

August 6, 2020

Hon. Paul Ray
OIRA Administrator
The Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Administrator Ray,

The undersigned write in strong support of Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents.” This administration has implemented regulatory reform in a variety of areas, and that work to expand prosperity on behalf of the American people must continue. We commend you for your work and urge you to continue to hold federal agencies accountable for the prompt implementation of Executive Order 13891.

Federal agencies frequently issue guidance—so much so, in fact, that the number of these documents is in effect unknown.¹ These guidance documents can function as shadow regulations that quietly establish precedents and de facto standards without following basic transparency norms, including notice-and-comment, regulatory analysis, and legislative accountability requirements. And, although guidance documents are technically not legally binding on regulated parties, in practice they wield the force of law. Guidance is frequently used to bring enforcement actions against regulated parties and often enjoys the weight of judicial deference in court.

The Constitution vests only Congress with the power to make law; however, for decades, executive branch agencies have used guidance documents to effectively usurp the legislature’s domain. Indeed, some observers claim agencies are using [guidance in lieu](#) of official regulations.² The D.C. Circuit Court puts it this way, “One guidance document may yield another and then another and so on. . . Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.”³

In addition, federal guidance often encroaches states’ authority to govern and undermines the federalist structure of our Union. In 2016, fifteen state Attorneys General [penned a letter](#)

¹ Clyde Wayne Crews, Jr., Mapping Washington’s Lawlessness: An Inventory of “Regulatory Dark Matter” 2017 Edition.

² Paul Noe, Why Trump’s Orders On Agency Guidance Are Significant, Law360, <https://www.law360.com/articles/1210011/why-trump-s-orders-on-agency-guidance-are-significant>. See also U.S. Senate Committee on Health, Education, Labor and Pensions, “Alexander, Lankford Begin Investigation into Federal Agencies’ Use of Regulatory Guidance,” news release, May 7, 2015, <http://www.help.senate.gov/chair/newsroom/press/alexander-lankford-begin-investigation-into-federal-agencies-use-of-regulatory-guidance>.

³ *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1019 (DC Cir. 2000).

to Congress stating that federal agency guidance frequently fails “to fully consider the effect of their regulations on States and state law.”⁴

Executive Order 13891 charges agencies with implementing measures that would limit the legal weight of guidance to proper bounds, increase the transparency with which guidance is issued and enforced, and decrease the cost of compliance to regulated parties.

According to Section 3(a) of Executive Order 13891 and the [implementing memo](#), by February 28, 2020, federal agencies were to have made all guidance in effect available in a single, searchable database on their respective websites.⁵ This is a simple, straightforward measure towards improving agency guidance; yet, at the time of this letter, dated five months past the deadline, our analysis of 71 agencies finds that **approximately half (35)** have not done so (see table attached).⁶

Our analysis includes independent regulatory agencies, which unfortunately are not included within the scope of Executive Order 13891’s mandate. Although independent regulatory agencies are not required to publish their guidance documents, they cannot use unpublished guidance in an administrative enforcement action or adjudication against regulated parties.⁷ As the table below shows, some independent regulatory agencies, such as the Federal Trade Commission and National Labor Relations Board, have indeed made their guidance documents available on their website. In the spirit of good governance, such agencies should be commended while those agencies which have not published their guidance should be encouraged to do so as well.

Some agencies which are fully subject to the mandate of Executive Order 13891, such as the [Department of Labor](#) (DOL) and the [Environmental Protection Agency](#) (EPA), met the deadline. They offer easy-to-navigate websites allowing the public to explore thousands of government decision-making documents and serve as an example to others. Nonetheless, even this initial implementation reveals the breathtaking scope of the shadow regulatory state. Tens of thousands of shadow regulations have been posted, with EPA and DOL posting roughly 9,000 and 7,500 documents, respectively.

Regulatory reform without implementation is a missed opportunity. Agency adoption and implementation of Executive Order 13891 will improve regulatory transparency and promote good government. We stand ready to work with you in these regulatory reform efforts as we seek to break down economic barriers for thousands, if not millions, of American businesses and individuals.

Sincerely,

⁴ Office of the Attorney General, State of West Virginia (and other signatories), letter to House and Senate leadership, “On eliminating burdensome and illegal regulations by strengthening the Administrative Procedure Act,” July 11, 2016.

