

## **Some Guidance About Federal Agencies and Guidance\***

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*The federal administrative system is complex and contains ambiguities about what counts as an “agency,” and there is an amorphous border between regulations and guidance. The body of guidance documents (or nonlegislative rules) is growing, both in volume and in importance, and legal researchers should be aware of this important source of authority, as well as its unclear status.*

¶1 Imagine a stranger to the ways of the law walking down the aisle where the *Code of Federal Regulations* is shelved. Look with this stranger at the volumes: uniform height, uniform color (or colors—a portion of the set still wears last year’s fashion). Take a few volumes off the shelf and see the systematic numbering (whole numbers and decimals, parts and sections), the standard font, the pages of orderly text. See how the titles are numbered to an even fifty, just like the states in the union and the stars on the flag. What’s that over there? Why, it’s the *Federal Register*, printing new and proposed rules, in issue after issue, all the same to outward appearances. Would it be any surprise if the visitor concluded that everything about federal regulations was just as orderly and consistent as the books on the shelf?

¶2 Oh, my, would that conclusion be wrong! Although I hypothesized a naive visitor with only a superficial exposure to the materials, even a more experienced researcher might be surprised at the extent of the inconsistency and ambiguity in the federal regulatory world.

### **What Is an Agency?**

¶3 Everyone can name many federal agencies from day-to-day experience. We send our taxes to the IRS, we take off our shoes and belts for the TSA, we hope never to be arrested by the FBI or the DEA, and one day we plan to retire and get monthly payments from the SSA. That’s five agencies right there. Or is it? Maybe we should say it’s just four, since the FBI and the DEA are both part of the Department of Justice. And yet people think of them as two agencies. Their agents

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even have different windbreakers. More formally, we can find support for counting them as two in the Administrative Procedure Act, which says that “agency” means “each authority of the government of the United States, whether or not it is within or subject to review by another agency.”<sup>1</sup> So we’ve named five.

¶4 How many agencies are there altogether? This turns out to be a tough question:

Every list of agencies in government publications is different. For example, FOIA.gov lists 78 independent executive agencies and 174 components of the executive departments as units that comply with the Freedom of Information Act requirements imposed on every federal agency. This appears to be on the conservative end of the range of possible agency definitions. The *United States Government Manual* lists 96 independent executive units and 220 components of the executive departments. An even more inclusive listing comes from USA.gov, which lists 137 independent executive agencies and 268 units in the Cabinet.<sup>2</sup>

¶5 However many there are, federal agencies come in a variety of shapes and sizes. There are the fifteen executive departments—the ones headed up by a secretary (or, in the case of Justice, the attorney general). These are also called “cabinet departments,”<sup>3</sup> but the President may include in cabinet meetings other executives, such as the administrators of the EPA and the Small Business Administration.<sup>4</sup> Even leaving aside the Department of Defense, with more than 770,000 employees, some executive departments are very large: Treasury, Justice, and Agriculture each have more than 100,000 employees. Homeland Security (the newest executive department) has more than 190,000 employees, and Veterans Affairs has more than 310,000. On the other hand, some executive agencies are just a fraction as big: Labor (16,300), Energy (16,400), and the smallest, Housing and Urban Development (9760).<sup>5</sup> Think of it this way: Veterans Affairs has more employees than the population of Pittsburgh,<sup>6</sup> while the employees of both Labor and Energy could easily fit in the stadium where the Pittsburgh Pirates play.<sup>7</sup>

1. 5 U.S.C. § 551(1) (2006). The definition goes on to exclude Congress, federal courts, the government of the District of Columbia, and some other entities. Elsewhere “federal agency” or “agency” is defined as “the President of the United States, or an executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government.” 44 U.S.C. § 1501 (2006) (chapter covering *Federal Register* and *Code of Federal Regulations*).

2. DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONF. OF THE UNITED STATES, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 15 (2012), available at <http://www.acus.gov/publication/sourcebook-united-states-executive-agencies> (footnotes omitted). I found the *Sourcebook* fascinating and useful—as you might guess after you see how many times I cite it—and I recommend it to anyone who would like an overview of federal administrative structure.

3. *Id.* at 5–6.

