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AT A JOINT HEARING BEFORE THE
SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT, COMMITTEE ON SCIENCE AND TECHNOLOGY AND THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW, COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
TITLED
"AMENDING EXECUTIVE ORDER 12866: GOOD GOVERNANCE OR REGULATORY USURPATION?"
FEBRUARY 13, 2007

Chairman Miller, Chairman Sanchez, Ranking Member Sensenbrenner, Ranking Member Cannon, and members of the subcommittees, thank you for inviting me here today to testify concerning the Administration's amendment to Executive Order 12866 (which is in the form of E.O. 13422) and the Office of Management and Budget's (OMB) Final Bulletin for Agency Good Guidance Practices. I am William Kovacs, Vice President of Environment, Technology, and Regulatory Affairs at the U.S. Chamber of Commerce. The U.S. Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96% of the U.S. Chamber's members qualify as small businesses.

WHY WE CARE

As a business federation, the U.S. Chamber is all too familiar with the overwhelming regulatory burdens our members face at the hands of government regulators. Each year approximately **4,000 new regulations** are issued by federal agencies, and the *Federal Register* exceeds **73,000 pages** annually.[1] Currently, there are more than **110,000 regulations** in existence,[2] not including the thousands of **guidance documents** that implement them! Since 1995, more than **44,000 new final rules** have been issued. The annual

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[1] *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, by Clyde Wayne Crews, Vice President for Policy and Director of Technology Studies at the Competitive Enterprise Institute (June 28, 2006).

[2] John D. Graham, Administrator of the Office of Information and Regulatory Affairs, Testimony before the Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs, U.S. House of Representatives (Nov. 17, 2004).

cost to implement the nation's regulatory system exceeds the amounts collected from individual income taxes.[3]

Moreover, the cost of federal regulations to the public is estimated to be as high as **$1.13 trillion**[4]—a cost which equals almost half the amount of last year's entire federal budget![5] And the impact of federal regulations is especially severe on small businesses. For example, the annual cost of all federal regulations is, on a per employee basis, $7,647 for firms with fewer than 20 employees—nearly 45% higher than the $5,282 for companies with 500 or more employees.[6]

In addition, the number of paperwork burden hours—hours spent by businesses in preparing paperwork imposed by federal regulations—has skyrocketed. Last year alone, the number of paperwork burden hours imposed on the public exceeded an extraordinary **10.5 billion hours**—the highest in history—and 2.5 billion hours more than just two years ago.[7]

With the regulatory process so increasingly complex and expensive, it is easy to understand why Presidents and Congress—both Democrat and Republican—have tried, albeit unsuccessfully, to exercise some management responsibility over the system. And, similarly, it is hard to understand the current fervor over Executive Order 13422 and OMB's Final Bulletin for Agency Good Guidance Practices (GGP). The E.O. and GGP are merely the latest efforts in a long-term, *bipartisan* attempt to exercise oversight of the regulatory process. Congress certainly would not want guidance documents masquerading as regulations, adding cost and complexity to the regulatory process and without appropriate public review and comment as required by the Administrative Procedure Act (APA).

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[3] *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, supra, pg. 6. The amount of individual income taxes collected in 2005 was $894 billion, and the amount of corporate income taxes collected was $226 billion.
[4] *The Impact of Regulatory Costs on Small Firms*, Report RFP No. SBHQ-03-M-0522, by W. Mark Crain, Lafayette College, for The Office of Advocacy, U.S. Small Business Administration (Sept. 2005).
[5] *Budget of the United States Government, Fiscal Year 2005*, Office of Management and Budget. Accessible at: http://www.whitehouse.gov/omb/budget/fy2005/.
[6] *Ibid*, footnote 2, page 5.
[7] *Paperwork Reduction Act: New Approaches Can Strengthen Information Collection and Reduce Burden*, U.S. Government Accountability Office Report, GAO-06-477T, pg. 7, Washington, DC (Mar. 8, 2006).

