



## Testimony

Before the Subcommittee on Regulatory  
Affairs and Federal Management,  
Committee on Homeland Security and  
Governmental Affairs, U.S. Senate

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For Release on Delivery  
11:00 a.m. ET  
Wednesday, September 23, 2015

# REGULATORY GUIDANCE PROCESSES

## Agencies Could Benefit from Stronger Internal Control Practices

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# GAO Highlights

Highlights of [GAO-15-834T](#), a testimony before the Subcommittee on Regulatory Affairs and Federal Management, Committee on Homeland Security and Governmental Affairs, U.S. Senate

## Why GAO Did This Study

Regulatory guidance is an important tool agencies use to communicate timely information about regulatory and grant programs to regulated parties, grantees, and the public. Guidance provides agencies flexibility to articulate their interpretations of regulations, clarify policies, and address new issues more quickly than may be possible using rulemaking. The potential effects of guidance and risks of legal challenges underscore the need for consistent processes for the development, review, dissemination, and evaluation of guidance.

This statement discusses four key questions addressed in GAO's April 2015 report on regulatory guidance: (1) what it is; (2) how agencies use it; (3) how agencies decide whether to use guidance or undertake rulemaking; and (4) steps agencies can take to ensure more effective guidance processes. To conduct that work, GAO reviewed relevant requirements, written procedures, guidance, and websites, and interviewed agency officials.

## What GAO Recommends

GAO is making no new recommendations in this statement. In the April 2015 report, GAO recommended steps to ensure consistent application of OMB requirements for significant guidance and to strengthen internal controls in guidance production processes. The agencies generally agreed with the recommendations.

View [GAO-15-834T](#). For more information, contact Michelle Sager, (202) 512-6806 or [sagerm@gao.gov](mailto:sagerm@gao.gov).

September 23, 2015

## REGULATORY GUIDANCE PROCESSES

### Agencies Could Benefit from Stronger Internal Control Practices

#### What GAO Found

**What is regulatory guidance?** One of the main purposes of guidance is to explain and help regulated parties comply with agencies' regulations. Even though not legally binding, guidance documents can have a significant effect on regulated entities and the public, both because of agencies' reliance on large volumes of guidance documents and because the guidance can prompt changes in the behavior of regulated parties and the general public.

**How do agencies use regulatory guidance?** The four departments GAO reviewed—Agriculture (USDA), Education (Education), Health and Human Services (HHS), and Labor (DOL)—and the 25 components engaged in regulatory or grant making activities in these departments used guidance for multiple purposes, such as clarifying or interpreting regulations and providing grant administration information. Agencies used many terms for guidance and agency components issued varying amounts of guidance, ranging from about 10 to more than 100 guidance documents each year. Departments typically identified few of their guidance documents as "significant," generally defined by the Office of Management and Budget (OMB) as guidance with a broad and substantial impact on regulated entities.

**How do agencies determine whether to issue guidance or undertake rulemaking?** According to officials, agencies considered a number of factors when deciding whether to issue a regulation or guidance. However, the key criterion in making the choice was whether they intended the document to be binding; in such cases agencies proceeded with regulation.

**How can agencies ensure more effective guidance processes that adhere to applicable criteria?** All four departments we studied identified standard practices to follow when developing guidance but could also strengthen their internal controls for issuing guidance.

- Agencies addressed OMB's requirements for significant guidance to varying degrees. Education and USDA had written departmental procedures for approval as required by OMB. DOL's procedures were not available to staff and required updating. HHS had no written procedures. In addition, USDA, DOL, and Education consistently applied OMB's public access and feedback requirements for significant guidance, while HHS did not.
- In the absence of specific government standards for non-significant guidance—the majority of issued guidance—the application of internal controls is particularly important. The 25 components GAO reviewed addressed some control standards more regularly than others. For example, few components had written procedures to ensure consistent application of guidance processes. However, all components could describe standard review practices and most used tools to document management approval of guidance. Not all components conferred with external nonfederal stakeholders when developing guidance. Finally, nearly half of the components GAO reviewed did not regularly evaluate whether issued guidance was effective and up to date.

