

# AGENCY OVERSIGHT AS “WHAC-A-MOLE”: THE CHALLENGE OF RESTRICTING AGENCY USE OF NONLEGISLATIVE RULES

STUART SHAPIRO\*

## INTRODUCTION

When agencies want to compel private entities to act, they face a complex array of choices. The Administrative Procedure Act (APA) gives agencies a series of options for pursuing their preferred policy.<sup>1</sup> At one extreme is the possibility of formal rulemaking. Formal rulemaking, requiring a quasi-judicial proceeding, is rarely used by agencies. It is extremely burdensome for them and, after a period of initial experimentation with the approach, agencies have largely abandoned it altogether.<sup>2</sup>

At the other extreme, agencies can choose not to make policy with any general pronouncements, but rather to rely on case-by-case enforcement actions to implement their preferences. Although these actions are judicially reviewable, the cost for the regulated party to seek redress is significant, and agency penalties often withstand judicial scrutiny. Professor Todd Rakoff, however, cites three reasons why agencies moved toward more general approaches in the 1960s.<sup>3</sup> First, ensuring a consistent enforcement approach is costly for agency management. Second, case-by-case enforcement produces laws that are often vague and contradictory. Finally, as the age of the most far-reaching regulatory statutes

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\* Associate Professor and Director, Public Policy Program, Bloustein School of Planning and Public Policy, Rutgers University. I would like to thank Natalia Campora for valuable research assistance on this project. Helpful comments and ideas were provided by Anne Gowen, James Broughel, and two anonymous reviewers. I am also grateful to the Mercatus Center for its support on this project.

1. Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2012).

2. Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1466 (1992).

3. Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 163 (2000); see also Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1501–02 (1992) (noting that adjudications cannot be used as precedent by agencies).

dawned, agencies were confronted with policy problems that lent themselves particularly well to more general approaches.<sup>4</sup>

The most well-known of these approaches is informal rulemaking, as described in section 553 of the APA.<sup>5</sup> Informal rulemaking, or “regulation,”<sup>6</sup> as it is more commonly known, allows agencies to set policies that apply to vast swaths of the economy to protect public health, govern financial transactions, or decrease the likelihood of a terrorist attack. Although on occasion courts do overturn agency regulations, in general they are deferential to agencies’ interpretations of the laws that they are charged with implementing.<sup>7</sup>

Because of its ability to make far-reaching policies and often withstand judicial review, informal rulemaking proliferated. This growth in turn led to a reaction from those who oppose regulation, either on ideological grounds, or because regulation typically places burdens on industry.<sup>8</sup> Beginning in the late 1970s, Congress and the President began requiring regulatory agencies to undertake procedures significantly beyond those required in the APA when they pursued informal rulemaking. Agencies were required to analyze the impact of their regulations on small businesses,<sup>9</sup> measure the information-collection burden their regulations would impose,<sup>10</sup> and conduct Regulatory Impact Analyses of their more significant regulatory efforts.<sup>11</sup> The requirements imposed on agencies engaged in informal rulemaking have continued to increase over the past several

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4. Rakoff, *supra* note 3, at 163.

5. 5 U.S.C. § 553.

6. As discussed above, “formal rulemaking” is a rarely used procedure that is distinct from “informal rulemaking.” Informal rulemaking is used to promulgate the regulations that are often the center of high-profile political debates. See Strauss, *supra* note 2, at 1466–68.

7. See, e.g., *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

8. MARC ALLEN EISNER, *REGULATORY POLITICS IN TRANSITION* 6 (2000).

9. Regulatory Flexibility Act, Pub. L. No. 96-354, § 3, 94 Stat. 1164, 1166 (1980).

10. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, § 2, 94 Stat. 2812, 2819 (1980).

11. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2012).

decades, and courts have insisted that some of those requirements, such as notice-and-comment, must be strictly followed.<sup>12</sup>

The growing complexity of the informal rulemaking process led some scholars to predict that agencies would begin to turn away from it as a means of setting policy.<sup>13</sup> Professor Thomas McGarity and others have argued that the burden of issuing regulations (which they describe as the “ossification of rule-making”)<sup>14</sup> would eventually push agencies to resort to less formal methods, known in the APA as interpretative rules and general policy statements<sup>15</sup> and, more generally, as guidance documents and enforcement manuals (collectively, “nonlegislative rules”).<sup>16</sup> Although there is scant evidence that agencies have abandoned informal rulemaking,<sup>17</sup> there are an abundance of agency actions that rely on these less formal means.<sup>18</sup>

Proposals to restrict agency usage of “guidance documents” and other similar policy instruments have been discussed for decades. An executive order even implemented one such proposal (albeit briefly) in 2007.<sup>19</sup> The Regulatory Accountability Act,<sup>20</sup> a piece of legislation currently pending in Congress, would echo many of the requirements of that executive order.

