, guidance can reasonably channel the discretion of agency employees, provide the public with clear notice of the line between permissible and impermissible conduct and ensure equal treatment of similarly-situated parties.” Paul Noe, “Shining the Light on Regulatory Dark Matter: Due Process and Management for Agency Guidance Documents,” February 6, 2018. American Forest and Paper Association blog, <http://www.afandpa.org/media/blog/bloga/2018/02/06/shining-the-light-on-regulatory-dark-matter-due-process-and-management-for-agency-guidance-documents>. Also with respect to the 2017 tax reform law, see “U.S. Chamber Comments Regarding Regulatory Guidance under Public Law No. 115-97,” (Letter to the Assistant Secretary of Tax Policy and Deputy Chief Counsel of the Internal Revenue Service), March 7, 2018, <https://www.uschamber.com/comment/us-chamber-comments-regarding-regulatory-guidance-under-public-law-no-115-97>.

¹⁷ For example, regulated parties may “follow the policy statement’s approach even if in theory they might be legally free to choose a different course, because the costs and risks associated with doing so are simply too high. This is often the case if statutes or regulations (a) require a regulated party to obtain prior approval from an agency to obtain essential permissions or benefits; (b) subject a regulated party to repeated agency evaluation under a legal regime with which perfect compliance is practically unachievable, incentivizing the party to cultivate a reputation with the agency as a good-faith actor by following even nonbinding guidance; or (c) subject the regulated party to the possibility of enforcement proceedings that entail prohibitively high costs regardless of outcome, or can lead to sanctions so severe that the party will not risk forcing an adjudication of the accusation.” Also, “there are a number of reasons why agencies themselves may naturally tend to be somewhat inflexible with respect to their own policy statements.” *Agency Guidance Through Policy Statements*, Administrative Conference Recommendation 2017-5, Administrative Conference of the United States, December 14, 2017, p. 3,

https://www.acus.gov/sites/default/files/documents/Recommendation%202017-5%20%28Agency%20Guidance%20Through%20Policy%20Statements%29_2.pdf.

¹⁸ “Two Regulatory ‘Dumbfounders,’” Center for Regulatory Effectiveness, November 14, 2018. <http://www.thecre.com/forum8/?p=1180>.

¹⁹ Congressional Review Act of 1996, <https://www.gpo.gov/fdsys/pkg/PLAW-104publ121/html/PLAW-104publ121.htm>. Curtis W. Copeland, “Congressional Review Act: Many Recent Final Rules Were Not Submitted to GAO and Congress,” Administrative Conference of the United States, July 15, 2014, <http://www.thecre.com/forum2/wp-content/uploads/2014/08/CRA-Report-0725.pdf>. A related earlier report by Copeland was “Congressional Review Act: Rules Not Submitted to GAO and Congress,” Congressional Research Service, Report R40997, December 29, 2009, <http://www.thecre.com/forum2/wp-content/uploads/2014/08/CRS-Report-GAO.pdf>. Clyde Wayne Crews Jr., “Most Federal Agency Regulatory Guidance May Be Invalid, So Now What?” *Forbes.com*, November 6, 2017, <https://www.forbes.com/sites/waynecrews/2017/11/06/most-federal-agency-regulatory-guidance-may-be-invalid-so-now-what/>

²⁰ U.S. Government Accountability Office, Reports on Major Rules, <https://www.gao.gov/legal/other-legal-work/congressional-review-act>.

²¹ On the review process, see Richard S. Beth, Disapproval of “Regulations by Congress: Procedure under the Congressional Review Act,” Congressional Research Service Report RL31160, October 10, 2001, <http://www.au.af.mil/au/awc/awcgate/crs/rl31160.pdf>.