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

Thank you for the opportunity to discuss our report on regulatory guidance processes, which we issued earlier this year.<sup>1</sup> Regulatory guidance is an important tool that agencies use to communicate timely information about the implementation of regulatory and grant programs to regulated parties, grantees, and the general public. Guidance can take a variety of formats and names including directives, interpretive memorandums, fact sheets, and Dear Colleague letters. The Office of Management and Budget (OMB) defines the term “guidance document” as an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.

Guidance documents provide agencies valuable flexibility to clarify their requirements and policies, and to address new issues and circumstances more quickly than may be possible using rulemaking. Although not legally binding, guidance documents can have far-reaching effects. Guidance documents can vary—by type, purpose, and amount—among agencies and subcomponents of the same agency, and have often been reported to outnumber regulations in terms of the number of documents issued annually.

My remarks today highlight answers to four key questions addressed in our April 2015 report on regulatory guidance processes:

1. What is regulatory guidance?
2. How do agencies use regulatory guidance?
3. How do agencies determine whether to issue guidance or undertake rulemaking?
4. How can agencies ensure more effective guidance processes that adhere to applicable criteria?

To conduct that work, we reviewed guidance processes at 25 components that engaged in regulatory or grant-making activities in four

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<sup>1</sup>GAO, *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, [GAO-15-368](#) (Washington, D.C.: Apr. 16, 2015).

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departments—Agriculture (USDA), Education (Education), Health and Human Services (HHS), and Labor (DOL).<sup>2</sup> The scope of that review focused on guidance issued to external parties that explained regulatory and grant-related requirements and other policies. We reviewed agencies' written procedures, guidance documents, and websites. We also interviewed department and component officials on guidance practices. We selected and applied four government-wide internal control standards to guidance processes.<sup>3</sup> We identified both opportunities for improved internal controls related to guidance and highlighted agency practices that could be applied to guidance processes in other agencies. We conducted the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. More details on our methodology can be found in our report.

Mr. Chairman, agencies must exercise diligence when using guidance. Although guidance documents are not legally binding, they can affect the actions of stakeholders and other interested parties, as well as agencies' staffs, because guidance articulates agencies' interpretations and policy choices. The potential effects of these documents—and the risks of legal challenges to agencies—underscore the need for consistent and well-understood processes for the development, review, dissemination, and evaluation of guidance.

Our April 2015 report found that agencies and their components used guidance for multiple purposes. Further, we also found that all four departments identified standard practices to follow when developing

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<sup>2</sup>These components were within the jurisdiction of the requesting committee, the House Committee on Education and the Workforce. See appendix II for a list of the components we reviewed.

<sup>3</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: November 1999). Revised standards will be effective beginning with fiscal year 2016. See *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: September 2014). We applied four of the five standards of internal control to guidance processes. We determined that the internal control we did not apply to guidance processes in this review—assuring an adequate control environment—was less applicable to our review of specific guidance production processes.

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guidance. However, stronger application of internal controls would help ensure that guidance processes achieve desired results and prevent errors. Components primarily relied on websites to disseminate guidance, but could do more to improve online access, such as making guidance documents easier to find and ensuring that they are current. We recommended that HHS and DOL ensure consistent application of OMB requirements for guidance. We also recommended that USDA, Education, HHS, and DOL strengthen the use of internal controls in guidance production processes and improve online guidance dissemination. All four agencies generally agreed with the recommendations.

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## Regulatory Guidance Is a Tool for Agency Communication