4. See *The Cabinet*, WHITE HOUSE, <http://www.whitehouse.gov/administration/cabinet> (last visited May 14, 2013) (listing the following as having “the status of Cabinet-rank”: White House Chief of Staff, Acting Administrator of the Environmental Protection Agency, Deputy Director of the Office of Management and Budget, United States Trade Representative, Ambassador to the United Nations, Chairman of the Council of Economic Advisers, and Administrator of the Small Business Administration). See also LEWIS & SELIN, *supra* note 2, at 39.

5. LEWIS & SELIN, *supra* note 2, at 36–38.

6. The Census Bureau estimates that Pittsburgh had 307,484 residents in 2011. *State & County Quick Facts, Pittsburgh (city), Pennsylvania*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/42/4261000.html> (last visited May 14, 2013).

7. Pittsburgh’s stadium seats 38,362. Maury Brown, *Ballpark Seating Capacities*, BIZ OF BASEBALL

¶6 Within the executive departments are subunits that are called by different names, including administration, agency, and bureau.<sup>8</sup> Some of the bureaus have so much autonomy that scholars say that their parent departments should be thought of as “holding companies of a number of distinct agencies rather than one large agency.”<sup>9</sup> For example, the U.S. Geological Survey, the Bureau of Indian Affairs, and the National Park Service are all within the Department of the Interior<sup>10</sup> but are to a large extent separate agencies. In fact, when the department was created in 1849, it was nicknamed the “Department of Everything Else,” because its portfolio included such a variety of programs that did not fit within existing agencies.<sup>11</sup>

¶7 Just as the departments’ subunits can have different labels, so can their heads. Table 1 includes a quick sample, drawn from the 2012 edition of the *United States Government Manual*.<sup>12</sup> In this limited sample, we can see the following labels for subunits: Administration, Agency, Bureau, Centers, Commission, Institute, Institutes, Office, Service, Services, Survey. The titles for heads include Administrator, Assistant Secretary, Chairman, Chief, Commissioner, Comptroller, Director, Under Secretary, Under Secretary and Administrator, and Under Secretary and Director. The titles of the bosses don’t always match the titles of the subunits: for instance, there are “commissioners” who don’t serve on “commissions” and “administrators” who don’t lead “administrations.”

¶8 In addition to the executive departments, the federal bureaucracy includes independent agencies. I always thought of these as simply agencies that aren’t part of an executive department.<sup>13</sup> But most scholars focus on ways that the agency is insulated from presidential control.<sup>14</sup> For example, the FBI is within the Department of Justice, but its director is appointed for a ten-year term and can’t be fired (except for cause) by the attorney general or the President, so it has some protection from political whim.<sup>15</sup> Typically (but not always), independent agencies are multimember boards and commissions.<sup>16</sup> A table in the *Sourcebook of United States Executive*

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(May 23, 2010), [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=4391&Itemid=187](http://bizofbaseball.com/index.php?option=com_content&view=article&id=4391&Itemid=187).

8. See LEWIS & SELIN, *supra* note 2, at 41.

9. *Id.*

10. *Interior Organizational Chart*, U.S. DEP’T INTERIOR, <http://www.doi.gov/whowere/orgchart.cfm> (last visited May 14, 2013).

11. LEWIS & SELIN, *supra* note 2, at 32.

12. OFFICE OF THE FED. REGISTER, NAT’L ARCHIVES & RECORDS ADMIN., UNITED STATES GOVERNMENT MANUAL 2012 *passim* (2012). For a fond discussion of the *Government Manual*, see Mary Whisner, *A Manual “to Inform Every Citizen,”* 99 LAW LIBR. J. 159, 2007 LAW LIBR. J. 9.

13. See LEWIS & SELIN, *supra* note 2, at 48.

14. “The independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from Presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 523 (2009) (Scalia, J.). Agencies face pressures not only from the President and Congress but also from the industries they regulate. For a discussion of structural techniques for insulating independent agencies from influence, see Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010).

15. Some might say that during the long tenure of J. Edgar Hoover, politicians needed protection from the FBI, rather than vice versa.

16. The Bureau of Consumer Financial Protection, created in 2010, is “an independent bureau,” but is headed by a director, not a board. 12 U.S.C. § 5491 (Supp. V 2011). For a discussion of the CFPB’s structure and the political compromises that shaped it, see Barkow, *supra* note 14, at 72–78.

