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**AMERICAN BAR ASSOCIATION**

**Section of Administrative Law &  
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Ms. Lisa Jones  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
725 17<sup>th</sup> Street, N.W.  
New Executive Office Bldg., Room 9013  
Washington, D.C. 20503

Submitted via email: [OMB\\_GGP@omb.eop.gov](mailto:OMB_GGP@omb.eop.gov)

Dear Ms. Jones:

The Section of Administrative Law and Regulatory Practice of the American Bar Association (Section) is pleased to submit comments on OMB's Proposed Bulletin for Good Guidance Practices (Bulletin). The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. Members of the Section include lawyers who practice administrative law, government employees, and academics who teach in the field. Members of the Section have written extensively about this subject.<sup>1</sup> These comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association (ABA) and, accordingly, should not be construed as representing the position of the Association.

The Section applauds OMB for seeking to bring greater accountability and regularity to this important area of administrative practice. We also agree with OMB that agencies should educate the public about the non-binding legal effect of guidance and explain the legal effect when speaking to the public about guidance documents. Administrative guidance, however, is a complex and multifaceted phenomenon. And, although we favor more transparency and accountability, these goals should be

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<sup>1</sup> See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992); Robert A. Anthony, *Which Agency Interpretations Should Bind the Public?*, 7 YALE J. ON REG. 1 (1990); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381; Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 521 (1977);

James W. Conrad, Jr., *Draft Guidance on the Appropriate Use of Rules Versus Guidance*, 32 ENVTL. L. REP. 10721 (2002); William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023 (2004); Charles Koch, Jr., *Public Procedures for the Promulgation of Interpretive Rules and General Statements of Policy*, 64 GEO. L. J. 1047 (1976); Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. (1992); Randolph J. May, *Ruling Without Rules--Or How to Influence Private Conduct Without Really Binding*, 53 ADMIN. L. REV. 1303 (2001); Peter Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803 (2001); Peter Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992).

achieved in a manner that does not chill an agency's willingness to offer useful and appropriate guidance.

Because of the short time period for comments, the Section is unable to offer comprehensive comments on OMB's proposal. Our review, however, has identified a number of concerns that suggest to us that a more thorough vetting of the Bulletin by OMB is indicated. We therefore urge OMB to extend the deadline for comments, and to engage in stakeholder meetings, before the adoption of any final Bulletin, as OMB did in the development of its Peer Review Bulletin.

As a general matter, the Section supports OMB's efforts to make guidance documents available over the internet. The ABA has recommended that federal and state agencies adopt standardized procedures for the dissemination of information in electronic form.<sup>2</sup> The ABA has further recommended that "federal agencies should explore means to maximize the availability and searchability of existing law and policy on their websites" and that agencies should include within "their own searchable data bases their governing statutes, all agency rules and regulations, and all important policies, interpretations, and other like matters on which members of the public are likely to request."<sup>3</sup>

As a general matter, the Section also supports OMB's efforts to ensure a notice and comment process for the most significant guidance documents. As far back as 1976, the Administrative Conference of the United States (ACUS) recognized the importance of such a process.<sup>4</sup> The ABA has also recommended that "an opportunity be given to the public to comment on non-legislative rules that an agency plans to adopt."<sup>5</sup> The Section also agrees with OMB's requirement that an agency advise members of the public that they can submit comments on significant guidance documents after they have been issued or request that such documents be created, reconsidered or modified. The 1973 ACUS recommendation included a similar requirement.<sup>6</sup> In circumstances where agencies obtain public comments, agencies should post the comments on their websites

Although the Section endorses the concept of the OMB Guidance Bulletin, and its emphasis on transparency and participation, we have several concerns that suggest that OMB should not rush to judgment in this important area.

### *What Guidance Should Be Subjected to More Process?*

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<sup>2</sup> American Bar Association, Recommendation on Dissemination of Information in Electronic Form, August 1991.

<sup>3</sup> American Bar Association, Recommendation on Federal Agency Web Pages, August, 2001; *see also* ABA Section of Administrative Law & Regulatory Practice, *Improving the Federal Administrative Process: A Report for the President-Elect*, 52 ADMIN. L. REV. 1099, 1106-07 (2000).