In my testimony today, I want to make three key points:

1. Regulatory reform is not new—rather it has been an ongoing *bipartisan effort* for more than 30 years;

2. E.O. 13422 and GGP are essential tools for the executive branch to exercise oversight over the regulatory process; and

3. E.O. 13422 and GGP are part of a larger government effort to ensure and maximize the quality, utility, integrity, and objectivity of information disseminated by the federal government.

BACKGROUND

One of the fundamental cornerstones of good government is ensuring that the public has the opportunity to participate in the policymaking process. This participation allows the public to have a voice in the making of the laws that regulate them. Public participation protects citizens from arbitrary decisions by federal agencies by enabling citizens to effectively engage in the rulemaking process.

Citizens cannot participate effectively, however, without knowing all the facts. Why do we need this rule? How much will it cost to implement? How does it fit in with other regulations? Without such basic information, citizens are precluded from intelligently voicing their concerns. **Rules do not operate in a vacuum.** As such, their cost and impact *must* be considered in conjunction with other rules.

Likewise, federal agencies exclude the public by issuing documents that are not legally binding, yet effectively regulate people's behavior. By calling such documents "guidance," they circumvent the public participation requirements guaranteed by the APA. By law, agency advisory opinions and guidance documents have no legally binding effect. They are merely an agency's interpretation of how the public can comply with a particular rule or regulation. Unfortunately, however, the use of guidance documents to regulate the public has become a common practice. That is, even though guidance documents do not have legally binding effect, they have practical binding effect when the agencies use them to establish criteria that affect the rights and obligations of private persons.

It is far easier to issue a guidance document than to undergo the rigors of rulemaking. Consider that rulemakings require internal agency review, public participation (including notice and comment under the APA), compliance with the analytical requirements of Executive Order 12866, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act, OMB review, Congressional review, and potentially judicial review. Because of these stringent requirements, agencies have a strong incentive to issue rules as less procedurally onerous guidance documents that—intentionally or not—cut the public and the regulated community out of the process.

The problem with regulations and guidance documents is symptomatic of a larger problem concerning the entire regulatory system. But, over the years, efforts have been made to address it.

I. REGULATORY REFORM HAS BEEN A BIPARTISAN EFFORT

For years, the Executive and Legislative branches of government—*regardless of party or politics*—have tried hard to exercise oversight over a cumbersome, complex, and often times inequitable regulatory system.[8] Through a vast array of executive orders and statutes, efforts to inject sanity into the regulatory process have made slow, but noticeable, progress.[9] As guidance document abuse became more and more prevalent[10], however, Congress again intervened to try to correct the inequity. In 2000, the House Committee on Government Reform adopted a report titled "Non-Binding Legal Effect of Agency Guidance Documents," which highlighted agency abuse of guidance documents and severely criticized the use of such so-called "backdoor regulation."[11] Still, agencies continued to issue guidance to effectively regulate the public. The judicial branch eventually weighed in, with

[8] For example, Executive Order 12044, Improving Government Regulations, signed by President Carter in 1978, established requirements for centralized review of regulations and the preparation of regulatory analyses, and mandated that agencies "periodically" review existing regulations. Executive Order 12866, Regulatory Planning and Review, was signed by President Clinton in 1993 and required agencies to review existing regulations to identify which could be modified or eliminated. Section 610 of the Regulatory Flexibility Act requires federal agencies to review regulations every 10 years to determine whether they are meeting their objectives and if they should be rescinded.

[9] See Appendix A.

[10] Perhaps the most notorious example of an agency guidance document regulating behavior is EPA's "Interim Guidance for Investigating Title IV Administrative Complaints Challenging Permits" (the so-called "Environmental Justice" guidance), which a GAO investigation subsequently concluded was a rule disguised as guidance.

[11] H. Rep. 106-1009 (106th Cong., 2d Sess. 2000).

courts alerting congress to the problem, and encouraging legislation to correct it:

> The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.[12]

While presidential and Congressional efforts at regulatory reform have improved the system, much work remains to be done.