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12. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1400 (1992).

13. *Id.* at 1386.

14. *Id.* at 1386. See also Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rule-making*, 47 ADMIN. L. REV. 59 (1995).

15. 5 U.S.C. § 552(a)(2)(B) (2012).

16. To minimize confusion, all of these types of documents (interpretive rules, guidance documents, enforcement manuals, and policy statements) will be referred to as “nonlegislative rules” throughout this Article. This will be in contrast to “legislative rules,” which are promulgated using the formal or informal rule-making procedures in the APA.

17. See Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making “Ossified”?*, 20 J. PUB. ADMIN. RES. & THEORY 261, 277, 279 (2010); see also Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 896 (2008); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1421 (2012).

18. There is no formal count of agency nonlegislative rules. Most informal analyses indicate that there have always been many of them, but no study has indicated that a turn away from informal rulemaking has led to an increase in nonlegislative rules.

19. Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007). See Part III of this Article for further discussion of the current status of these requirements.

20. Regulatory Accountability Act of 2013, H.R. 2122, 113th Cong. (2013).

At the state level, the Model State Administrative Procedures Act adopted in 2010 also has provisions that address nonlegislative rules.<sup>21</sup> Would any of these proposals actually curb agency use of these informal means of setting policy? Or would they push agencies toward even more informal instruments? In this Article, I use a series of recent actions by the Department of Labor to argue that agencies are likely to react to a restriction on one type of policymaking activity (to the extent that the restriction works at all) by moving to even more difficult-to-monitor methods of setting policy.

Many of these policymaking approaches can be characterized as the movement of information from agency managers to other parties. When an agency describes how it is interpreting its regulation, it is sharing information on its views with regulated parties. This sharing of information with regulated parties is well-covered in the literature on nonlegislative rules, as is the dissemination of information from agency management to enforcement personnel so as to improve or alter the enforcement of regulations. As discussed below, however, agencies also collect information from the regulated community and share information with regulatory beneficiaries and other parties, all in the service of improving or altering regulatory implementation without changing regulations.

What influences an agency to choose one method of setting policy rather than another? How would restricting one type of nonlegislative rule (as many have proposed) change agency incentives to use other methods? This Article looks at the agency choice between informal rulemaking and even more informal means of setting policy—usually consisting of the dissemination of information. Once agencies decide not to pursue rulemaking to achieve a policy goal, there are still many options for the agency. Restrictions on one or more types of action may lead to a “Whac-a-Mole”<sup>22</sup> effect. A restriction on one type of agency policymaking approach would lead the agency to try a different approach. This latter approach is at least as likely to be more difficult for elected officials to oversee (and hence less normatively

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21. Ronald M. Levin, *Rulemaking Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 855, 875–84 (2011).

22. See *Whac-a-Mole*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Whac-A-mole>, [perma.cc/0zTzTigE9z].

desirable) as it is to be easier to oversee. Indeed, significant restrictions could lead to more of the much more informal and difficult-to-oversee case-by-case enforcement oversight that led to the demand for rulemaking in the first place.

In the next two Parts of this Article, I review the literature on two subjects: in Part II, agencies' decisions to use nonlegislative rules to set policy, and in Part III, the proposals to oversee these approaches. Part II is written from the perspective of the regulatory agencies. It is critical to understand the motivations of agencies so as to predict how they will react to attempts to restrict the use of nonlegislative rules. In Part IV, I use a series of recent actions by the Department of Labor to illuminate the vast array of approaches to policy at regulatory agencies, and to show that many of them can be characterized as transfers of information. I draw concluding observations about attempts to oversee agency use of nonlegislative rules in Part V.

#### I. WHY WOULD AGENCIES AVOID RULEMAKING?

The informal rulemaking process outlined in section 553 of the APA has numerous advantages for agencies. Chief among them is the establishment of a preferred policy that is likely to receive significant deference from the courts.<sup>23</sup> Rulemaking also allows a presidential administration to make far-reaching policies that do not require legislative action.<sup>24</sup> Regulations can also be used by agencies (or the President) to get credit for taking action in a particular policy area.

Yet, despite these advantages, agencies frequently turn to nonlegislative rules to set policy. According to some scholars, the use of nonlegislative rules actually dwarfs that of rulemaking.<sup>25</sup> As I discuss further below, one also can characterize most choices that avoid rulemaking as using information provision to set policies.