²² For overviews, see Paul J. Larkin Jr., “Reawakening the Congressional Review Act,” *Harvard Journal of Law and Public Policy*, Vol. 41, No. 1, pp. 187-252, http://www.harvard-jlpp.com/wp-content/uploads/2018/01/Larkin_FINAL.pdf. Maeve P. Carey, Alissa M. Dolan, and Christopher M. Davis, “The Congressional Review Act: Frequently Asked Questions,” Congressional Research Service, November 17, 2016, <https://fas.org/sgp/crs/misc/R43992.pdf>. Morton Rosenberg, “Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform,” *Administrative Law Review* (American Bar Association), Vol. 51, No. 4, Fall 1999, pp. 1066-1067, <http://www.jstor.org/stable/40710052>

²³ U.S. Government Accountability Office, Congressional Review Act FAQs, <https://www.gao.gov/legal/congressional-review-act/faq>.

²⁴ For action in prior administrations, see Crews, “Mapping Washington’s Lawlessness 2017.”

²⁵ White House, Office of the Press Secretary, “Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs,” news release, January 30, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>. Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” *Federal Register*, Vol. 82, No. 22, February 3, 2017, <https://www.gpo.gov/fdsys/pkg/FR-2017-02-03/pdf/2017-02451.pdf>.

²⁶ White House, Office of the Press Secretary, “Presidential Executive Order on Enforcing the Regulatory Reform Agenda,” news release, February 24, 2017, <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda>. Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” *Federal Register*, Vol. 82, No. 39, March 1, 2017, <https://www.gpo.gov/fdsys/pkg/FR-2017-03-01/pdf/2017-04107.pdf>.

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³⁸ *Ibid.*, p. 8.

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<https://oversight.house.gov/report/committee-report-scrutinizes-federal-regulatory-guidance-practices/>; and https://oversight.house.gov/wp-content/uploads/2018/03/Guidance-Project-Report-Appendices-v3-FINAL_.pdf.

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<https://docs.google.com/spreadsheets/d/1IFgTrTWTEZK8RB9fM4IW3jfg8rK0Yr0JO9O1aE0gzI/pubhtm1>. The online version includes links to specific agency websites containing the guidance. Some agencies, when they claim no guidance to report, nonetheless maintain a landing page for it, which is also depicted. The Environmental Protection Agency’s 185 significant guidance documents dominate the tally. One source of agencies’ (sometimes outdated) disclosure in this fashion is a residual nod to George W. Bush’s defunct Executive Order 13422, which subjected significant guidance to OMB review (technically, Reagan’s already apparently had, a feature annulled by Bill Clinton’s E.O. 12,866). Executive Order 13422, Further Amendment to Executive Order 12866 on Regulatory Planning and Review, January 18, 2007, <https://www.gpo.gov/fdsys/pkg/FR-2007-01-23/pdf/07-293.pdf>. Clyde Wayne Crews Jr., “What’s the Difference Between ‘Major,’ ‘Significant,’ and All Those Other Federal Rule Categories? A Case for Streamlining Regulatory Impact Classification,” *Issue Analysis* 2017 No. 8, September 13, 2017, <https://cei.org/content/whats-difference-between-major-significant-and-all-those-other-federal-rule-categories>.

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¹⁰⁶ C. Boyden Gray, “The President’s Constitutional Power to Order Cost-Benefit Analysis and Centralized Review of Independent Agency Rulemaking.” Mercatus Working Paper, Mercatus Center, 2017,

<https://www.mercatus.org/system/files/mercatus-gray-executive-power-independent-agencies-v1.pdf>.

¹⁰⁷ Strengthening Regulatory Review: Recommendations for the Trump Administration from Former OIRA Leaders, Institute for Policy Integrity,

<http://www.thecre.com/oira/wp-content/uploads/2016/11/Report.pdf>.

¹⁰⁸ “The Fragile State of the Term ‘Guidance,’” Center for Regulatory Effectiveness, November 21, 2018, <http://www.thecre.com/forum8/?p=1333>.

¹⁰⁹ This memorandum took the additional step of incorporating agency guidance documents. White House, Office of the Press Secretary, “Memorandum for the Heads of Executive Departments and Agencies from Reince Priebus, Assistant to the President and Chief of Staff, Regulatory Freeze Pending Review,” January 20, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/20/memorandum-heads-executive-departments-and-agencies>.

¹¹⁰ Memorandum for the Heads of Executive Departments and Agencies, from then-Chief of Staff Rahm Emanuel, on “Regulatory Review,” January 20, 2009, https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/information_and_regulatory_affairs/regulatory_review_012009.pdf.