Table 1

Federal Agency Subunits and the Names of Subunit Administrators

Executive Department	Subunit	Head of Subunit
Agriculture	Animal and Plant Inspection <i>Service</i>	Administrator
	Forest <i>Service</i>	Chief
Commerce	<i>Bureau</i> of Industry and Security	Under Secretary
	Economic Development <i>Administration</i>	Assistant Secretary
	Economic and Statistics <i>Administration</i>	Under Secretary
	National Oceanic and Atmospheric <i>Administration</i>	Under Secretary and Administrator
	National <i>Institute</i> of Standards and Technology	Under Secretary and Director
	National Technical Information <i>Service Administration</i>	Director
	United States Patent and Trademark <i>Office</i>	Under Secretary and Director
Energy	<i>Office</i> of the American Recovery and Reinvestment Act	Director
	Federal Energy Regulatory <i>Commission</i>	Chairman
Health and Human Services	<i>Administration</i> on Aging	Assistant Secretary
	<i>Centers</i> for Disease Control and Prevention	Director
	<i>Centers</i> for Medicare and Medicaid Services	Administrator
	Food and Drug <i>Administration</i>	Commissioner
	National <i>Institutes</i> of Health	Director
Homeland Security	Federal Emergency Management <i>Agency</i>	Administrator
	United States Citizenship and Immigration <i>Services</i>	Director
	Transportation Security <i>Administration</i>	Administrator
Interior	National Park <i>Service</i>	Director
	United States Geological <i>Survey</i>	Director
	<i>Office</i> of Surface Mining Reclamation and Enforcement	Director
	<i>Bureau</i> of Indian Affairs	Director
Treasury	<i>Office</i> of the Comptroller of the Currency	Comptroller
	<i>Bureau</i> of Engraving	Director
	Internal Revenue <i>Service</i>	Commissioner

*Agencies* lists sixty-six of these, indicating which ones are outside any executive department (almost all of them), which have explicit statutory protections against dismissal without cause, which have staggered terms, and so on.<sup>17</sup> These commissions include several that are frequently in business headlines (e.g., the Federal

17. LEWIS & SELIN, *supra* note 2, at 52–53 tbl.4.

Reserve Board and the SEC) and half a dozen that regulate the workplace (e.g., the EEOC and the NLRB). There are some that provide services to millions of Americans (e.g., Legal Services Corporation, United States Postal Service, Tennessee Valley Authority) and some that appear to have fairly narrow charges (e.g., Harry S Truman Scholarship Foundation).<sup>18</sup>

¶9 You might wonder why, for instance, OSHA is within the Department of Labor but the Social Security Administration is independent, or why the National Oceanic and Atmospheric Administration is within the Department of Commerce but the Environmental Protection Agency is independent. Don't read too much into it. The *Sourcebook* authors observe: "There is no fundamental constitutional or management principle guiding which agencies are departments and which agencies are sub-department bureaus or independent agencies. The status and location of agencies is the subject of political determination."<sup>19</sup> If you are interested in the political battles that led to the creation of a particular agency—and the pressures that might shape that agency's work in the future—the structure is important. And if you're in line to head up either an executive department or an independent agency, you might want to know that one position pays more than the other.<sup>20</sup> But a researcher should be aware that the legal effect of regulations or adjudications is the same, whether the agency is within an executive department or independent.

¶10 The Executive Office of the President includes small but important offices such as the Council of Economic Advisers and the Office of Management and Budget—and, of course, the real-life counterparts of the characters many of us followed on *The West Wing*.<sup>21</sup> "Independent administrations," headed by individuals rather than boards, range in size from the very small (Office of Navajo and Hopi Relocation, 41 employees) to the very large (Social Security Administration, 67,000).<sup>22</sup> Other entities include government corporations and government-sponsored enterprises<sup>23</sup> as well as certain nonprofits and regional agencies.<sup>24</sup>

¶11 In this quick tour of federal agencies, we've seen a few examples of ambiguity. An agency could be a freestanding body, a subunit of a larger body, or an executive department. An independent agency could be one outside any executive department, one whose top people enjoy some job security, or one with a certain structure (a multiperson commission). The federal government isn't even sure how many "agencies" it has—at any rate, there are at least three different lists enumerating them. Which brings us to regulations issued by those agencies.