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23. See Rakoff, *supra* note 3, at 163.

24. Congress can veto regulations via the Congressional Review Act but as of 2011 had done so only once in the fifteen years since the Act was passed. Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 708–09 (2011).

25. Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 399 (2007); Strauss, *supra* note 2, at 1468 (noting that formal rulemaking is the "least frequent" kind of rulemaking).

The two most common types of nonlegislative rules discussed in the literature are “guidance documents” or “interpretations”—which can be seen as the provision of information from agencies on the interpretation of their regulations to regulated parties—and “compliance manuals”—which can be seen as the provision of similar information from agency managers to their enforcement personnel. The factors that lead an agency to avoid rulemaking when addressing a policy problem have been well documented in the literature; the discussion below is a summary.

It may be helpful to think of the choice of policy instrument as a continuum from informal rulemaking (or from the rarely used mechanism of formal rulemaking, if you prefer) to adjudication. As we move along the continuum away from rulemaking, we see decreasing scope and increasing use.<sup>26</sup> Other scholars have posed the choice in more discrete terms. Professor Robert Anthony hews closely to the three categories listed in the APA: legislative rules (which have gone through informal rulemaking) at one end of the spectrum, interpretive rules in the middle, and policy statements at the other end.<sup>27</sup> Strauss, while calling the choice a continuum, groups all non-rulemaking activity into a category he calls “publication rules.”<sup>28</sup> Professor Ronald Levin sees the key distinction as between legislative rules (promulgated through formal or informal rulemaking) and nonlegislative rules (everything else).<sup>29</sup> Whether one sees the policy choice as a continuum or a discrete choice, the question facing the agency is similar: Why move away from rulemaking and toward other alternatives?

#### A. Saving Resources

Informal rulemaking is costly. Although one can debate whether the process is “ossified”<sup>30</sup> or whether agencies have been de-

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26. See Strauss, *supra* note 2, at 1466–68.

27. 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, 1323 (1992) (arguing that all the categories of nonlegislative rules listed in his title—guidance documents, enforcement manuals, etc.—should fit into one of these three categories).

28. Strauss, *supra* note 2, at 1467–68.

29. See Levin, *supra* note 3, at 1497–98.

30. McGarity, *supra* note 12, at 1419 (arguing that notice-and-comment requirements as interpreted by the courts through “hard look” judicial review have ossified the informal rulemaking process, or that the rulemaking process has become

tered from engaging in rulemaking, there is little argument that using informal rulemaking to issue a legislative rule of any significance consumes many hours of work by agency personnel and, if the issue is salient enough, the attention of the head of the agency. Other, less formal approaches are less costly and less time-consuming, simply because they allow agencies to avoid rulemaking requirements such as notice-and-comment and review by the Office of Management and Budget (OMB).<sup>31</sup> Although agencies may solicit comment on some nonlegislative rules and submit some to OMB for review, these will be the exceptions.<sup>32</sup>

Not having to devote personnel to responding to public comment and negotiating with OMB is only one of the ways that avoiding rulemaking saves resources for agencies when compared to rulemaking. Nonlegislative rules also conserve agency resources relative to case-by-case adjudication, because firms often advise themselves of agency policies and attempt to comply with them. Strauss notes that tools such as instructions to compliance officers often announce the agency's expectation for how it wants its regulations enforced and thereby saves the agency money on training and staffing: "If the policies were not there, and these operatives were required to act on the basis of their own knowledge and judgment, agency staffing would be a much more complex matter. . . ."<sup>33</sup> In addition to benefitting the agency, this guidance can be seen as a positive for all parties.<sup>34</sup> Professor Nina Mendelson notes, "Agencies rely on handbooks, directives, and other similar guidance documents to ensure that lower-level employees. . . make consistent (and thus more predictable) decisions."<sup>35</sup>

Similarly, Strauss notes that time is a scarce resource among senior agency personnel.<sup>36</sup> Issuing a regulation in any signifi-

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so difficult for agencies that they are turning away from informal rulemaking as an approach to setting policy).

31. Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 999–1000 (2011).

32. See *infra* Part III.

33. Strauss, *supra* note 2, at 1482.

34. The increase in the use of forms of regulation such as management-based regulation, performance-based regulation, and market-based regulation may have increased the need for such clarifications. All these types of regulation are more vague (because they are intended to increase flexibility). See *infra* notes 90–92.

