U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 23 2018

The Honorable Ron Johnson
Chairman
Homeland Security and Government Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice (Department) on S. 2296, the "Guidance Out Of Darkness (Good) Act." The Department supports the purposes of this bill. The universe of existing or effective guidance documents concerning the public's rights and obligations is vast and unquantifiable, and the Department supports shedding more light on guidance in the interests of transparency, accountability, and good government. The Department believes the bill can be revised to address our concerns while ensuring that the legitimate goals of the bill are fully met, and we would appreciate the opportunity to work with Congress to address the concerns.

I. CONSTITUTIONAL ISSUES

S. 2996 would require agencies to publish on the Internet, without exception, any "guidance document" that it has already issued within 180 days of enactment, and all "guidance documents" that it issues in the future concurrently with issuance. *Id.* § 3(a), (b). A "guidance document" would be defined broadly to mean "an agency statement of general applicability, other than a rule, that—(I) does have not the force and effect of law; and (II) is designated by any agency official as setting forth—(aa) a policy on a statutory, regulatory, or technical issue; or (bb) an interpretation of a statutory or regulatory issue." *Id.* § 2(2)(A)(i). The bill would state that the term "guidance document" "shall be construed broadly to effectuate the purpose and intent of this Act." *Id.* § 2(2)(B). An "agency" for purposes of these definitions would have "the meaning given that term" in 5 U.S.C. § 551, which would include the Department of Justice and components thereof, such as the litigating divisions and the Federal Bureau of Investigation.

This definition of "guidance document" is broad and would include any "interpretation of a statutory or regulatory issue" and any legal document filed in any case taking any statutory or regulatory position. The broad definition would affect agencies across the Executive Branch, including any agency that issues classified guidance to its employees, but it is of particular concern to the Department because of the adverse effect it would have on the conduct of criminal investigations and prosecutions. The Department has circulated internally a range of manuals

and other guidance documents to advise investigators and prosecutors in the conduct of their investigations and cases. The Department considers these materials to be confidential internal guidance to DOJ attorneys, containing litigation strategy as well as internal deliberations, attorney-client communications, and attorney work product. They may also contain confidential trade secrets and taxpayer information. The Department has never considered these materials to be appropriate for public disclosure and has resisted attempts to force their public disclosure.

Most of this information is constitutionally protected from compelled disclosure, specifically by the national security,[1] law enforcement,[2] deliberative process,[3] and attorney-client[4] components of executive privilege. The Department accordingly recommends this bill be amended to provide an express exception for privileged information in guidance documents. For example, section 2(2)(B) ("Rule of Construction") could be amended to include a subparagraph

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[1] The President's "authority to classify and control access to information bearing on national security . . . flows principally from th[e] constitutional investment of [the Commander in Chief] power in the President" and the "authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988); *see also Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996) (stating "that a congressional enactment would be unconstitutional if it were interpreted to divest the President of his control over national security information in the Executive Branch" (internal quotation marks and citation omitted)).

[2] The President has constitutional authority to withhold law enforcement information to protect against "the potential damage to proper law enforcement that would be caused by revelation of sensitive techniques, methods or strategy." *Response to Congressional Requests for Information Regarding Decision Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 76 (1986); *see also Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 32 (1982) (explaining that the Executive Branch was invoking the law enforcement component of executive privilege to withhold certain items in EPA law enforcement files, including "sensitive memoranda . . . reflecting enforcement strategy, legal analysis, . . . settlement considerations, and similar materials the disclosure of which might adversely affect . . . overall enforcement policy").

[3] This component of executive privilege protects "'communications between high Government officials and those who advise and assist them in the performance of their manifold duties," *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 2 (1999) (opinion of Attorney General Janet Reno) (quoting *United States v. Nixon*, 418 U.S. 683, 705 (1974)), and "extends to all Executive Branch deliberations, even when the deliberations do not directly implicate presidential decisionmaking," *Assertion of Executive Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff*, 32 Op. O.L.C. 7, 9 (2008); *see also Assertion of Executive Privilege over Communications Regarding EPA's Ozone Air Quality Standards and California's Greenhouse Gas Waiver Request*, 32 Op. O.L.C. 1, 2 (2008) (same).

[4] "Both the attorney-client privilege and the work-product doctrine are subsumed under executive privilege." *Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 2, 3 (1996). "[T]he reasons for the constitutional privilege against the compelled disclosure of executive branch deliberations have special force when legal advice is involved" because "legal matters are likely to be among those on which high government officials most need, and should be encouraged to seek, objective, expert advice" *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. 481, 490 & n.17 (1982) (quotation omitted); *see also Constitutionality of the OLC Reporting Act of 2008*, 32 Op. O.L.C. 14, 17 (2008) ("[I]f executive branch officials are to execute their constitutional and statutory responsibilities, they must have access to candid and confidential legal advice and assistance.").