<sup>4</sup> Administrative Conference of the United States, Interpretive Rules of General Applicability and Statements of General Policy (Recommendation 76-5), available at <http://www.law.fsu.edu/library/admin/acus/305765.html>. ACUS recommended that "[b]efore an agency issues, amends, or repeals an interpretive rule of general applicability or a statement of general policy which is likely to have a substantial impact on the public, the agency normally should utilize the procedures set forth in Administrative Procedure 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 ...."

<sup>5</sup> ABA, Rulemaking Procedures for Non-Legislative Rules, August, 1993.

<sup>6</sup> Recommendation 76-5, *supra* note 4. According to the ACUS recommendation, "When 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 ... should include ... an invitation to interested persons to submit written comments ...."

Guidance documents are the “bread and butter” of the administrative process.<sup>7</sup> They are used in a myriad of contexts for a myriad of purposes. For example, one type of guidance document within the Bulletin’s definition would be an internal instruction to an agency employee. Another type of guidance document would be one that is issued to advise the public or regulated entities. While some of the former may have meaningful impacts on regulated entities, many do not. For example, guidance to field offices that they maintain electronic data files of complaints regarding regulated entities that are retrievable by the name of the complainer, the name of the regulated entity, the date submitted, and subject matter of the complaint is of a wholly different character than a guidance document that tells field offices to cite any regulated entity for engaging in certain specified conduct. Procedures appropriate for the latter should differ from those appropriate for the former. Similarly, guidance intended to affect or assist the public or regulated entities may range from the most significant to the routine, such as a routine response to a written inquiry. If OMB makes it too difficult for an agency to give guidance to the public concerning routine matters, it is likely to discourage agencies from engaging in such activities.

As currently drafted, we fear that the proposed Bulletin may not adequately distinguish among the different types and impacts of guidance documents. For example, OMB defines “significant” guidance documents to include, among other categories, all “initial interpretations of statutory or regulatory requirements, or changes in interpretation or policy.” Bulletin, § I.3.(iii). Thus, OMB appears to sweep into the category of “significant” guidance documents all initial agency guidance to the public, regardless of whether the guidance concerns routine matters or matters with a substantial impact on the public. Similarly, all changes to initial guidance, no matter how routine or insignificant, also are deemed significant. As a result, OMB imposes substantial burdens on an agency for a large body of its guidance documents. For example, OMB requires agencies to post and maintain a comprehensive list of all significant guidance documents and changes to them. Bulletin, § III.1.a. & b. It also requires that only “appropriate senior agency officials” may issue significant guidance documents. Bulletin, § II.1.b.

A similar potential problem may exist concerning OMB’s requirement that agencies offer a notice and comment process for any “economically significant” guidance document. Bulletin, § IV.1. The definition of “economically significant” means a “guidance document that may ... reasonably be anticipated to lead to an annual effect of \$100 million or more or adversely affect in a material way the economy or a sector of the economy.” Bulletin, § I.3.(i). We understand and support OMB’s attempt to limit the requirement of a notice and comment process to those guidance documents that will likely have very substantial impact on the economy and regulated entities, as well as other limited categories.

Defining this category of guidance documents, however, is challenging. As a technical matter, most agency interpretive rules purport to do nothing more than clarify an already existing legal duty. As such, the interpretation has no dollar effect. Likewise, since policy statements are not legally binding, they also do not legally have any dollar effect. Of course, guidance documents, although not legally binding, can cause regulated entities to change their conduct in a manner that would have the requisite dollar impact. Many interpretive rules, however, construe the law in a manner that may identify expensive legal obligations but are in no way surprising to the regulated community. OMB may have also meant that the notice and comment requirement applies to guidance concerning regulations that

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<sup>7</sup> Strauss, *Rulemaking Continuum*, *supra* note 1, at 1468.

themselves have an annual effect of \$100 million or more or adversely affect in a material way the economy or a sector of the economy, but it is not clear whether this is a good idea. Some of this guidance may be routine and, as such, may not have a significant impact on the implementation of regulation. If, however, an agency has to use a notice and comment process to issue it, it is likely to forgo issuing the guidance.

At the same time, OMB's Bulletin may be under-inclusive. For example, OMB exempts "speeches," although administrators often use speeches to make major policy statements. We assume that OMB does not intend that an agency could present policy statement otherwise subject to the Bulletin in a public forum, and thereby avoid the requirements of a Bulletin. *See* § II.1.c.