35. Mendelson, *supra* note 25, at 409.

36. See Strauss, *supra* note 2, at 1472.

cant policy area often commands a fair share of this resource. Issuing nonlegislative rules on smaller pieces of the regulation is unlikely to do so. Such manuals are likely to prevent differential enforcement and interpretation of the regulation. Differences in enforcement are issues that may command the attention of senior management as companies with multiple sites complain about different treatment by different compliance officers. "Finally, with such policies in place, the agency head needs only to watch for signals of distress about them, not to reach an unending series of discretionary judgments."<sup>37</sup>

### B. *Preserving Agency Flexibility*

Because informal rulemaking is a resource-intensive process, agencies have incentives to leave their regulations in place unless forced to change them by Congress or the courts. Yet, in a rapidly changing world, regulations become out of date quickly. Technologies, economic conditions, and knowledge about the best way to achieve a policy goal evolve with time. Nonlegislative rules allow agencies to interpret their own regulations in new ways as conditions change and are themselves easier to modify. As Professor Michael Asimow says, general policy statements "leave decisionmakers room for flexible application; they do not foreclose further experimentation and learning from experience."<sup>38</sup>

In addition, whereas regulations limit agency behavior, courts have consistently found that agencies are not similarly bound by their own guidance documents. In *Brock v. Cathedral Bluffs Shale Oil Co.*<sup>39</sup> and *Western Radio Services Co. v. Espy*,<sup>40</sup> courts found that it was permissible for agencies to cite regulated parties even though the citation was inconsistent with a nonlegislative rule issued by the agency (a guidance document in the former case and a Forest Service Manual in the latter).<sup>41</sup>

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37. Strauss, *supra* note 2, at 1482.

38. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 388.

39. 796 F.2d 533, 534, 538 (D.C. Cir. 1986).

40. 79 F.3d 896, 900–01 (9th Cir. 1996).

41. Of course it could be argued that these decisions undermine the assertion that guidance increases uniform enforcement, discussed above.



To be certain, this is one of the primary criticisms of nonlegislative rules from the perspective of regulated parties.<sup>42</sup>

### C. *Compelling Compliance*

The supposed largest advantage of informal rulemaking over nonlegislative rules is that, once promulgated, legislative rules have the force of law. Theoretically, guidance documents, in all their forms, are not binding on the regulated parties. Numerous scholars, however, have noted that this lack of “bindingness” creates less of a difference between regulations and nonlegislative rules than it might seem. Two reasons have been noted for this lack of distinction. The first is that the regulated parties will often comply out of fear of the agency. The second is that courts, though not as deferential to agencies enforcing regulations, have given some deference to agencies in interpreting their own nonlegislative rules.<sup>43</sup>

When an agency issues a guidance document or public instructions to its enforcement personnel, it leads the regulated community to understand what the agency expects from it. A regulated firm must make a choice: comply with the guidance document—and likely be safe from prosecution—or do something different that it believes to be legally compliant—and be prepared to litigate the issue. Professor William Funk argues that the choice is relatively clear:

Regulated entities, unable to obtain pre-enforcement review of a questionable nonlegislative rule, are put in the unenviable position of having to conform to the questionable rule or willfully act contrary to its terms. In many cases, the risk analysis will counsel in favor of complying with the rule, even when the doubts as to the lawfulness of the rule are substantial. Agencies

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42. According to some scholars, a document that preserves agency flexibility but restricts the actions of those subject to the document should be produced only with the procedural protections of the APA (i.e., with the requirements applicable to rulemaking). See Anthony, *supra* note 27, at 1382. Although this flexibility is desirable from the point of view of the regulatory agency, it is not desirable from a standpoint of democratic accountability, according to this perspective. See *id.* One of the innovative reforms suggested in the 2010 Model State Administrative Procedure Act (MSAPA) addresses this particular problem. It would require agencies to justify departures from their own nonlegislative rules. Levin, *supra* note 21, at 881.

43. See *infra* notes 49–51 and accompanying text.

act with the knowledge that their nonlegislative rules may escape pre-enforcement review, and they may count on the coercive (extortionate) effect of the unreviewable rule to achieve compliance even when they might be very reluctant to test the validity of their rule in an actual enforcement action.<sup>44</sup>

Anthony argues that this ability to compel compliance, combined with the factors described above, makes nonlegislative rules very attractive for agencies: "If such nonlegislative actions can visit upon the public the same practical effects as legislative actions do, but are far easier to accomplish, agency heads (or, more frequently, subordinate officials) will be enticed into using them."<sup>45</sup>

