U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 10 2019

The Honorable Ron Johnson
Chairman
Committee on 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. 380, the "Guidance Out Of Darkness ("GOOD") Act," as reported by the Senate Committee on Homeland Security and Government Affairs. As stated in a views letter on a previous version of this bill in the last Congress, the Department supports 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. In the reported version of S. 380, the Committee has addressed many of the concerns we expressed in last year, for which we thank the Committee. However, a few concerns still remain.

S. 380 would require agencies to publish on the Internet, *id.* § 3(c), any "guidance document" that it has already issued, *id.* § 3(b), all "guidance documents" that it issues in the future, *id.* § 3(a), and all "rescinded guidance documents," *id.* § 3(e). A "guidance document" would be defined broadly to mean "an agency statement of general applicability (other than a rule that has the force and effect of law promulgated in accordance with the notice and public procedure under section 553 of title 5, United States Code), that—(I) does have not the force and effect of law; and (II) is designated by an agency 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(3)(A)(i).

As we noted last year, this definition of "guidance document" might include an agency's privileged or classified guidance to its employees. Such information would be constitutionally protected from compelled disclosure, specifically by the national security, law enforcement, deliberative process, and attorney-client components of executive privilege. For this reason, we appreciate the Committee's inclusion of the exception in section 3(d) for documents exempt from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b), which will help protect privileged documents from compelled disclosure. Nevertheless, the FOIA exemptions in 5 U.S.C. § 552(b) do not fully encompass all privileged information. In particular,

exemption (5) now "provide[s] that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested." 5 U.S.C. § 552(b)(5) (as amended by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, sec. 2(2), 130 Stat. 538, 540). As noted, the disclosure requirements of the bill would apply to guidance documents issued going forward, S. 380 § 3(a), guidance documents previously issued and still in effect, *id.* § 3(b), and rescinded guidance documents, *id.* § 3(e), and thus are likely to cover deliberative materials more than 25 years old.[1] Some of these deliberative materials may be covered by other FOIA exemptions, *see, e.g.*, 5 U.S.C. §§ 552(b)(1) (classified information); 552(b)(7) (law enforcement information), but some may not be.

The Department accordingly continues to recommend that S. 380 be amended to provide an express exception for privileged information in internal agency guidance documents. For example, section 2(3)(B) ("Rule of Construction") could be amended to include a subparagraph (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."). This rule of construction would make explicit what we believe is the most appropriate reading of the statute.

In the absence of such a change, to avoid constitutional concerns, we would construe "an agency statement of general applicability" in section 2(3)(A)(i) 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 November 2017 memorandum (attached), in which he defined "guidance documents" to include "any Department statements 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."

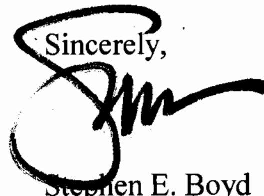
---

[1]The deliberative process 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)). It "extends to all Executive Branch deliberations, even when the deliberations do not directly implicate presidential decision making," and regardless of how old they are. *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).

* * * * *

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,



Stephen E. Boyd
Assistant Attorney General

Enclosure

cc: The Honorable Gary C. Peters
Ranking Member

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.