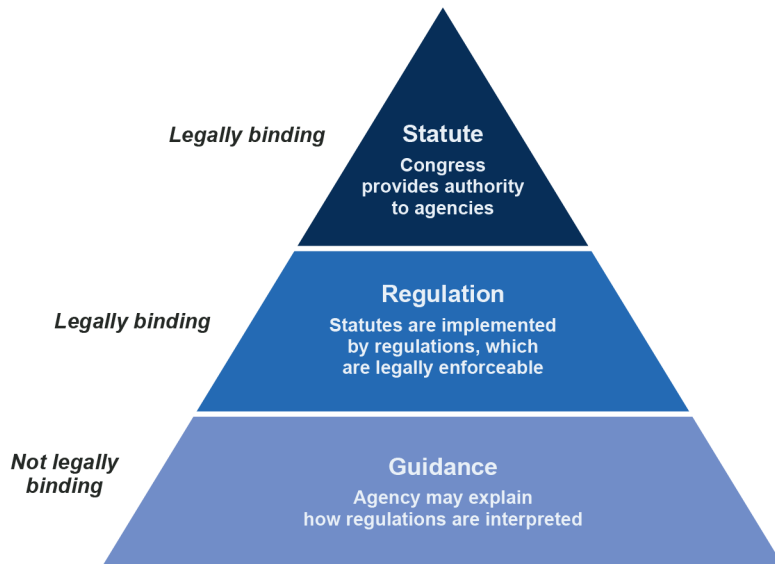
One of the main purposes of guidance is to explain and help regulated parties comply with agency regulations. As shown in figure 1, guidance may explain how agencies plan to interpret regulations. Agencies sometimes include disclaimers in their guidance to note that the documents have no legally binding effect on regulated parties or the agencies. Even though not legally binding, guidance documents can have a significant effect on regulated entities and the public, both because of agencies' reliance on large volumes of guidance documents and because the guidance can prompt changes in the behavior of regulated parties and the general public.<sup>4</sup> Nevertheless, defining guidance can be difficult. To illustrate that difficulty, several of the components told us that they do not consider many of the communication documents they issue to the public to be guidance.<sup>5</sup>

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<sup>4</sup>See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 *Cornell L. Rev.* 397, 400 (March 2007).

<sup>5</sup>For the purposes of our review, we examined agency processes for guidance that ranged from interpretive (such as explaining how to comply with a statute or regulation) to informational (such as hazard alerts and toolkits).

**Figure 1: Hierarchy of Statutory and Regulatory Authority**



Source: GAO analysis of agency authority. | GAO-15-834T

Regulations and guidance documents serve different purposes. The Administrative Procedure Act (APA) established broadly applicable requirements for informal rulemaking, also known as notice and comment rulemaking. Among other things, the APA generally requires that agencies publish a notice of proposed rulemaking in the *Federal Register*. After giving the public an opportunity to comment on the proposed regulation by providing “written data, views, or arguments,” and after considering the public comments received, the agency may then publish the final regulation. To balance the need for public input with competing societal interests favoring the efficient and expeditious conduct of certain government affairs, the APA exempts certain types of rules from the notice and comment process, including “interpretative rules” (we will refer to these as interpretive rules in this statement) and “general statements of policy.” Regulations affect regulated entities by creating binding legal obligations. Regulations are generally subject to judicial review by the courts if, for example, a party believes that an agency did not follow required rulemaking procedures or went beyond its statutory authority.

Despite the general distinctions between regulations and guidance documents, legal scholars and federal courts have at times noted that it is not always easy to determine whether an agency action should be issued as a regulation subject to the APA’s notice and comment requirements, or

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is guidance or a policy statement, and therefore exempt from these requirements.<sup>6</sup> Among the reasons agency guidance may be legally challenged are procedural concerns that the agency inappropriately used guidance rather than the rulemaking process or concerns that the agency has issued guidance that goes beyond its authority. On March 9, 2015, the Supreme Court held that an agency could make substantive changes to an interpretive rule without going through notice and comment under the APA. This decision overturned prior federal court rulings that had held that an agency is precluded from substantively changing its interpretation of a regulation through issuance of a new interpretive rule without notice and comment.<sup>7</sup> Other concerns raised about agency use of guidance include consistency of the information being provided, currency of guidance, and whether the documents are effectively communicated to affected parties.