On the other hand, if a regulated party calls an agency's bluff and seeks judicial relief from a nonrulemaking document, the agency's prospects are uncertain. There are numerous prominent examples of agency enforcement actions being vacated by courts because the agency improperly relied on documents that were issued without the procedural protections of the APA. In *Hocor v. United States Department of Agriculture*,<sup>46</sup> for example, the Department of Agriculture cited the owner of an exotic game farm because his perimeter fence was only six feet high—two feet lower than the agency's purported requirement.<sup>47</sup> The Seventh Circuit overruled the Department on the ground that the agency could not rely on a height requirement that appeared only in an internal memorandum to enforcement personnel.<sup>48</sup>

In other cases, agencies have been more successful. In the frequently cited case of *Bowles v. Seminole Rock & Sand Co.*,<sup>49</sup> the Su-

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44. William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1340 (2001).

45. Anthony, *supra* note 27, at 1317; *see also* Asimow, *supra* note 38, at 384 ("Most members of the public assume that all agency rules are valid, correct, and unalterable. Consequently, most people attempt to conform to them rather than to mount costly, time-consuming, and usually futile challenges. Although legislative and nonlegislative rules are conceptually distinct and although their legal effect is profoundly different, the real-world consequences are usually identical.").

46. 82 F.3d 165 (7th Cir. 1996).

47. *Id.* at 168.

48. *Id.* at 171–72; *see also* Chamber of Commerce v. U.S. Dep't of Labor, 174 F.3d 206, 208, 213 (D.C. Cir. 1999) (vacating an OSHA directive because OSHA failed to conduct notice-and-comment rulemaking proceeding before issuing directive as required by the APA).

49. 325 U.S. 410 (1945).

preme Court ruled that it would defer to an agency's interpretation of its own rules unless the interpretation was plainly erroneous or inconsistent with the underlying regulation.<sup>50</sup> In an empirical examination of judicial decisions in this area, Professors Richard Pierce and Joshua Weiss found that district and circuit courts upheld agency decisions (giving them "*Seminole Rock*" deference) in 76% of cases, and another study found that the Supreme Court did so 91% of the time.<sup>51</sup> If a nonlegislative rule leads to compliance without legal challenge in many circumstances, and frequently withstands those challenges that are made, an agency's incentive to use this policy tool is tremendous.

D. *Disadvantages of Guidance and Other Nonlegislative Rules from an Agency Perspective*

Reading the above advantages of avoiding rulemaking for regulatory agencies and listening to critics of nonlegislative rules, one is left wondering why agencies would ever engage in rulemaking. Yet, thousands of informal rules are issued by agencies each year, and hundreds of them are deemed "significant" by OMB.<sup>52</sup> Only a small number of them are clearly required by statute. For all its pitfalls and onerous requirements, the regulatory process is clearly still quite appealing.

Chief among those appeals is the increasing certainty that a regulation will be enforced<sup>53</sup> and the assurance that it will have

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50. *Id.* at 414.

51. Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules* (George Washington Univ., Legal Studies Research Paper No. 523, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1744990](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1744990), [<http://perma.cc/08qFu2hGsh>]. In *Decker v. Northwest Environmental Defense Center*, decided on March 20, 2013, the Supreme Court echoed this principle: "When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation." 133 S. Ct. 1326, 1337 (2013) (internal quotation marks omitted).

52. CLYDE WAYNE CREWS JR., *COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE REGULATORY STATE 3* (2012), [http://cei.org/sites/default/files/Wayne%20Crews%20%2010,000%Commandments%202012\\_0.pdf](http://cei.org/sites/default/files/Wayne%20Crews%20%2010,000%Commandments%202012_0.pdf), [<http://perma.cc/0B5uM4ZW>].

53. While the presence of a regulation does not guarantee that enforcement resources will be devoted to the implementation of that regulation, it does increase the likelihood that they will be. The presence of a regulation also increases the likelihood that regulated entities will comply with the policy embodied in the regulation, regardless of enforcement.

a long-term impact. Regulations can better withstand changes in presidential administrations and the changes in political preferences that accompany them. Just as informal rulemaking is more difficult to implement than the publication of nonlegislative rules, so rulemaking directives are more difficult to overturn than policies announced via nonlegislative rules.

Any directive contained in a nonlegislative rule is subject to the risk that a new agency head (or even a political subordinate) could modify or even eliminate it with the stroke of a pen. Getting rid of directives enshrined in regulations is far more difficult: any attempt to modify one would have to go through the same torturous maze of notice-and-comment procedure, OMB review, and perhaps other requirements as the original regulation. This inertia produces a powerful incentive for political agency heads—whose time in office is, by definition, limited—to use regulation to make their long-term imprint on policy. It produces a powerful incentive for Presidents to do the same.

