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Submitted via email: OMB_GGP@omb.eop.gov

Dear Ms. Jones:

Having practiced Administrative Law for a decade and then taught it for two more decades, I applaud OMB's effort to bring some regularity to the use of guidance documents throughout the government. I submit the following comments with the goal of minimizing inappropriate burdens on agencies and assuring that regulated entities will continue to receive the information they need about agency interpretations and policies.

1. The OMB Guidance creates distinct requirements to govern "significant guidance documents" and "economically significant guidance documents." The former are subject only to appropriate access requirements, while the latter are to be submitted to notice and comment. This approach is appropriate to serve several purposes: (1) widespread public knowledge about agency positions, (2) uniformity, and (3) increased public involvement as issues become more important and expensive.

2. The definition of "significant guidance documents" is problematic because of its extreme breadth. As written, it seems to encompass any statement by any agency personnel that would constitute the agency's first expression of an interpretation on a particular point. To the extent that this applies to written communications by low level personnel, it seems unworkable. There are so many such communications that compiling and providing access to them would be an extremely burdensome task. But they are of little value precisely because they are issued at such a distance from authoritative agency personnel and do not have the status of secret agency law. This means that the expensive task of compiling them produces a nearly worthless product that may create confusion rather than providing useful guidance.

The extreme breadth of the definition is also inconsistent with language in the Supplementary Information. At Part II.C.1, OMB says:

> Agencies should follow GGP when providing important policy direction on a broad scale. Accordingly, § II(1)(c) states that each agency should not use documents or other means of communication that are excluded from the definition of significant guidance document to informally or indirectly communicate new or different regulatory expectations to a broad public audience for the first time.

This language suggests that the Guidance requirements are not intended to apply to the sort of lower-level, particularized responses I described above. Only if such responses would play a role as "secret agency law" should they be compiled and specifically made available.

The real issue here is when agency personnel should go up the chain of command to reach a level at which a statement could truly be considered "significant." As written, OMB's Guidance would seem to force virtually all statements up the chain so that when issued they are worthy of compilation. This would seem to reduce significantly the ability of lower level agency personnel to communicate effectively and to achieve productive give-and-take with regulated parties.

Perhaps the key to this problem lies in the definition of "guidance document:" "a document . . . prepared by an agency." What is the scope of "prepared by an agency?" Does it include every document prepared by any employee of the agency, certainly a plausible interpretation? Or does it mean a document that bears the imprimatur of the agency at some level above line employees? Regardless of the meaning of the actual language, is there a way to define "guidance document" to exclude the low level, ad hoc, response to particularized circumstances?

3. The definition of "guidance document" is problematic for another reason. It provides that "'guidance document' . . . means a document, other than a document issued pursuant to 5 U.S.C. § 553 or § 554, prepared by an agency." It is true, for example, that § 553(b)(3)(A) provides that § 553 "does not apply" to interpretations and statements of policy." But an agency might well say that it has issued an interpretation without notice and comment pursuant to the exemption in § 553. Thus, it is possible to read the exclusion for documents "issued pursuant to 5 U.S.C. § 553" as excluding interpretations and statements of policy from the OMB Guidance. This was certainly not intended.

Accordingly, I recommend that the relevant portion of the definition of "guidance document" be revised to read as follows:

> The term "guidance document" means a document, other than a document issued pursuant to the procedures required by 5 U.S.C. § 553(c)-(d) or § 554(b)-(d), . . .

4. OMB's Guidance requires that notice and comment be pursued with respect to an "economically significant guidance document." There is a conceptual problem with the proposition as applied to initial interpretations of statutes or regulations. In theory (pre-*Chevron* theory, at least), an interpretation reflects the requirement of the underlying provision. Thus, it is the statute or regulation, not the interpretation that has an annual effect of $100 million or more on the economy. Under this understanding of "interpretation," no interpretive guidance would have the required economic effect. Moreover, this requirement to assess the economic impact of an interpretation is, in effect, a requirement to assess the economic impact of the underlying legislation. Among other things, this is an inappropriate intrusion on the Article I prerogatives of the legislative branch.

We understand, however, that there may be several possible interpretations. Certainly if an agency has already adopted one interpretation, it is fair to say that a *Chevron*-authorized change of interpretation can have a substantial economic effect. There is no difficulty applying the "economically significant guidance document" requirement to second and later generation interpretations.

The problem is the initial interpretation. There is no baseline against which to judge the economic impact of the first interpretation of a statute or regulation. One might argue that the interpretation imposes a certain cost relative to other possible interpretations. If so, as applied to initial interpretation, the OMB Guidance provision requires a full-scale analysis of all possible alternative interpretations, not simply a determination of whether the interpretation imposes certain costs. This could be an extremely burdensome task. All such burdens deter the issuance of guidance documents and reduce the ability of regulated parties to have access to agency positions

Either OMB should be clear in articulating a requirement for alternatives analysis for all initial interpretations, or it should exclude initial interpretations from the term "economically significant guidance document."

5. Agencies will also need guidance as to when an agency statement constitutes an "interpretation" triggering the GGP, and when it is simply a restatement of the law. Consider, for example, the question of whether EPA may consider costs in setting an ambient standard at the level necessary to protect human health. Many would argue, now with Supreme Court backing, *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457 (2001), that the Clean Air Act clearly does not permit the agency to consider costs. Thus, they would say that an EPA assertion to that effect is not truly an "interpretation," but merely a reflection or restatement of the statute. How are agencies to draw that line? If agencies implement the GGP with a typical "abundance of caution," they will become bogged down in process issuing statements that do not really qualify as interpretations. At a minimum, OMB should explicitly recognize this difficulty and provide some guidance as to how agencies should address it.

6. It should be noted that various requirements of the OMB Guidance may have an unintended (or at least unexpressed) effect on judicial review. Until the Supreme Court clarifies *U.S. v. Mead*, we know only that *Chevron* deference may attach to informal agency statements based upon some unknown combination of procedural input and delegated authority. Part II.1.b of the OMB Guidance provides that

> Each agency shall develop or have written procedures for the approval of significant guidance documents. Those procedures shall ensure that issuance of significant guidance documents is approved by appropriate senior agency officials.

A court might decide that a showing of careful decisionmaking (primarily a *Skidmore* consideration) and issuance from a relatively high level of the agency is enough to warrant *Chevron* deference.

Chevron deference is even more likely with respect to interpretations in economically significant guidance documents. Even if the OMB-imposed notice and comment process does not render the interpretation a legislative rule, it may constitute the degree of procedural fairness and input that would justify *Chevron* deference.

These results seem entirely appropriate in light of the enhanced agency consideration and public participation mandated by OMB. They should be recognized and acknowledged by OMB.

Thank you for your consideration.

Sincerely,

William S. Jordan, III
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