### What Is a Regulation? What Is Guidance?

¶12 Agencies often issue regulations under authority delegated to them by Congress. Before 1935, regulations were published in pamphlets and sometimes on

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18. *See id.*

19. *Id.* at 34.

20. *Id.* at 39.

21. *See id.* at 22–28.

22. *Id.* at 55.

23. *Id.* at 60.

24. *Id.* at 64.

single sheets of paper. They weren't required to be in any set form.<sup>25</sup> Characterizing the situation as "chaos," Erwin Griswold lamented in 1934: "An attempt to compile a complete collection of these administrative rules would be an almost insuperable task for the private lawyer. It seems likely that there is no law library in this country, public or private, which has them all."<sup>26</sup> He proposed "an official publication, analogous to the Statutes at Large, in which all rules and regulations shall be systematically and uniformly published."<sup>27</sup> And, with the passage of the Federal Register Act the next year, that's what we got.<sup>28</sup>

¶13 The Federal Register Act defines "document" as "any Presidential proclamation or Executive order and any order, regulation, rule, certificate, code of fair competition, license, notice, or similar instrument issued, prescribed, or promulgated by a Federal agency."<sup>29</sup> The next section requires the publication of all proclamations and executive orders with general effect and "such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect."<sup>30</sup>

¶14 Some cases have tested when regulations must be published to have legal effect. For example, in *Borak v. Biddle*, an attorney who was discharged from the Immigration and Naturalization Service after nine and a half months disputed the

25. "By statute, the head of each department is authorized to prescribe regulations not inconsistent with law for the government of his department . . . Such regulations need not be in any set form, or in writing, and they have the force of law." *State ex rel. Kaser v. Leonard*, 102 P.2d 197 (Or. 1940) (quoting 65 C.J. *United States* § 33, at 1272 (1933)).

26. Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 204 (1934).

27. *Id.* at 205. The publication of regulations was so haphazard that in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *United States v. Smith*, 293 U.S. 633 (1934) (appeal dismissed), companies were prosecuted for violations of regulations that had been withdrawn and were not in effect, but the prosecutors weren't aware of this. During oral argument, Justice Brandeis asked Assistant Attorney General Harold Stephens, "Is there any way by which to find out what is in these executive orders when they are issued?" An embarrassed Stephens confessed that no general government publication carried the orders and that they would be "rather difficult" to obtain . . . MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 700 (2009). Griswold had sent his article to Brandeis, "who no doubt had it in mind when he grilled Stephens." *Id.*

These cases are often referred to as the "Hot Oil" cases (because the regulation involved quotas on oil production and sale). Another nickname is the "Hip Pocket Law" cases, suggesting the image of an order being carried in some administrator's pocket. See Urban A. Lavery, "The Federal Register"—Official Publication for Administrative Regulations, etc.: Its Historical Background—And Its Present-Day Meaning for the Practicing Lawyer, 7 F.R.D. 625, 635–36 (1948).

28. Federal Register Act, ch. 417, 49 Stat. 500 (1935). When title 44 of the *United States Code* (Public Printing and Documents) was enacted into positive law, the Federal Register Act was repealed. Pub. L. No. 90-620, 82 Stat. 1238, 1309 (1968). Substantially the same provisions are codified at 44 U.S.C. §§ 1501–1511 (2006).

Before publishing his law review article (Griswold, *supra* note 26), Griswold, then at the Department of Justice, had served on a government committee that recommended something like the *Federal Register* in October 1934. James H. Ronald, *Publication of Federal Administrative Legislation*, 7 GEO. WASH. L. REV. 52, 64 & n.44 (1938). President Roosevelt rejected the proposal "with a notation that he did not want a government newspaper." *Id.* at 66.

29. Federal Register Act § 4, 49 Stat. at 501. The comparable provision is codified at 44 U.S.C. § 1501 (2006).

30. *Id.* § 5, 49 Stat. at 501. The comparable provision is codified at 44 U.S.C. § 1505 (2006).



action because he had successfully completed his six-month probationary period.<sup>31</sup> The government countered that the Civil Service Commission had lengthened the probationary period to one year, after he was hired but before he was fired. The government's argument failed because the rule with the six-month period was published in the *Federal Register*, but the order lengthening the time was not.<sup>32</sup> On the other hand, courts rejected several taxpayers' arguments that the Internal Revenue Service could not enforce tax laws against them because of the failure to publish Treasury Department Orders (TDOs) delegating certain functions to it.<sup>33</sup>

¶15 The Administrative Procedure Act spells out requirements for agencies to follow when creating rules and regulations.<sup>34</sup> A "rule" is

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . .<sup>35</sup>

¶16 When agencies adopt rules,<sup>36</sup> they must publish a notice of proposed rule making and give interested parties an opportunity to comment.<sup>37</sup> But the requirements don't apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."<sup>38</sup> And that exception can be enormous.