Finally, as Mendelson notes, the procedures required in informal rulemaking confer benefits on the agencies.<sup>54</sup> Notice-and-comment rulemaking often provides the agency with information that allows it to make better policy choices and, perhaps, better withstand judicial review.<sup>55</sup> Even OMB review, reputedly often dreaded by agency rule writers, has the benefit of offering a different perspective and analytical rigor to agency decisionmaking.<sup>56</sup>

In this section, I have examined the choice to avoid rulemaking when attempting to influence policy in comparison to engaging in rulemaking from the perspective of the agency making the choice. Critics of agency nonlegislative rules have often examined this question from the perspective of the regulated entities or implicitly from a social welfare perspective.<sup>57</sup> In doing so, they have come up with numerous proposals to curb or strictly regulate agency use of these documents. In the next section, I briefly review these proposals.

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54. Mendelson, *supra* note 25, at 409.

55. *See id.*

56. The author, a former OMB desk officer, may be biased in this regard.

57. *See generally, e.g.,* Anthony, *supra* note 27.

## II. CURBING AGENCY USE OF GUIDANCE DOCUMENTS

At one extreme are proposals to severely restrict agencies' use of nonlegislative rules to set policy. Anthony, a strong advocate of these proposals, argues that "[t]he costs of observing the law and fair procedure are bedrock obligations that cannot legitimately be slighted simply because an agency might lack adequate resources or prefer to direct them elsewhere. At worst, they are a price to be paid for lawfulness and openness and accountability in government."<sup>58</sup> Anthony argues that if an agency wants to compel action, it must follow the processes outlined in the APA for formal or informal rulemaking.<sup>59</sup> Alternatively, he suggests all documents that do not go through this process be clearly labeled as "non-binding."<sup>60</sup> These recommendations largely mirror those issued by the Administrative Conference of the United States (ACUS).<sup>61</sup>

A more moderate version of this proposal comes from John Graham and Paul Noe, who describe an attempt by the George W. Bush Administration to rein in the use of agency guidance documents.<sup>62</sup> President Bush issued Executive Order No. 13,422, which, among other things, imposed requirements for analysis and pre-publication and OMB review of a subcategory of guidance documents known as "significant guidance documents."<sup>63</sup> The executive order was rescinded by President Obama with Executive Order No. 13,497.<sup>64</sup> Less than two months later, however, OMB Director Peter Orszag issued a memorandum stating that

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58. *Id.* at 1379.

59. *Id.* at 1379–80. About twenty states take this approach. Levin, *supra* note 21, at 875.

60. Anthony, *supra* note 27, at 1372.

61. Recommendations of the Administrative Conference of the United States Regarding Administrative Practice and Procedure, 57 Fed. Reg. 30, 101, 103 (July 8, 1992). The Administrative Conference of the United States (ACUS) is a federal body charged with studying and making recommendations to improve administrative processes, including rulemaking. For this recommendation, while the ACUS language closely mirrored Anthony's language, there is room for interpretation in determining when an agency wants to compel action. ACUS may have intended a narrower interpretation than Anthony.

62. Paul R. Noe & John D. Graham, *Due Process and Management for Guidance Documents: Good Governance Long Overdue*, 25 YALE J. ON REG. 103, 103 (2008).

63. Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007).

64. Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Feb. 4, 2009).

OMB still retained the right to review significant guidance documents.<sup>65</sup> In addition, the OMB bulletin on guidance documents that largely implemented the Bush Executive Order remains on the OMB website.<sup>66</sup> This combination of activities essentially leaves the provisions of the Executive Order on guidance documents in effect, but no data are available on how this has affected agency issuance of nonlegislative rules or even the extent to which agencies have complied with the requirements.

The idea of subjecting nonlegislative rules to notice-and-comment and other oversight mechanisms used for informal rulemaking has received widespread criticism. Asimow notes that making it harder to issue guidance will lead agencies to abandon guidance and result in a loss of the benefits that guidance provides:

[I]t seems likely that the supply of nonlegislative rules is quite sensitive to increases in bureaucratic production costs . . . . For the most part, the costs of uncertainty are borne by members of the public, not by the agency. For that reason, uncertainty is an externality that agency utility-maximizers need not take into account.<sup>67</sup>

Professor E. Donald Elliott, arguing that judicially imposed requirements would be equally hazardous, says, "If the courts were to . . . develop a rigid rule that all general statements of guidance or policy must be made through the full-scale notice-and-comment procedure contemplated by section 553 of the APA, the modern administrative process would literally grind to a halt."<sup>68</sup>

Many scholars arguing against the proceduralization of nonlegislative rules cite the decline of formal rulemaking. Both Strauss<sup>69</sup> and Rakoff<sup>70</sup> argue that the existence of numerous

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65. Memorandum from Peter R. Orszag, Dir., Office of Mgmt. and Budget, to Heads and Acting Heads of Exec. Dep'ts and Agencies (March 4, 2009), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_fy2009/m09-13.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf), [<http://perma.cc/0K8N7Dfo5Na>].

