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**TESTIMONY OF HOWARD SHELANSKI  
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**BEFORE THE COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENT AFFAIRS  
SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT  
UNITED STATES SENATE**

September 22, 2016

Chairman Lankford, Ranking Member Heitkamp, and members of the Subcommittee:

Thank you for the invitation to appear before you today. I am pleased to have this opportunity to discuss the role of the Office of Information and Regulatory Affairs (OIRA) in the development of good guidance practices for federal agencies. OIRA's role with respect to guidance documents is twofold: we advise agencies regarding best practices for developing and issuing guidance, and we also review a subset of guidance documents under the same principles that guide our regulatory reviews.

Guidance documents serve an integral function in the policy development process. Agencies issue guidance to explain existing regulatory or statutory requirements, often at the public's request, or to make non-binding policy statements and recommendations. These documents often provide substantial value to the regulated community—they can increase efficiency, help the public understand the full range of compliance options that are available to them under current statutes and regulations, clarify to stakeholders whether a particular regulation or policy applies to them, and channel the discretion of agency employees.

OMB has long believed that agency guidance practices should be transparent, consistent and require agency accountability. In 2007, OMB published a bulletin in the Federal Register titled

Agency Good Guidance Practices to establish new policies and procedures for the development, issuance, and use of significant guidance documents.<sup>1</sup>

The bulletin, which remains in effect, establishes policies, practices, and procedures for guidance documents that Executive Branch agencies identify as significant or economically significant, designations that arise from criteria very similar to those for regulatory significance under Executive Order (E.O.) 12866. Those criteria include whether a guidance may reasonably be anticipated to cause changes that have a \$100 million annual economic impact, have material budgetary effects, implicate interagency interests, or otherwise raise novel legal or policy issues.

For the subset of guidance documents that agencies designate as significant, the 2007 bulletin sets forth general policies and principles for agencies to help ensure quality and transparency, including:

- Adopt written internal approval procedures at each agency;
- Include certain standard elements in guidance documents, including information about applicability and appropriate citations to legal authority;
- Establish a website that lists all *significant* guidance documents in effect and specify how the public can comment on them, request modifications or rescissions, or submit a complaint;
- Follow a notice-and-comment process for *economically significant* guidance, including publication of a proposed notice inviting public comment and the preparation of a response-to-comment document.

The bulletin also reminds agencies that the Administrative Procedure Act (APA) generally requires notice-and-comment when an agency establishes new requirements that it treats as binding. A key additional benefit of following good guidance practices is that the agency's review process will help to identify any draft guidance documents that instead should be promulgated through the formal rulemaking process.

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<sup>1</sup> [https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/m07-07.pdf](https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/m07-07.pdf)

In addition to the procedures required by the 2007 bulletin, OIRA also works with agencies to identify a subset of significant guidance documents that will undergo interagency review.

Once a guidance document is under interagency review, OIRA plays two roles. The first is to coordinate that review. OIRA circulates the guidance to other agencies in the Executive branch whose own policies, expertise, or responsibilities may in some way interrelate with the draft guidance document. The second principal role that OIRA plays is to ensure that the guidance embodies the relevant principles laid out in E.O.s 12866 and 13563, including whether the guidance is both necessary and consistent with applicable statutes and regulations. For example, the focus of such a review could be to help the agency hone and sharpen its arguments, interpret complex regulatory requirements into real world scenarios and applications, or discuss a particular way in which a regulated entity could comply with a regulation while not foreclosing other legitimate compliance approaches.

OIRA reviews economically significant guidance documents as well, although such guidance documents have been relatively uncommon. In OIRA's experience and based on agency analysis, the behavioral impacts associated with non-binding guidance documents do not often exceed \$100 million in a given year. One example where this could happen is when an agency issues guidance on emergency or disaster preparedness to state and local authorities. Even though the guidance is not binding, if the guidance is sound many states might be expected to willingly follow such recommendations and change their behavior accordingly. Even in such cases, however, guidance documents generally do not lend themselves to formal economic analysis of the kind that is required for an economically significant regulation under E.O. 12866. OMB's Good Guidance Practices bulletin does not require agencies to conduct a formal impact analysis when making a determination about whether a particular guidance document is economically significant. In addition, in many cases, the regulatory impact analysis associated with a published rule on the same topic can prove informative when considering the magnitude of the potential effects that might result from related guidance.

The implementation of government-wide good guidance practices continues to be a priority for OMB and OIRA. Agency guidance documents serve an important role in the regulatory sphere. The good guidance practices set forth in the 2007 bulletin serve as a useful tool for agencies in setting the appropriate scope for their guidance documents and in deciding whether regulation

would be a more appropriate mechanism. OIRA will continue to work with agencies as appropriate on the review of the various kinds of significant guidance documents that the agencies issue.

Finally, we have been in contact with our agency colleagues about their work to implement GAO recommendations regarding best practices for guidance. The agencies have acknowledged and endorsed the recommendations of GAO's report and are making improvements where needed. We note, however, that the GAO report did find many good agency practices to be in place. We look forward to exploring whether there is more we can do at OIRA to promote improvements in agencies' processes for developing guidance.

Thank you for your time and attention. I would be happy to answer any questions you may have.