II. THE E.O. AND GGP ARE ESSENTIAL TO EXERCISING OVERSIGHT OVER THE REGULATORY PROCESS

a. E.O. 13422

When President Bush signed Executive Order 13422, he was expanding the scope of E.O. 12866, issued under President Clinton, to include not just rules, but also, for the first time, guidance documents. This would serve to correct the abuse of guidance documents by federal agencies seeking to avoid

[12] Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) (striking down emissions monitoring guidance as legislative rule requiring notice and comment). See also, Chamber of Commerce v. Dep't of Labor, 174 F.3d 206 (D.C. Cir. 1999) (striking down OSHA Directive as legislative rule requiring notice and comment); General Electric Co. v. EPA, 290 F.3d 377 (D.C. Cir. 2002) (striking down PCB risk assessment guidance as legislative rule requiring notice and comment). Even the American Bar Association, recognizing the problem with guidance documents, stated in its Annual Report Including Proceedings of the Fifty-Eighth Annual Meeting, August 10-11, 1993, Vol. 118, No. 2, at 57: "Before an agency adopts a non-legislative rule that is likely to have a significant impact on the public, the agency must provide an opportunity for members of the public to comment on the proposed rule and to recommend alternative policies or interpretations, provided that it is practical to do so; when non-legislative rules are adopted without prior public participation, immediately following adoption, the agency must afford the public an opportunity for post-adoption comment and give notice of this opportunity."

public participation in the policymaking process. Far from being radical, E.O. 13422 merely instructs federal agencies to:

1. State the reason for the regulation;

2. State the cost of the regulation, and an estimate of the combined costs and benefits of all of its regulations planned for that calendar year (to assist with the identification of agency priorities); and

3. Have a Regulatory Policy Officer ensure that these requirements have been followed by the agency.

Perhaps the most talked about requirement in E.O. 13422 has been the appointment of a Regulatory Policy Officer (RPO) by the President. Critics have declared that this provision is an illegal expansion of executive authority because it allows the President to control the regulatory agenda. Yet what is it the RPO is tasked to do? First, the RPO ensures that any guidance document is not actually a rule—one that will regulate public behavior. Second, the RPO ensures that the agency has explained the need for a rule, and has looked at the costs and benefits of the proposed rule, and the aggregate costs and benefits of all the rules being issued by that agency for the year. If it hasn't, then the RPO can notify OMB. Is it really so insidious to require accountability in our rulemaking process?

Nevertheless, critics continue to decry E.O. 13422 as an unwarranted (and possibly unconstitutional) expansion of executive power. Yet, without delving into a constitutional law treatise on the subject—which is beyond the scope of this testimony—it is certainly well settled that the President has the power to make political appointments of officers within his own executive agencies.[13] Hysterical claims of unconstitutional "power grabs" only serve to distract us from the important and sizable problems with the regulatory process that E.O. 13422 is intended to address.

[13] Article II, U.S. Constitution.

b. GGP

The final version of OMB's GGP bulletin, released simultaneously with the President's E.O. 13422, establishes policies and procedures for the development, issuance and use of significant guidance documents in order to increase the quality and transparency of internal agency practices. The purpose of GGP is to ensure that guidance documents of Executive Branch departments and agencies are developed with appropriate review and public participation, accessible and transparent to the public, and not improperly treated as legally binding. The GGP also provides a distinction between what does and does not constitute a guidance document to provide greater clarity to the public.

Such criteria are not new. In fact, there is a strong foundation for establishing standards for the initiation, development, and issuance of guidance documents to improve their quality and transparency. The former Administrative Conference of the United States (ACUS), for example, developed recommendations for the development and use of agency guidance documents.[14] In 1997, the Food and Drug Administration (FDA) created a guidance document distilling its good guidance practices.[15] Congress then codified aspects of the FDA document into the Food and Drug Administration Modernization Act of 1997.[16] Much of GGP is modeled on the FDA's early efforts.