66. Memorandum from Peter R. Orszag, Dir., Office of Mgmt. and Budget, to Heads of Exec. Dep'ts and Agencies (Jan. 18, 2007), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf>, [<http://perma.cc/06Z143qMDsk>].

67. Asimow, *supra* note 38, at 405.

68. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1494 (1992).

69. Strauss, *supra* note 2, at 1463 & n.2.

70. Rakoff, *supra* note 3, at 162–63.

procedural requirements on the formal rulemaking process led agencies to abandon it as a policymaking tool and led them toward informal rulemaking. Forcing agencies to solicit comment on guidance documents and other nonlegislative rules would push policymaking underground and lead to even more informal means of setting policy, such as internal memoranda and word-of-mouth instruction to enforcement personnel.<sup>71</sup>

Numerous suggestions for reforming agency use of nonlegislative rules have not required these rules to be treated like informal rulemaking. In a recommendation, ACUS suggested that agencies voluntarily publish documents for public comment either before or after their issuance.<sup>72</sup> Asimow expands upon this recommendation to suggest that notice-and-comment procedures be made mandatory for agencies after the issuance of the document. He argues that this will provide the salutary effects of public input without making it burdensome for agencies to publish guidance and other nonlegislative rules.<sup>73</sup> In another work, Asimow examines policies toward guidance documents in the States and finds that many do little to regulate their use, but some states, such as California, make it very difficult for agencies to issue them.<sup>74</sup> He also proposes a regime by which agencies could publish and solicit comment on nonlegislative rules, thereby qualifying for a “safe harbor” from judicial challenges.<sup>75</sup>

The Model State Administrative Procedure Act (MSAPA)<sup>76</sup> issued in 2010 had a number of innovative provisions for addressing nonlegislative rules. Under section 311 of the MSAPA, agencies are required to afford those affected by a nonlegislative rule “an adequate opportunity to contest the legality or wisdom of a position taken in the document.”<sup>77</sup> It also requires agencies to justify departures from their own nonlegislative

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71. See Mendelson, *supra* note 25, at 436–38 (arguing that some standardization would not drive agency action underground, but full notice-and-comment requirement would likely disincentivize the use of guidance).

72. Recommendations of the Administrative Conference of the United States, 41 Fed. Reg. 56,767, 56,770 (Dec. 30, 1976). (Dec. 30, 1976).

73. See Asimow, *supra* note 38, at 425–26.

74. See Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 ADMIN. L. REV. 631, 637–38 (2002).

75. *Id.* at 656–57.

76. REVISED MODEL STATE ADMIN. PROCEDURE ACT (2010).

77. *Id.* § 311(b); see also Levin, *supra* note 21, at 878.

rules and instructs agencies to respond to petitions for withdrawal of nonlegislative rules.<sup>78</sup>

Mendelson catalogs a number of other suggested reforms.<sup>79</sup> These (in addition to the ones described above) include requiring agencies to respond to citizen petitions complaining about guidance documents, requiring agencies to issue “good guidance practices,” much as the FDA has done,<sup>80</sup> and allowing regulatory beneficiaries to obtain judicial review of guidance documents.<sup>81</sup>

These proposals attempt to make some distinctions between different types of nonlegislative rules. Many argue that the substantive impact of the document should determine the degree of procedural protection that accompanies its issuance. This “substantial impact” test is the basis of the guidance provisions of Executive Order 13,422<sup>82</sup> and the Regulatory Accountability Act<sup>83</sup> and has occasionally been applied by the courts,<sup>84</sup> but it has also been criticized as impermissibly vague and not grounded in the APA.<sup>85</sup> Others have made distinctions based on whether the agency document is strictly interpretive or sets new requirements, but this distinction has also been criticized as a difficult line to draw.<sup>86</sup>

In the next section I look at a number of efforts by the Department of Labor in recent years to set policy without going through the regulatory process. As we will see below, agencies have many means of communicating their preferred method of interpreting regulations. Some of these means fall squarely into the types of nonlegislative rules (guidance documents and enforcement manuals) most frequently discussed in this section and the previous one. Others do not, and they indicate the types of policies that agencies would likely pursue if Congress or the President made traditional forms of nonlegislative rules more difficult to pursue.