¹¹¹ The FDA episode, while controversial, still typified the dilemma recognized with guidance. A *Wall Street Journal* news story on noted: “Though complying with warnings in the letters is voluntary, the violations can lead the FDA to seize a product or take a company to court. In certain circumstances, the agency can refuse to approve products.” Jared Favole, “FDA Warning Letters to Companies Decline Sharply,” *Wall Street Journal*, June 7, 2008, <https://www.wsj.com/articles/SB121279277032553331>.

¹¹² Office of Management and Budget Reports, <https://www.whitehouse.gov/omb/information-regulatory-affairs/reports/#ICB>.

¹¹³ Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions, [reginfo.gov](https://www.reginfo.gov/public/do/eAgendaMain), <https://www.reginfo.gov/public/do/eAgendaMain>.

¹¹⁴ OIRA Reports to Congress, <https://www.whitehouse.gov/omb/information-regulatory-affairs/reports/#ORC>.

¹¹⁵ Crews, “What’s the Difference Between ‘Major,’ ‘Significant,’ and All Those Other Federal Rule Categories?” p. 7. The OMB’s shift is discussed in Crews, “Tip of the Costberg: On the Invalidity of All Cost of Regulation Estimates and the Need to Compile Them Anyway,” 2017 Edition, <https://ssrn.com/abstract=2502883>.

¹¹⁶ Testimony of Clyde Wayne Crews Jr., before the United States House of Representatives Committee on the Budget, Hearing, An Introduction to Regulatory Budgeting, July 7, 2016, <http://budget.house.gov/uploadedfiles/crewstestimony.pdf>.

¹¹⁷ Executive Order 13777 of February 24, 2017, Enforcing the Regulatory Reform Agenda, *Federal Register*, Vol. 82, No. 39, March 1, 2017, <https://www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda>.

¹¹⁸ Memorandum for Regulatory Reform Officers and Regulatory Policy Officers at Executive Departments and Agencies, “Guidance on Regulatory Reform Accountability under Executive Order 13777, titled ‘Enforcing the Regulatory Reform Agenda,’” April 28, 2017, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-23.pdf>.

¹¹⁹ Executive Order 13781, Comprehensive Plan for Reorganizing the Executive Branch, March 13, 2017, <https://www.federalregister.gov/documents/2017/03/16/2017-05399/comprehensive-plan-for-reorganizing-the-executive-branch>.

¹²⁰ Executive Office of the President, Delivering Government Solutions in the 21st Century: Reform Plan and Reorganization Recommendations, 2018. <https://www.whitehouse.gov/wp-content/uploads/2018/06/Government-Reform-and-Reorg-Plan.pdf>. For an assessment see Crews, “Trump’s Executive Branch Restructuring: What if the Federal Government Is Beyond Streamlining?” *Forbes.com*, June 25, 2018, <https://www.forbes.com/sites/waynecrews/2018/06/25/trumps-executive-branch-restructuring-what-if-the-federal-government-is-beyond-streamlining/#58b2a3ac52f7>.

¹²¹ As summarized in Noe, February 2018. See also statement of Paul R. Noe, Vice President, Public Policy, American Forest and Paper Association/American Wood Council Before the House Committee on Oversight and Government Reform Committee Hearing “Shining Light on the Federal Regulatory Process,” March 14, 2018, https://oversight.house.gov/wp-content/uploads/2018/03/Noe_AFPA-Testimony_03142018.pdf.

¹²² *Agency Guidance Through Policy Statements*, Administrative Conference Recommendation 2017-5, Administrative Conference of the United States, December 14, 2017,

https://www.acus.gov/sites/default/files/documents/Recommendation%202017-5%20%28Agency%20Guidance%20Through%20Policy%20Statements%29_2.pdf.

¹²³ *Shining Light*, 2018, p. 21.

¹²⁴ For an example, see *Ten Thousand Commandments 2018*, p. 70.

¹²⁵ Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions.