31. 141 F.2d 278 (D.C. Cir. 1944).

32. *Id.* at 280.

33. See, e.g., *United States v. Saunders*, 951 F.2d 1065, 1068 (9th Cir. 1991) (delegation orders not required to be published because they "simply effected a shifting of responsibilities wholly internal to the Treasury Department"); *Lonsdale v. United States*, 919 F.2d 1440, 1445–46 (10th Cir. 1990) (Federal Register Act and Administrative Procedure Act do not require publication of TDOs); *United States v. McCall*, 727 F. Supp. 1252, 1254 (N.D. Ind. 1990) (rules of agency organization and procedure not required to be published; defendant not adversely affected by failure to publish particular rule).

34. Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706, and other scattered sections of title 5 (2006 & Supp. V 2011)).

35. 5 U.S.C. § 551(4) (2006).

36. It is not always clear when Congress has granted agencies the authority to make rules with the force of law. See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 470 (2002): "An unarticulated assumption took hold sometime after the 1970s that virtually every agency is free to make policy in any mode it chooses, including legislative rules, interpretive rules, policy statements, or adjudication. . . . [But the recent Supreme Court case of *United States v. Mead Corp.*] makes clear that agencies act with the force of law only if Congress intended to delegate authority to them to so act." Merrill and Watts argue that facially ambiguous grants of authority can often be resolved by looking at whether Congress specified that violation of a rule would subject someone to a sanction. *Id.* at 472.

37. 5 U.S.C. § 553 (2006).

38. *Id.* § 553(b)(3)(A). Using the word "interpretive" is more common today, but Congress used "interpretative" in the statute:

APA § 553(b) and (d) use the word "interpretative" rather than "interpretive," the usage this Court would ordinarily employ. After all, does anyone "interpretate" anything? Both the statutory usage and this Court's own curiosity sent it back to the books. Webster's *Third New International Dictionary* was of little help: It listed both "interpretative" and "interpretive" without differentiation, and it included "interpretate" as an archaic version of "interpret." However, Fowler's *Modern English Usage* was (not surprisingly) much better on the subject: It said "*interpretative*, not

[T]he Centers for Medicare and Medicaid Services claims that it issues thousands of new or revised guidance documents annually, with “perhaps most” of the 37,000 documents on its website constituting guidance documents. Its guidance manuals for plans participating in the Medicare Prescription Drug Program total over 884 pages, with additional manual chapters forthcoming, as compared to the 106 pages of regulations in the *Code of Federal Regulations* governing the plans’ conduct. Between 1996 and 1999, the Occupational Safety and Health Administration of the Department of Labor (OSHA) issued over three thousand guidance documents whereas the entire Department of Labor, including OSHA, issued only twenty “significant” rules subject to review by the Office of Management and Budget (OMB).<sup>39</sup>

¶17 Not long ago, someone asked me about the phrase “subregulatory guidance.” She had seen it in a blog post,<sup>40</sup> thought it was a perfect description for all of these “non-rule rules,” and wondered whether it was in common use. I did some searches and discovered that it has been growing in popularity as a term for the massive body of guidance documents. I found occurrences in law review articles, federal cases, and the *Federal Register*.<sup>41</sup> But its use is not yet widespread. It is more common to speak of “administrative guidance,” “guidance documents,” or simply “guidance.” An even more common term is “nonlegislative rules”—rules that are not binding on a large class of people or entities.<sup>42</sup> Agencies may announce these rules “through agency manuals, advisory notices, internal guidance to agency field inspectors, and letters from government officials to regulated entities.”<sup>43</sup>

¶18 Many cases have challenged the use of guidance documents, asserting that they were sufficiently regulatory to require the use of notice-and-comment rule making.<sup>44</sup> For example, to enforce the Toxic Substances Control Act, the EPA pro-

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*interpretive*, is the right form” because “-ive adjectives are normally formed on the Latin [past participle] stem, i.e., here *interpretat-*.” In deference to both Fowler and the statute itself, this opinion will consistently employ “interpretative.”