III. E.O. 13422 AND GGP ARE PART OF A LARGER GOVERNMENT EFFORT TO INCREASE TRANSPARENCY AND MAXIMIZE THE QUALITY, UTILITY, INTEGRITY, AND OBJECTIVITY OF INFORMATION DISSEMINATED BY THE FEDERAL GOVERNMENT

E.O. 13422 and the GGP are part of a long effort by Congress and several Administrations to improve the transparency and quality of government data and provide effective parameters to guide the regulatory activities of federal agencies.[17] These efforts finally coalesced in the passage of the

[14] ACUS, Rec. 92-2, 1 C.F.R. 305.92-2 (1992).
[15] Notice, "The Food and Drug Administration's Development, Issuance, and Use of Guidance Documents," 62 FR 8961 (Feb. 27, 1997).
[16] Public Law No. 105-115.
[17] See Appendix A.

Information Quality Act (IQA) in 2001, which serves as the basis for the issuance of the GGP. Were it not for a unified commitment to quality data by this and former Administrations and Congresses—as exemplified in the passage of the IQA—the GGP would not exist today.

In order to understand the connection between GGP and IQA, it is helpful to understand what the IQA really is.

More than any law before it, the IQA served to promote integrity in the agency decision making process, and to enhance the accuracy of the data underlying government regulatory decisions. It does this by creating a mechanism by which the public can challenge poor data. In this way, the IQA is a tool for everyone—from industrialists to environmentalists—providing equal opportunity to correct faulty government data.

Data quality is a matter of great importance to all of us. For me to have confidence that my decisions are sound, I must have good information. This is just plain common sense. Similarly, Members of Congress must be able to rely on their staff to provide good information. Why shouldn't we be able to expect United States government agencies to do the same, that is, rely on good information when developing regulations and guidelines?

The IQA seeks to assure that this expectation can in fact be realized. It requires federal agencies to ensure and maximize the quality, objectivity, utility, and integrity of disseminated information and establishes a system whereby interested parties can seek correction of erroneous, disseminated information. Ideally, the Act improves information quality, and in so doing, provides a firmer basis for regulatory authorities to make sound policy decisions. This is why the Chamber has been one of the strongest proponents of the IQA.

At the time of its passage, just like now with the issuance of E.O. 13422 and the GGP, many critics insisted that the IQA would "shut down" the regulatory process, result in thousands of regulatory challenges, and ultimately rollback environmental, health and safety protections in this country. Of course, nothing of the sort occurred. In fact, in FY2005 only 27 IQA petitions were filed with federal agencies. And only 12 IQA appeals were handled by federal agencies that year—2 new appeals, and 10 from FY2003 and FY2004.[18]

[18] 2006 Report to Congress on the Cost and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, OMB's Office of Information and Regulatory Affairs. January 2007.

Nevertheless, even faced with these facts regarding the IQA, there are still people that claim the law is an underhanded attempt by industry to stymie the regulatory system. It is difficult to understand why people wouldn't want regulations based on the most accurate and objective available data. It is likely they are the same people that are currently decrying E.O. 13422 and GGP, and, consequently, time will again prove them wrong. But more importantly, it is essential that federal agencies clearly explain to the American public why they are issuing rules, and the cost of these rules. For after all, it is the American public that must live under these rules, and as a society of laws, not of men, it is not unreasonable to ask that our government clearly explain to us what they are asking us to obey, particularly when disobedience results in severe civil and criminal penalties.

CONCLUSION

The long-standing debate over regulatory reform will not end today. The U.S. Chamber strongly believes that the regulatory reform process is critical to ensuring that regulations and guidance documents are sound, balanced, cost-effective, and open to the public. Congress must not abandon its oversight role in this area, and the U.S. Chamber applauds this committee for this hearing today.

The U.S. Chamber is grateful for the opportunity to present its views about this important topic.