¹²⁶ The Regulatory Flexibility Act created the twice-yearly “Regulatory Agenda,” a reporting instrument shortly afterward supplemented by President Ronald Reagan’s Executive Order 12291. In President Bill Clinton’s E.O. 12866, this became supplemented by the Regulatory Plan (along with the Unified Regulatory Agenda. E.O. 12866 specified: “As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan ... of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter.”

¹²⁷ Bridget C.E. Dooling, “OIRA Sends a Smoke Signal on Independent Agencies,” *Notice & Comment* (blog of the *Yale Journal on Regulation* and the ABA Section of Administrative Law & Regulatory Practice), August 23, 2018, <http://yalejreg.com/nc/oira-sends-a-smoke-signal-on-independent-agencies/>.

¹²⁸ The slate of “EO 13771 Designation” options on the [Reginfo.gov](https://www.reginfo.gov/public/do/eAgendaAdvancedSearch) search engine for the Unified Agenda and Regulatory Plan consists of: Deregulatory; Regulatory; Fully or Partially Exempt; Not subject to, Not Significant; Other; and Independent Agency, <https://www.reginfo.gov/public/do/eAgendaAdvancedSearch>.

¹²⁹ Copeland, 2014.

¹³⁰ “Guidance for Implementing the Congressional Review Act, Jacob J. Lew, Director, Office of Management and Budget, March 30 1999, <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/1999/m99-13.pdf>.

¹³¹ Government Accountability Office, Submission of Federal Rules under the Congressional Review Act, form, <https://www.gao.gov/decisions/majrule/fedrule2.pdf>.

¹³² Crews, “What’s the Difference Between ‘Major,’ ‘Significant,’ and All Those Other Federal Rule Categories?”

¹³³ Rosenberg, 1999, p. 1068.

¹³⁴ A separate question for Congress is how in the future it might wish to manage and more prominently publicize and review the guidance and rules it receives.

¹³⁵ Responses that Sen. Lankford ultimately receives in his query to Director Mulvaney could also be incorporated.

¹³⁶ Presidential Survey: Who Will Sign the REINS Act? American Commitment, 2016, <https://www.americancommitment.org/content/presidential-survey-who-will-sign-reins-act-0>.

¹³⁷ Believe in America: Mitt Romney’s Plan for Jobs and Economic Growth, 2012, p. 63, <https://grist.files.wordpress.com/2012/01/believeinamerica-planforjobsandeconomicgrowth-full.pdf>.

¹³⁸ Crews, “Mapping Washington’s Lawlessness 2017.”

¹³⁹ Crews, “The Administrative State Lacks Its Own Justification: Expertise,” *Cato Unbound*, June 2, 2016, <https://www.cato-unbound.org/2016/06/02/clyde-wayne-crews/administrative-state-lacks-its-own-justification-expertise>.

¹⁴⁰ Guidance for Industry Quality Systems Approach to Pharmaceutical CGMP Regulations (U.S. Department of Health and Human Services, Food and Drug Administration, Center for Drug Evaluation and Research, Center for Biologics Evaluation and Research, Center for Veterinary Medicine, Office of Regulatory Affairs), September 2006, <https://www.fda.gov/downloads/Drugs/Guidances/UCM070337.pdf>.

¹⁴¹ This may result in more rather than fewer rules, however the limited accountability afforded by the APA could arguably be present.

¹⁴² I owe this insight to discussions about guidance I have had with Richard Williams, Senior Affiliated Scholar with the Mercatus Center.

¹⁴³ E.O. 12291 enabled the OMB Director “to order a rule to be treated as a major rule,” <https://www.archives.gov/federal-register/codification/executive-order/12291.html>.

¹⁴⁴ Crews, “What’s the Difference Between ‘Major,’ ‘Significant,’ and All Those Other Federal Rule Categories?”

¹⁴⁵ Rather than acknowledge the significance of federal broadband policy on such a scale, the FCC called the rule “prophylactic.” Federal Communications Commission, Preserving the Open Internet, *Federal Register*, Vol. 76, No. 185, September 23, 2011, <http://www.gpo.gov/fdsys/pkg/FR-2011-09-23/pdf/2011-24259.pdf>.