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### Departments Considered Few of Their Guidance Documents as Significant under OMB's Definition

An OMB Bulletin establishes policies and procedures for the development, issuance, and use of "significant" guidance documents.<sup>8</sup> OMB defines "significant guidance documents" as guidance with a broad and substantial impact on regulated entities.<sup>9</sup> Pursuant to a memorandum issued by the Director of OMB in March 2009, OMB's Office of Information and Regulatory Affairs (OIRA) reviews some significant

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<sup>6</sup>See Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 5<sup>th</sup> Edition (Chicago, Illinois; American Bar Association, 2012) pp. 63-77; David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L.J. 276, 278-79 (2010); Stuart Shapiro, *Agency Oversight as "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 Harv. J.L. & Pub. Pol'y 523, 528 (2014). See, e.g., *Iowa League of Cities v. EPA.*, 711 F.3d 844 (8th Cir. 2013).

<sup>7</sup>*Perez v. Mortgage Bankers Assn.*, 575 U.S. \_\_\_\_, 135 S. Ct. 1199 (2015).

<sup>8</sup>Office of Management and Budget, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432 (Jan. 25, 2007).

<sup>9</sup>Specifically, OMB defines significant guidance documents are those that may reasonably be anticipated to (1) lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended.

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guidance documents prior to issuance. All significant guidance documents, whether reviewed by OIRA or not, are subject to the OMB Bulletin. “Economically significant guidance documents” are also published in the *Federal Register* to invite public comment. Non-significant guidance is not subject to the OMB Bulletin, and any procedures for developing and disseminating it are left to agency discretion.

Selected departments considered few of their guidance documents to be significant as defined by OMB. For example, as of February 2015, agencies listed the following numbers of significant guidance documents on their websites: Education, 139; DOL, 36; and USDA, 34.<sup>10</sup> We were unable to determine the number of significant guidance documents issued by HHS. In contrast, some of the agencies issued hundreds of non-significant guidance documents. All selected components told us that they did not issue any economically significant guidance. OIRA staff told us they accepted departments’ determinations of which types of guidance meet the definition of significant guidance.

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## Agencies Issued a Wide Variety of Guidance Serving Multiple Purposes

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### Agencies Used Many Terms for Non-significant Guidance

The selected components we reviewed differed in both the terminology they used for their external non-significant guidance documents and in the amounts of non-significant guidance they issued. We found the components used many names for these guidance documents—for example, Education components’ guidance documents included FAQs and “Dear Colleague” letters, while DOL components used varied terms including bulletins, “Administrator Interpretations,” directives, fact sheets, and policy letters.

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<sup>10</sup>Education officials noted that their list of significant guidance documents includes documents issued over the past 40 years.



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The components issued varying amounts of guidance ranging from 10 to more than 100 documents issued by a component in a single year. Component officials said a component's mission or the types of programs it administers can affect the number of guidance documents issued. Officials from DOL's Bureau of Labor Statistics (BLS) told us their agency, as a non-regulatory component, rarely issues guidance. They said BLS has issued about 10 routine administrative memorandums each year related to the operation of two cooperative agreement statistical programs. In contrast, DOL Occupational Safety and Health Administration (OSHA) officials told us they have regularly issued guidance to assist with regulatory compliance, and could easily produce 100 new or updated products each year to provide guidance to stakeholders. Although the DOL Office of Workers' Compensation Programs has regulatory authority, officials told us that they have not frequently issued guidance because their authorizing statutes have not changed recently and their programs focus on administering benefits.

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### Agencies Issued Non-significant Guidance Serving Multiple Purposes

Agencies have used guidance for multiple purposes, including explaining or interpreting regulations, clarifying policies in response to questions or compliance findings, disseminating suggested practices or leadership priorities, and providing grant administration information.

### Explain or Interpret New, Immediate, or Upcoming Regulations

Component officials told us they used guidance to summarize regulations or explain ways for regulated entities to meet regulatory requirements. For example, Education officials told us that they often follow their regulations with guidance to restate the regulation in plainer language, to summarize requirements, to suggest ways to comply with the new regulation, or to offer best practices.

