

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
MINORITY (202) 225-5051

<http://oversight.house.gov>

Opening Statement Rep. Carolyn Maloney Hearing on “Shining Light on the Federal Regulatory Process” March 14, 2018

Mr. Chairman, thank you for calling today’s important hearing, and thank you to all of our witnesses for being here.

I would like to start by making one very important point. We all agree that rules and guidance documents should be fair, open, and informed by those entities and individuals who are regulated by them. However, we cannot simply eliminate them. That would result in chaos. I want to point out that it is often members of the business community who want regulations and guidance. Because they want certainty. They want clarity. That is critical for them to determine how to invest their resources and their time.

Guidance documents—even though they are nonbinding—are often very useful to regulated entities in explaining how they can stay on the right side of the law.

The Chairman has invited Professor Nicholas Parrillo to testify today, and I am very pleased that he is here. He issued a report highlighting this point, and he based it on interviews with business representatives who stressed the importance of guidance documents.

For example, Marc Freedman, the Executive Director of Labor Law Policy at the U.S. Chamber of Commerce, “acknowledged that businesses sometimes demanded guidance and that it was quite reasonable for the agency to provide it to clarify vague legislative rules.”

Let me give you an example. Industry groups recently asked the IRS to issue guidance about the new tax law. The American Institute of Certified Public Accountants wrote to the IRS that specific areas “need immediate guidance in order for taxpayers and practitioners to comply with their 2017 tax obligations and to make informed decisions regarding cash-flow, entity structure, retirement, wealth transfer and a vast number of other tax planning issues.”

Professor Parrillo summarized his findings by writing this: “It was clear from these interviews that guidance increases an agency program’s integrity and efficiency and shields regulated parties against unequal treatment, unnecessary work, and unnecessary risk.”

Guidance works best if there is ongoing interaction between regulators and the regulated entities. This interaction can take the form of conversations with stakeholders, advisory committee meetings, town halls, or even requests for public comment.

But we need to avoid placing an overwhelming burden on federal agencies. Guidance documents are effective precisely because regulators can issue them more quickly than formal rulemakings. Imposing burdensome requirements on guidance documents will mean that agencies will stop using them, depriving the business community and others of these useful tools.

Formal rules are different because they carry the force of law. They are governed by statutory procedures that require formal public participation and the opportunity to appeal to the courts if these processes are not followed. This has been the law since we enacted the Administrative Procedure Act in 1946.

My concern is that there are multiple recent examples of the Trump Administration attempting to circumvent the Administrative Procedure Act or issue agency guidance that is not even public, which leads to less transparency and certainty—not more.

For example, just last week, the Inspector General for the General Services Administration (GSA) issued a report finding that the agency’s guidance on how its staff communicates with Congress “lacks transparency” and completely omitted whistleblower protection language that is required by the Whistleblower Protection Act.

Specifically, the IG found that GSA “created opportunities for confusion, mis-interpretation, and inconsistent application among its officials and employees.” According to the IG, GSA followed oral instructions from the White House to stop responding to oversight and investigative requests from Member of Congress other than a committee chairs. GSA officials communicated this new policy to staff in “small in-person meetings” and through “telephone calls and hallway conversations.”

In another example, the Department of Labor is withholding from the public an economic analysis of its proposed rule to allow employers to take the tips from restaurant workers and other employees. According to press reports, the Department did not publish its analysis, which showed that “employees could lose out on billions of dollars in gratuities.” Hiding from the public an analysis conducted by the agency—especially when it contradicts the agency’s own proposal—is the opposite of the transparency we expect in the rulemaking process.

For today’s hearing, I am very pleased that we will be able to shine a light on the federal regulatory process, and I look forward to the testimony. This is Sunshine Week, after all, and as the saying goes, sunlight is the best disinfectant. I hope we can apply that disinfectant across the board and not limit it only to those issues with which some may disagree.

Thank you, Mr. Chairman.

Contact: Jennifer Werner, Communications Director, (202) 226-5181.