In addition, the Section is not certain whether the blanket exclusion of memoranda of understanding is a good idea, but we suggest that OMB's justification for excluding such memoranda from the Bulletin is not totally accurate. Memoranda of understanding not only are agreements as to who will enforce laws, but often articulate how those laws will be enforced.<sup>8</sup>

The Section has similar concerns about the exclusion of contractor instructions. While many such instructions undoubtedly should be excluded (because they do not have regulatory impacts on regulated entities or beneficiaries), many such instructions can have regulatory impacts. This appears to be true, for example, in the health care field, where HHS contracts with Quality Improvement Organizations to review hospitals and doctors, and with fiscal intermediaries for Medicare and Medicaid reimbursement. The Section is uncertain about whether such instructions should be included within the scope of the Bulletin, although there appears to be a good argument for doing so. There is also the problem of how to define which instructions to contractors should be within the scope of the Bulletin, if OMB decides to include some instructions.

OMB also indicates that significant guidance documents on federal budget expenditures and taxes are exempt from Section IV (notice and comment for economically significant guidance), but are covered by other requirements. Bulletin, §I.5. The Section is unclear what sorts of statements regarding taxes, custom duties, and even general OMB policies, will have to follow all the processes in Parts II and III.

Finally, but not least of all, agencies are experimenting with offering guidance in new and innovative formats, such as video or audio tapes, or inter-active web based software. It is not clear to us how the Bulletin relates to such media; they are not obviously "documents." At the same time, the Section is concerned that OMB not inadvertently discourage the development of these new and promising means of offering guidance to the public.

Because of these important issues about the scope of the Bulletin and its requirements, the Section believes OMB should consult stakeholders about the extent to which guidance should be subject to the transparency and notice and comment provisions of the Bulletin. We believe it is possible that certain categories of guidance documents should be exempt from at least some of the procedures that OMB proposes, or subject to different types of procedures.

### *Background Legal Principles*

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<sup>8</sup> *See, e.g.*, Environmental Protection Agency & Department of Defense, Department of the Army, Memorandums of Agreement (MOA); Clean Water Act Section 404(b)(1) Guidelines; Correction, 55 Fed. Reg. 9210 (Mar. 12, 1990).

The law concerning interpretive rules and policy statements may be among the most complex in administrative law. It is particularly important therefore that OMB carefully relate its Bulletin to the APA and case law.<sup>9</sup>

One problem is that the definition of “guidance document” excludes a document “issued pursuant to 5 USC 553.” Bulletin, § I.2. The problem is that most guidance documents are issued pursuant to 5 USC § 553 but subject to its exception from notice and comment. Only rules covered by the subject matter exemptions in § 553(a) are not issued pursuant to § 553. It would be more accurate for OMB to provide that a guidance document excludes “a document required to be published for notice and comment pursuant to 5 USC § 553 ....”

A related problem concerns the reference to 5 USC § 554 in the definition. By excluding documents that are issued pursuant to section 554, the Bulletin implicitly says that an order (i.e., a decision that results from an adjudication) can be a guidance document, and that any order involving an interpretation “of or policy on a regulatory or technical issue” is subject to the requirements of the Bulletin unless it is the result of a formal adjudication (i.e., a “document issued pursuant to 5 USC § 554”). If OMB meant to exclude all “adjudicatory decisions,” whether or not they are produced by formal adjudication, OMB should amend its definition to exclude “a document required to be published for notice and comment pursuant to 5 USC § 553 or that results from an adjudicative decision.” If OMB meant to include adjudicatory decisions produced by informal adjudication within the scope of the Bulletin, the Section recommends that OMB consult widely with agencies and stakeholders before taking this step. We make this recommendation because our perception is that orders do not pose the types of problems to which the Bulletin is a response. Furthermore, even if OMB excludes adjudicatory decisions, we note there are some types of actions that are on the borderline between adjudicatory decisions and guidance and not easily characterized, including, for example, letter rulings, SEC no-action letters, waivers, “compliance guides” required by SBREFA, and studies that contain recommendations.