In a few cases, components used guidance to alert affected entities about immediate statutory requirements or to anticipate upcoming requirements to be promulgated through the rulemaking process. Education officials told us they often used guidance to help their field office staff understand and apply new statutory requirements. While this may provide timely information about new or upcoming requirements, it may also cause confusion as details are revised during the rulemaking process. Officials from USDA's Food and Nutrition Service (FNS) told us that when a new statute becomes effective immediately and there is little ambiguity in how the statute can be interpreted, they use a "staging process." In this process, they issue informational guidance so their stakeholders are aware of and consistently understand new requirements before the more time-consuming rulemaking process can be completed. Other officials

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told us that in rare instances, they have issued guidance while a proposed rule is out for comment. They noted that statutory deadlines for implementation may require them to issue guidance before issuing a final rule.

Component officials cited instances in which they used guidance to provide information on upcoming requirements to be promulgated through regulation to those affected. In one example, HHS's Office of Child Care within the Administration for Children and Families issued recommendations to its grantees to foreshadow future binding requirements. In that case, the office issued an Information Memorandum in September 2011 recommending criminal background checks. It later published a proposed rule in May 2013 to mandate the background checks.<sup>11</sup>

Clarify Policies in  
Response to Questions or  
Compliance Findings

Multiple component officials told us that they used guidance to clarify policies in response to questions received from the field, or regional office input about questions received from grantees or regulated entities. Officials at Education's Office for Civil Rights and OSHA told us that they often initiated guidance in response to findings resulting from their investigatory or monitoring efforts, among other things.

Distribute Information on  
Suggested Practices or  
Leadership Priorities

Component officials also told us that they used guidance to distribute information on program suggestions (sometimes called best practices). In particular, we heard this from component officials who administered formula grants in which wide discretion is given to grantees, such as states. Officials at Education's Office of Postsecondary Education told us that component leadership initiates guidance related to priorities the administration wants to accomplish. One example they cited was a Dear Colleague letter explaining that students confined or incarcerated in locations such as juvenile justice facilities were eligible for federal Pell grants.

Provide Guidance on  
Grant Administration

Components that administered grants also issued procedural guidance related to grant administration. For example, BLS issued routine administrative memorandums to remind state partners of federal grant reporting requirements and closeout procedures. In other examples, DOL

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<sup>11</sup>Administration for Children and Families, *Information Memorandum*, CCDF-ACF-IM-2011-05 (Sept. 20, 2011); 78 Fed. Reg. 29,441 (May 20, 2013).

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provided guidance on how to apply and comply with Office of Disability Employment Policy grants.

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## Agencies Weighed Various Factors When Choosing Whether to Issue a Regulation or Guidance

Officials considered a number of factors before deciding whether to issue guidance or undertake rulemaking. Among these factors, a key criterion was whether officials intended for the document to be binding (in which case they issued a regulation). Officials from all components that issue regulations told us that they understood when guidance was inappropriate and when regulation was necessary and that they consulted with legal counsel when deciding whether to initiate rulemaking or issue guidance. According to DOL officials, new regulations may need to be issued if components determined that current regulations could not reasonably be interpreted to encompass the best course of action, a solution was not case specific, or a problem was widespread. An Education official told us that Education considered multiple factors, including the objective to be achieved, when choosing between guidance and regulations. Similarly, HHS's Administration for Community Living officials told us that they considered a number of factors, including whether the instructions to be disseminated were enforceable or merely good practice. For example, when Administration for Community Living officials noticed that states were applying issued guidance related to technical assistance and compliance for the state long-term care ombudsman program differently, they decided it would be best to clarify program actions through a regulation, as they could not compel the states to comply through guidance. Officials believed that a regulation would ensure consistent application of program requirements and allow them to enforce those actions. They issued the proposed rule in June 2013 and the final rule in February 2015.<sup>12</sup>

FNS officials told us that the decision to issue guidance or undertake rulemaking depended on (1) the extent to which the proposed document was anticipated to affect stakeholders and the public, and (2) what the component was trying to accomplish with the issued document. OIRA staff concurred that agencies understood what types of direction to regulated entities must go through the regulatory process.

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<sup>12</sup>78 Fed. Reg. 36,449 (June 18, 2013) (proposed rule). 80 Fed. Reg. 7704 (Feb. 11, 2015) (final rule).