Am. Med. Ass’n v. United States, 688 F. Supp. 358, 361 n.4 (N.D. Ill. 1988). Bryan Garner observes that “*interpretive* has gained ground in the last 50 years—so much so that it’s about five times as common in print as *interpretative*. . . . Refight an old fight, if you like, and stick to *interpretative*. But *interpretive* has already taken hold.” BRYAN A. GARNER, GARNER’S MODERN AMERICAN USAGE 476 (3d ed. 2009).

39. Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 353–54 (2009) (footnotes omitted).

40. Timothy Jost, *Implementing Health Reform: The Basic Health Program and Federal Medicaid Matching Rates*, HEALTH AFFAIRS BLOG (Feb. 7, 2013, 2:57 P.M.), <http://healthaffairs.org/blog/2013/02/07/implementing-health-reform-the-basic-health-program-and-federal-medicaid-matching-rates/>.

41. Westlaw searches conducted May 16, 2013, for “**sub-regulatory guidance**”:

JLR (journals and law reviews, including CLE materials): 39 documents. The earliest was a CLE from 2002.

FR (*Federal Register*): 98 documents; the earliest was 1988.

ALLCASES (state and federal cases): 4 documents; the earliest was 2009.

Searching for **sub-regulatory** retrieves “subregulatory” (one word) as well as “sub-regulatory” (hyphenated).

42. Westlaw searches run in the JLR database on May 16, 2013:

“**sub-regulatory guidance**”: 39 documents

“**non-legislative rule**”: 300 documents

The oldest relevant hit for “nonlegislative rule” was from 1967: Developments in the Law, *Deceptive Advertising*, 80 HARV. L. REV. 1005, 1093 (1967).

43. Mantel, *supra* note 39, at 351.

44. See Elizabeth Williams, Annotation, *What Constitutes “Interpretative Rule” of Agency so as to Exempt Such Action from Notice Requirements of Administrative Procedure Act* (5 U.S.C.A. § 553(b)(3) (a)), 126 A.L.R. FED. 347 (1995).



mulgated two regulations concerning the cleanup and removal of PCBs, and then issued the PCB Risk Assessment Review Guidance Document explaining the risk assessment techniques that applicants should use.<sup>45</sup> When a prospective applicant challenged the guidance document, the D.C. Circuit held that it was a legislative rule and the agency should have used notice and comment.<sup>46</sup> A substantial literature discusses this category of material and whether more procedural safeguards should be imposed.<sup>47</sup> Without going into details (partly out of consideration for your reading patience and partly because I haven't mastered the details myself), I'll summarize. In the cases, sometimes the agency wins and sometimes the challenger wins.<sup>48</sup> The articles discuss values that are in tension: on the one hand, it is efficient for an agency to adopt guidance without the extra procedure, and it is helpful for those regulated to have access to guidance; on the other hand, guidance has such a big impact that fairness and democracy support more transparency and input.<sup>49</sup>

¶19 In the past few decades, Presidents have sought to coordinate and shape agency rule making by having "significant" regulations reviewed by the Office of Management and Budget, with a large role for a subunit of OMB called the Office of Information and Regulatory Affairs (OIRA).<sup>50</sup> The new review process was instituted by President Clinton via an executive order in 1993.<sup>51</sup> "Significant regulatory action" was defined in terms of effect on the economy (\$100 million or more annually) or on the environment, public health or safety, or state, local, or tribal governments; action could also be deemed "significant" if it created an inconsistency with

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45. *General Elec. Co. v. E.P.A.*, 290 F.3d 377, 379 (D.C. Cir. 2002).

46. *Id.* at 385.

47. See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381; Stephen M. Johnson, *Good Guidance, Good Grief?*, 72 MO. L. REV. 695 (2007); Mantel, *supra* note 39; Randolph J. May, *Ruling Without Real Rules—Or How to Influence Private Conduct Without Really Binding*, 53 ADMIN. L. REV. 1303 (2001); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011).