(iii) providing that nothing in the bill shall be construed to require the disclosure of information protected by executive privilege. *See, e.g.*, 33 U.S.C. § 2342(b) ("Nothing in this section may be construed to compel or authorize the disclosure of data or other information determined by the Secretary to be confidential information, privileged information, law enforcement information, national security information, infrastructure security information, personal information, or information the disclosure of which is otherwise prohibited by law."). The Department would be happy to consult on other ways the bill could be revised to accommodate the exercise of executive privilege.

The Department also recommends that the definition be refined to address certain ambiguities that exacerbate these constitutional concerns, such as what is meant by an "agency statement of general applicability" in section 2(2)(A)(i) and what is meant by the phrase "designated by an agency official" in section 2(2)(A)(i)(II). At a minimum, to avoid constitutional concerns, we would construe "an agency statement of general applicability" to be limited to guidance that agencies provide to the public or external audiences about how to follow a law or regulation. This would also be consistent with the Attorney General's recent memorandum (attached) as he used the phrase "of general applicability and future effect . . . that are designed to advise parties outside the federal Executive Branch about legal rights and obligations falling within the Department's regulatory or enforcement authority."

Thank you for the opportunity to present our views in support of this legislation. We hope this information is helpful, and we look forward to continuing to work with Congress on this important legislation. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Prim F. Escalona
Principal Deputy Assistant Attorney General

cc: The Honorable Claire McCaskill
Ranking Member

Enclosure

Office of the Attorney General
Washington, D. C. 20530

November 16, 2017

MEMORANDUM FOR ALL COMPONENTS

FROM: THE ATTORNEY GENERAL

SUBJECT: Prohibition on Improper Guidance Documents

The Department of Justice has the duty to uphold the laws of the United States and to ensure the fair and impartial administration of justice. Therefore, when the Department engages in regulatory activity, it should model the lawful exercise of regulatory power.

In promulgating regulations, the Department must abide by constitutional principles and follow the rules imposed by Congress and the President. These principles and rules include the fundamental requirement that agencies regulate only within the authority delegated to them by Congress. They also include the Administrative Procedure Act's requirement to use, in most cases, notice-and-comment rulemaking when purporting to create rights or obligations binding on members of the public or the agency. Not only is notice-and-comment rulemaking generally required by law, but it has the benefit of availing agencies of more complete information about a proposed rule's effects than the agency could ascertain on its own, and therefore results in better decision making by regulators.

Not every agency action is required to undergo notice-and-comment rulemaking. For example, agencies may use guidance and similar documents to educate regulated parties through plain-language restatements of existing legal requirements or provide non-binding advice on technical issues through examples or practices to guide the application or interpretation of statutes and regulations. But guidance may not be used as a substitute for rulemaking and may not be used to impose new requirements on entities outside the Executive Branch. Nor should guidance create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements.

It has come to my attention that the Department has in the past published guidance documents—or similar instruments of future effect by other names, such as letters to regulated entities—that effectively bind private parties without undergoing the rulemaking process.

The Department will no longer engage in this practice. Effective immediately, Department components may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local,

and tribal governments). To avoid circumventing the rulemaking process, Department components should adhere to the following principles when issuing guidance documents:

- Guidance documents should identify themselves as guidance, disclaim any force or effect of law, and avoid language suggesting that the public has obligations that go beyond those set forth in the applicable statutes or legislative rules.

- Guidance documents should clearly state that they are not final agency actions, have no legally binding effect on persons or entities outside the federal government, and may be rescinded or modified in the Department's complete discretion.

- Guidance documents should not be used for the purpose of coercing persons or entities outside the federal government into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or regulation.

- Guidance documents should not use mandatory language such as "shall," "must," "required," or "requirement" to direct parties outside the federal government to take or refrain from taking action, except when restating—with citations to statutes, regulations, or binding judicial precedent—clear mandates contained in a statute or regulation. In all cases, guidance documents should clearly identify the underlying law that they are explaining.

- To the extent guidance documents set out voluntary standards (e.g., recommended practices), they should clearly state that compliance with those standards is voluntary and that noncompliance will not, in itself, result in any enforcement action.

All components shall implement these principles immediately with respect to all future guidance documents, in consultation with the Office of Legal Policy. Components should also implement these principles consistent with policies issued by the Office of Management and Budget, including its Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). Furthermore, I direct the Associate Attorney General, as Chair of the Department's Regulatory Reform Task Force, to work with components to identify existing guidance documents that should be repealed, replaced, or modified in light of these principles.

For purposes of this memorandum, guidance documents include any Department statements of general applicability and future effect, whether styled as guidance or otherwise that are designed to advise parties outside the federal Executive Branch about legal rights and obligations falling within the Department's regulatory or enforcement authority. This memorandum does not apply to adjudicatory actions that do not have the aim or effect of binding anyone beyond the parties involved, and it does not address documents informing the public of the Department's enforcement priorities or factors the Department considers in exercising its prosecutorial discretion. Nor does it address internal directives, memoranda, or training materials for

Department personnel directing them on how to carry out their duties, positions taken by the Department in litigation, or advice provided by the Attorney General or the Office of Legal Counsel. This memorandum is an internal Department of Justice policy directed at Department components and employees. As such, it is not intended to, does not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.