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## Agencies Can Ensure More Effective Guidance Processes through Consistent Adherence with OMB Requirements and Stronger Internal Controls

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### Agencies Did Not Always Adhere to OMB Requirements for Significant Guidance

We found that agencies did not always adhere to OMB requirements for significant guidance. The OMB Bulletin establishes standard elements that must be included in significant guidance documents and directs agencies to (1) develop written procedures for the approval of significant guidance, (2) maintain a website to assist the public in locating significant guidance documents, and (3) provide a means for the public to submit comments on significant guidance through their websites. Education and USDA had written procedures for the approval of significant guidance as directed by OMB. While DOL had written approval procedures, they were not available to the appropriate officials and DOL officials noted that they required updating. HHS did not have any written procedures. We found that Education, USDA, and DOL consistently applied OMB's public access and feedback requirements for significant guidance, while HHS did not.

We made recommendations to HHS and DOL to better adhere to OMB's requirements for significant guidance. Both agencies concurred with those recommendations. Without written procedures or wide knowledge of procedures for the development of significant guidance, HHS and DOL may be unable to ensure that their components consistently follow other requirements of the OMB Bulletin and cannot ensure consistency in their processes over time. Further, because agencies rely on their websites to disseminate guidance, it is important that they generally follow requirements and guidelines for online dissemination for significant guidance.

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## Stronger Application of Internal Controls for Guidance Processes Could Achieve Desired Results and Prevent Errors

In the absence of government-wide standards for the production of non-significant guidance, officials must rely upon internal controls—which are synonymous with management controls—to ensure that guidance policies, processes, and practices achieve desired results and prevent and detect errors. We selected four components of internal control and applied them to agencies' guidance processes (see appendix I). Departments and components identified diverse and specific practices that addressed these four components of internal control. However, the departments and components typically had not documented their processes for internal review of guidance documents. Further, agencies did not consistently apply other components of internal control. Some of the selected components identified practices to address these internal controls that we believe could be more broadly applied by other agencies. Wider adoption of these practices could better ensure that components have internal controls in place to promote quality and consistency of their guidance development processes.

To improve agencies' guidance processes, we recommended that the Secretaries of USDA, HHS, DOL, and Education strengthen their components' application of internal controls by adopting, as appropriate, practices developed by other departments and components, such as assessment of risk; written procedures and tools to promote the consistent implementation and communication of management directives; and ongoing monitoring efforts to ensure that guidance is being issued appropriately and has the intended effect. USDA, Education, HHS, and DOL generally agreed with the recommendations.

## Determine Appropriate Level of Review to Manage Risk

Although no component can insulate itself completely from risks, it can manage risk by involving management in decisions to initiate guidance, prioritize among proposed guidance, and determine the appropriate level of review prior to issuance. In addition, if leadership is not included in discussions related to initiation of guidance, agencies risk expending resources developing guidance that is unnecessary or inadvisable.

At a few components, officials told us that leadership (such as component heads and department-level management) decided whether to initiate certain guidance, and guidance did not originate from program staff for these components. For example, guidance at DOL's Employee Benefits Security Administration related to legal, policy, and programmatic factors were proposed by office directors and approved by Assistant Secretaries and Deputy Assistant Secretaries. In most other cases, ideas for additional guidance documents originated from program staff and field offices or from leadership, depending on the nature of the guidance.

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Education officials told us that component program staff and leadership work together to identify issues to address in guidance.

At most components, officials told us that they determine the appropriate level of review and final clearance of proposed guidance, and in many cases guidance was reviewed at a higher level if the document was anticipated to affect other offices or had a particular subject or scope. Risk was one factor agency officials considered when determining the anticipated appropriate level of review and final clearance of proposed guidance. For example, officials at the Employee Benefits Security Administration told us that the need for department-level clearance depended on various factors, including likely congressional interest, potential effects on areas regulated by other DOL components, expected media coverage, and whether the guidance was likely to be seen as controversial by constituent groups. A few agencies reported they considered two other factors in making this decision: whether guidance was related to a major priority or would be “impactful.”