Another problem relates to OMB’s efforts to ensure that agency personnel do not depart from significant guidance documents without appropriate justification and supervisory concurrence, Bulletin, § III.1.a., and the related provision prohibiting the use of mandatory terms in guidance documents, except to describe a statutory or regulatory requirement, § II.2.(vii). A guidance document, which is not legally binding on anyone, can nevertheless have coercive effects as a practical matter, and these effects are properly of concern to OMB in its promulgation of this Bulletin. Agencies, however, can appropriately bind their employees to abide by agency policy as a matter of their supervisory powers over such employees and can do so without undertaking notice and comment rulemaking. The distinction between binding the agency, either legally or practically, which cannot be done without notice and comment rulemaking, and binding subordinate employees, which can be done without notice and comment rulemaking, is a fine but important distinction.<sup>10</sup> OMB should therefore

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<sup>9</sup> We have focused on OMB’s proposed procedures, but we would also note a concern with the preamble. Page 6 of the preamble discusses the requirement that agencies set up a system whereby the public can electronically comment on and request reconsideration or modification of, guidance documents, it states that “no formal response to comments is required.” This is misleading. Section 553(e) of the APA authorizes petitions for issuance, amendment or repeal of a rule, and section requires 555(e) agencies to give “prompt notice” of denial of petitions and such denials have to be “accompanied by a brief statement of the grounds for the denial.” The APA does not exempt petitions for the issuance, amendment or repeal of a non-legislative rule from these requirements.

<sup>10</sup> See Administrative Conference of the United States, Agency Policy Statements (Recommendation 92-2), available at

be careful in its preamble and mandated procedures to maintain this distinction, and it should consult agencies and stakeholders about how best to preserve this distinction. As one step, we recommend that OMB clarify § II.2.vii in the following manner: “Each significant guidance document shall ... (vii) Not include mandatory language such as ‘shall,’ ‘must,’ ‘required’ or ‘requirement,’ unless the agency is using these words to describe a statutory or regulatory requirement, *or the language is addressed to agency staff and will not foreclose consideration by the agency of positions advanced by affected private parties.*”

#### *Additional Guidance*

Finally, the Section believes that the Bulletin might be of more assistance to all concerned if it covered aspects of the guidance process which it currently does not cover. For example, the Bulletin does not advise agencies what steps that they are required to take under the Administrative Procedure Act when guidance documents are issued, such as the publication requirements under section 552 of the APA, nor does it attempt to integrate the requirements imposed by the Bulletin with the APA requirements so that agencies would have a complete picture of their responsibilities.

Beyond the previous issues, the Bulletin fails to address two of the more problematic aspects of the use of Guidance. First, although the preamble to the Bulletin notes the importance of educating the public about the non-binding legal effect of guidance, the Bulletin does not address the problem of how to communicate effectively to the public that policy statements are not binding on regulated entities or the agency that issued them. OMB could assist this understanding if it inquired of agencies and stakeholders how such disclaimers can be improved. It would also be helpful to the public if OMB addressed the issue of whether an agency should advise members of the public that they may rely on the guidance – that is, that the agency will use its prosecutorial discretion not to take enforcement action against someone who relies in good faith on the guidance. Since this is a particularly vexing problem for courts that are asked to protect parties from a change in the agency’s guidance, OMB has the opportunity to make an improvement in agency practice if it can design appropriate guidelines regarding this issue. In this context, OMB should consider the ABA’s recommendation that, if an agency proposes to depart from the policy of a non-legislative rule on which the party reasonably relied, the agency must explain this departure, and the party may request relief.<sup>11</sup>

Thank you for your consideration of these comments.

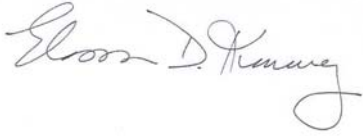
Sincerely yours,

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<http://www.law.fsu.edu/library/admin/acus/305922.html>:

[A]gencies are encouraged to provide guidance to staff in the form of manuals and other management directives as a means to regularize employee action that directly affects the public. However, they should advise staff that while instructive to them, such policy guidance does not constitute a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency.

<sup>11</sup> ABA, *supra* note 5.

A handwritten signature in black ink, reading "Eleanor D. Kinney". The signature is written in a cursive style with a large, looped initial "E".

Eleanor D. Kinney  
Section Chair