There are also articles examining guidance within particular agencies. See, e.g., Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517 (2012); Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565 (2012); Sam Kalen, *Changing Administrations and Environmental Guidance Documents*, NAT. RESOURCES & ENV'T, Fall 2008, at 13; Gregory J. Madden, *EPA's "New Windfall" Lien Guidance*, ST. & LOC. L. NEWS, Fall 2003, at 7; Nathaniel S. Cushman, Comment, *The Impact of Illegal Tax Guidance: Notice 2008-83*, 62 TAX LAW. 863 (2009).

48. See generally Williams, *supra* note 44. The litigation "is considered notoriously difficult. . . . [I]t turns out to be maddeningly hard to devise a test that reliably determines which rules are legislative in nature and which are not." David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 278 (2010).

49. See, e.g., Johnson, *supra* note 47, at 700–03; Seidenfeld, *supra* note 47, at 340–44.

50. "Though the controversies over regulatory review began in earnest during the Reagan administration, the technique began even earlier in different forms. The Ford administration issued the first executive order requiring benefit-cost analysis of regulations. The order instructed the OMB director to analyze the inflationary effect of rules. The Carter administration retained this order, helping to institutionalize the regulatory review." Connor Raso, *Introductory Comment [Symposium: Reflections on Executive Order 13,422]*, 25 YALE J. ON REG. 77, 77 n.3 (2008).

51. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

another agency's actions or plans or raised novel legal or policy issues.<sup>52</sup> President George W. Bush amended the executive order twice, first shifting some responsibilities away from the Vice President<sup>53</sup> and next adding "significant guidance documents" to the regulatory actions that OMB would review.<sup>54</sup> Ten days after taking office, President Obama revoked the two orders by President Bush and ordered the director of OMB and other agency heads to "promptly rescind any orders, rules, regulations, guidelines, or policies implementing or enforcing" them.<sup>55</sup>

¶20 In January 2007 (concurrent with the second executive order by President Bush), OMB issued a Bulletin for Agency Good Guidance Practices.<sup>56</sup> The bulletin orders agencies to establish written procedures for the approval of significant guidance documents.<sup>57</sup> Each document is to include the word "guidance" (or an equivalent), name the agency or office issuing the document, give the date of issuance, cite the statute or regulation it is interpreting, and so on.<sup>58</sup> The bulletin orders agencies to post on their web sites all current guidance documents and to provide means for the public to comment on them. The OMB bulletin appears to be a rule "of agency organization, procedure, or practice."<sup>59</sup> Although the introduction to the bulletin cites one of the revoked executive orders,<sup>60</sup> the bulletin doesn't appear to rely on it. The bulletin is still on the OMB's web site<sup>61</sup> and—as far as I can tell—has not been rescinded, so I assume it is still in effect.

## Conclusion

¶21 The federal administrative system is complex, and within that complexity lie ambiguities you might not expect. First are ambiguities about what counts as an "agency," along with an assortment of names for the agencies and their administrators. Second, there is the borderland between regulations and guidance. You might have been taught that agencies do their legal work through regulation and adjudication, but the body of guidance documents (or nonlegislative rules) is growing, both in volume and in importance.<sup>62</sup> Astute legal researchers should become aware of this important source of authority, as well as its unclear status.

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52. *Id.* at 641–42.

53. Exec. Order No. 13,258, 3 C.F.R. 204 (2003).

54. Exec. Order No. 13,422, 3 C.F.R. 191, 192 (2008). The *Yale Journal on Regulation* published a symposium of five articles on this executive order. Symposium, *Reflections on Executive Order 13,422*, 25 *YALE J. ON REG.* 77–124 (2008).

55. Exec. Order No. 13,497, 3 C.F.R. 218, 218 (2010).

56. 72 Fed. Reg. 3439 (Jan. 25, 2007).

57. *Id.* at 3440.

58. *Id.* Metadata!

59. 5 U.S.C. § 553 (2006). However, the bulletin states that "[i]t is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its agencies or other entities, its officers or employees, or any other person." 72 Fed. Reg. at 3440.

60. 72 Fed. Reg. at 3433 n.12.

61. *Final Bulletin for Agency Good Guidance Practices*, available at [http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/012507\\_good\\_guidance.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good_guidance.pdf) (last visited May 15, 2013).

62. Legal research texts have not all caught up with the boom in guidance. For a notable exception, see MORRIS L. COHEN & KENT C. OLSON, *LEGAL RESEARCH IN A NUTSHELL* 279–82 (10th ed. 2010).