#### Maintain Written Policies and Procedures for the Production of Non-significant Guidance

Control activities (such as written procedures) help ensure that actions are taken to address risks and enforce management’s directives. Only 6 of the 25 components we reviewed had written procedures for the entire guidance production process, and several of these components highlighted benefits of these procedures for their guidance processes. These components included HHS’s Administration for Children and Families Office of Head Start and five DOL components. The DOL Mine Safety and Health Administration’s written procedures contained information officials described as essential to the effective and consistent administration of the component’s programs and activities. OSHA officials reported that their written procedures were designed to ensure that the program director manages the process for a specific policy document by considering feedback and obtaining appropriate concurrence to ensure that guidance incorporates all comments and has been cleared by appropriate officials. The Deputy Assistant Secretary resolves any disagreements about substance, potential policy implications, or assigned priority of the document.

In contrast, Education’s Office of Innovation and Improvement and Office of Elementary and Secondary Education and DOL’s Veterans’ Employment and Training Service had written procedures only for the review and clearance phase. Components without written procedures said they relied on officials’ understanding of the guidance process. In these cases, officials told us that the guidance process was well understood by program staff or followed typical management hierarchies.

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Ensure Communication during the Guidance Development and Review Process

Officials from all components could describe standard review practices to provide management the opportunity to comment and ensure that its comments were addressed by program staff. Nonetheless, documented procedures are an important internal control activity to help ensure that officials understand how to adequately review guidance before issuance.

Most selected components had guidance practices to ensure either intra-agency and interagency review (or both) of guidance documents before issuance. Obtaining feedback from management, internal offices, the public, and other interested parties is essential to ensuring guidance is effective.

- Intra-agency communications. To ensure that management concurrence was recorded, most components we reviewed used communication tools, such as electronic or hard-copy routing slips, to document approval for guidance clearance or to communicate with management and other offices about proposed or upcoming guidance. In particular, officials at 20 components used a routing slip to document management concurrence.
- Interagency communications. Most component officials told us that they conferred with other affected components or federal departments to ensure consistency during the development of guidance.
- External stakeholders. Officials told us that feedback from external nonfederal stakeholders often served as the impetus for the initiation of guidance, and more than half of the selected components cited examples in which they conferred with external nonfederal stakeholders during the guidance development process. At OSHA, for example, external stakeholders were not involved in developing directives or issuing policy, but assisted with developing educational, non-policy guidance, such as hazard alerts.

Regularly Evaluate Whether Issued Guidance is Effective and Up to Date

Nearly half of the components we reviewed did not regularly evaluate whether issued guidance was effective and up to date. Without a regular review of issued guidance, components can miss the opportunity to revisit whether current guidance could be improved and thereby provide better assistance to grantees and regulated entities. DOL's Office of Labor-Management Standards officials told us they had not evaluated the relative success of existing guidance and therefore did not often revise guidance.

A few selected components had initiated or established a process for tracking and evaluating guidance to identify necessary revisions. For

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example, in November 2011, officials at DOL's Office of Federal Contract Compliance Programs initiated a 2-year project to review their directives system to ensure that they only posted up-to-date guidance. As a result of the project, in 2012 and 2013 officials identified necessary updates to guidance, clarified superseded guidance, and rescinded guidance where appropriate. Officials told us that these actions reduced the original number of directives by 85 percent. Officials also told us that they did this to ensure that their guidance was more accurate and correct, and the actions resulted in officials posting only relevant and current guidance information on the component's website. Officials told us they now routinely monitor their directives about once a year and review other guidance documents each time they issue new regulations or change a policy to decide if they need to revise them. DOL's Employment and Training Administration used a checklist to review a list of active guidance documents and identified whether to continue, cancel, or rescind the guidance. In addition, officials indicated which documents were no longer active on their website. Lastly, DOL's Mine Safety and Health Administration also ensured that program officials periodically reviewed and updated guidance documents and canceled certain guidance.

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Chairman Lankford, Ranking Member Heitkamp, and members of the Subcommittee, this concludes my prepared remarks. I look forward to answering any questions you may have.