⁵ OFFICE OF MANAGEMENT AND BUDGET, GUIDANCE IMPLEMENTING EXECUTIVE ORDER 13891, TITLED “PROMOTING THE RULE OF LAW THROUGH IMPROVED AGENCY GUIDANCE DOCUMENTS” (October 31, 2019).

⁶ Some agencies listed as “not-implemented,” such as the U.S. Dept. of Agriculture and U.S. Dept. of the Treasury, have Guidance Portals but have not populated them with guidance.

⁷ Exec. Order 13892, 84 C.F.R. 55239 (2019).

Brent Wm. Gardner | Chief Government Affairs Officer | Americans for Prosperity
James Valvo | Executive Director | Cause of Action
Tom Pyle | President | American Energy Alliance
Lisa B. Nelson | CEO | American Legislative Exchange Council
Grover Norquist | President | Americans for Tax Reform
Ryan Ellis | President | Center for a Free Economy
Matthew Kandrach | President | Consumer Action for a Strong Economy
Andrew F. Quinlan | President | Center for Freedom and Prosperity
Thomas A. Schatz | President | Citizens Against Government Waste
Craig Richardson | President | Energy & Environment Legal Institute
Adam Brandon | President | FreedomWorks
George Landrith | President | Frontiers of Freedom
James Taylor | President | The Heartland Institute
Jessica Anderson | Executive Director | Heritage Action for America
Mario H. Lopez | President | Hispanic Leadership Fund
Andrew Langer | President | Institute for Liberty
Seton Motley | President | Less Government
The Honorable Jason Isaac | Director | Life: Powered, Texas Public Policy Foundation
Jameson Taylor, PhD | Vice President for Policy | Mississippi Center for Public Policy
David W. Almasi | Vice President | National Center for Public Policy Research
Brandon Arnold | Executive Vice President | National Taxpayers Union
Paul Gessing | President | Rio Grande Foundation
David Williams | President | Taxpayers Protection Alliance
James L. Martin | Founder/Chairman | 60 Plus Association
Saulius "Saul" Anuzis | President | 60 Plus Association

Agency Guidance Document Portal Per Executive Orders 13891 & 13892

Not Implemented (35)	Implemented (36)
Agency for International Development	Corporation for National and Community Service
American Battle Monuments Commission	Council of the Inspectors General on Integrity and Efficiency
Central Intelligence Agency	Court Services and Offender Supervision Agency
Chemical Safety and Hazard Investigation Board	Environmental Protection Agency
Commission on Civil Rights	Equal Employment Opportunity Commission
<u>Consumer Financial Protection Bureau</u>	Federal Mediation and Conciliation Service
Commodity Futures Trading Commission	Federal Trade Commission
Consumer Product Safety Commission	Food and Drug Administration
Council on Environmental Quality	General Services Administration
Export-Import Bank of the United States	Institute of Museum and Library Services
Farm Credit Administration	Merit Systems Protection Board
Federal Communications Commission	National Archives and Records Administration
Federal Deposit Insurance Corporation	National Endowment for the Arts
Federal Energy Regulatory Commission	National Endowment for the Humanities
Federal Housing Finance Agency	National Labor Relations Board
Federal Labor Relations Authority	Peace Corps
Federal Maritime Commission	Pension Benefit Guaranty Corporation
Federal Reserve System	Presidio Trust
International Trade Commission	Railroad Retirement Board
National Aeronautics and Space Administration	Small Business Administration
National Credit Union Administration	Social Security Administration
National Indian Gaming Commission	Tennessee Valley Authority
National Mediation Board	U.S. Access Board
National Transportation Safety Board	U.S. Department of Commerce
Nuclear Regulatory Commission	U.S. Department of Defense
Office of Government Ethics	U.S. Department of Education
Office of Management and Budget	U.S. Department of Energy
Office of Personnel Management	U.S. Department of Health and Human Services
Postal Regulatory Commission	U.S. Department of Homeland Security
Securities and Exchange Commission	U.S. Department of Housing and Urban Development
Surface Transportation Board	U.S. Department of Justice
U.S. Agency for Global Media	U.S. Department of Labor
U.S. Department of Agriculture	U.S. Department of State
U.S. Department of the Treasury	U.S. Department of the Interior
United States Postal Service	U.S. Department of Transportation
	U.S. Department of Veterans Affairs