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## GAO Contact and Staff Acknowledgments

For questions about this statement, please contact me at (202) 512-6806 or [sagerm@gao.gov](mailto:sagerm@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals making key contributions to this testimony were Tim Bober, Assistant Director, Robert Gebhart, Shirley Hwang, Andrea Levine, and Wesley Sholtes.



# Appendix I: Application of Select Internal Control Standards to Agencies' Guidance Processes

Component of Internal Control	Application to Guidance Processes
<p><i>Risk Assessment</i></p> <p>Internal control should provide for an assessment of the risks the agency faces from both external and internal sources. Once risks have been identified, they should be analyzed for their possible effects.</p>	<p>Agencies should assess the level of risk associated with potential guidance at the outset to determine</p> <ol style="list-style-type: none"> <li>1. the legal implications of the use of guidance based on available criteria, and</li> <li>2. the appropriate level of review.</li> </ol> <p>Some agencies have found it helpful to categorize proposed guidance at initiation to determine different types and levels of review.</p>
<p><i>Control activities</i></p> <p>Internal control activities help ensure that management's directives are executed. Control activities are the policies, procedures, techniques, and mechanisms that enforce management's directives. They help ensure that actions are taken to address risks. The control activities should be effective and efficient in accomplishing the agency's control objectives.</p>	<p>The agency should maintain written policies, procedures, and processes to ensure that once the appropriate level of review has been determined, agency officials understand the process to adequately review guidance prior to issuance. Written policies and procedures should designate:</p> <ol style="list-style-type: none"> <li>1. the appropriate level of review to maintain appropriate segregation of duties, and</li> <li>2. the means by which management can comment on the draft guidance and program staff can address those comments.</li> </ol>
<p><i>Information and communication</i></p> <p>Information should be recorded and communicated to management and others within the entity who need it. In addition to internal communications, management should ensure there are adequate means of communicating with, and obtaining information from, external stakeholders who have a significant impact on the agency achieving its goals.</p>	<p><i>Internal communications:</i> Agencies should have procedures in place to get feedback from management and other internal offices on guidance to be issued. For example, they should have a written mechanism (such as a routing slip) to document management review and associated comments and suggestions.</p> <p><i>External communications:</i> Agencies should provide a means, via an e-mail box or contact person, for the public and interested parties to comment on the guidance, ask questions about the guidance, and facilitate two-way feedback and communication.</p>
<p><i>Monitoring</i></p> <p>Internal control should generally be designed to ensure that ongoing monitoring occurs in the course of normal operations.</p>	<p>Processes should be established to collect feedback on both the substance and clarity of guidance, to communicate this feedback to the appropriate officials, and to maintain applicable feedback to inform future guidance and revisions of guidance.</p>

Source: GAO analysis of application of internal control standards (as shown in GAO, *Standards for Internal Control in the Federal Government* GAO/AIMD-00-21.3.1 (Washington, D.C.: November 1999)) to guidance processes based on discussions with agency officials and subject specialists (including legal scholars, OMB staff, and Food and Drug Administration officials). | GAO-15-834T

# Appendix II: Components Included in Our Review

Department	Components
United States Department of Agriculture (USDA)	Food and Nutrition Service
Department of Education (Education)	Office for Civil Rights
	Office of Career, Technical, and Adult Education
	Office of Elementary and Secondary Education
	Federal Student Aid
	Office of Innovation and Improvement
	Office of Management
	Office of Postsecondary Education
	Office of Special Education and Rehabilitative Services
Department of Health and Human Services (HHS)	Administration for Children and Families' Office of Child Care
	Administration for Children and Families' Office of Head Start
	Administration for Community Living
Department of Labor (DOL)	Bureau of International Labor Affairs
	Bureau of Labor Statistics
	Employee Benefits Security Administration
	Employment and Training Administration
	Mine Safety and Health Administration
	Occupational Safety and Health Administration
	Office of Disability Employment Policy
	Office of Federal Contract Compliance Programs
	Office of Labor-Management Standards
	Office of Workers' Compensation Programs
	Veterans Employment and Training Service
	Wage and Hour Division
	Women's Bureau

Source: GAO analysis of the *Federal Register* and the *Catalogue of Federal Domestic Assistance*. | GAO-15-834T

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