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78. *Id.* § 311(d), (h).

79. Mendelson, *supra* note 25, at 433–52.

80. Good Guidance Practices, 21 C.F.R. § 10.115 (2013).

81. Mendelson, *supra* note 25, at 433–52.

82. *See* Exec. Order No. 13,422, 72 Fed. Reg. 2,763 (Jan. 23, 2007).

83. *See* Regulatory Accountability Act of 2013, H.R. 2122, 113th Cong. § 2 (2013).

84. *See, e.g.,* Pickus v. U.S. Bd. of Parole, 507 F.2d 1107, 1112–13 (D.C. Cir. 1974).

85. Asimow, *supra* note 38, at 399–400.

86. Anthony, *supra* note 27, at 1330.



## III. NONLEGISLATIVE RULES AT THE DEPARTMENT OF LABOR

The Department of Labor (DOL) provides an excellent laboratory for studying agency decisions to engage in alternatives to rulemaking and to evaluate the possible effects of policies to curb such activities. Under President Obama, the DOL has initiated a number of activities that are intended to strengthen enforcement of its regulations. Some of these activities fall under the traditional headings of guidance documents or instructions to enforcement personnel, but others reflect a different mode of policymaking that is rarely discussed in the law review articles on nonlegislative rules. Like guidance documents and enforcement manuals, these other approaches also disseminate agency interpretations of regulations. The intended audience, however, is not the regulated community (at least not directly), but regulatory beneficiaries or others who could help with agency enforcement.

DOL also has a long history of using alternatives to rulemaking and represents a fair proportion of the court cases on agency authority in this area. One of the most important cases was *Skidmore v. Swift & Co.*,<sup>87</sup> in which an administrator at the Department of Labor (at an agency that was a precursor to the current Wage and Hour Division) issued an advisory opinion that Justice Jackson said was “not controlling . . . [but did] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>88</sup> In the years since this case, courts and law review articles often describe giving “*Skidmore* deference” to agency interpretations of their governing statutes. DOL has also been involved in a series of cases determining when a communication from an agency is a “final action” and hence reviewable by the courts.<sup>89</sup> One of the more high-profile controversies regarding a nonlegislative rule occurred when the Occupational Safety and Health Administra-

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87. 323 U.S. 134 (1994).

88. *Id.* at 140.

89. See, e.g., *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 698, 701–02 (D.C. Cir. 1971); *Taylor-Callahan-Coleman Cnty Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953, 957–59 (5th Cir. 1991); *W. Ill. Home Health Cave, Inc. v. Herman*, 150 F.3d 659, 662–64 (7th Cir. 1998).

tion (OSHA) used a letter to an employer to announce that work activities in the home could be covered by OSHA regulations.<sup>90</sup>

In the subsections below, this Article reviews a number of DOL actions under the Obama Administration. I use the Obama Administration not to single it out (after all, DOL has a long history of using nonlegislative rules, as discussed above), but rather to highlight that the wide variety of types of nonlegislative rules is not some theoretical fancy but a key component of current-day policymaking. Each subsection is devoted to a different type of action by one or more DOL agencies.

At the conclusion of each, this Article speculates on agency motivations behind selecting each type of policymaking approach and whether some of the reforms discussed above would change the agency approach. The agency reaction to greater oversight of its nonlegislative rules depends on the stringency of the reform. Requiring notice-and-comment rulemaking for any nonlegislative rules that are considered binding would produce more of a Whac-a-Mole effect than some of the more modest reforms in the MSAPA.

#### A. *Information for Enforcement Personnel and State Implementers*

This is a type of agency action that the literature cited above has extensively covered and that the Obama Administration has used frequently. I briefly describe five examples here. The first is a letter<sup>91</sup> sent by the Employment and Training Administration (ETA) to state officials charged with implementing the Worker Adjustment and Retraining Notification (WARN) Act.<sup>92</sup> The WARN Act requires that under certain circumstances, federal contractors notify their employees at least sixty days in advance of layoffs.<sup>93</sup> The guidance clarifies that this requirement does not apply to layoffs that may arise from the sequestration that occurred in early 2013 because such layoffs are not “mass layoffs”

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90. Randolph J. May, *Ruling Without Real Rules—or How to Influence Private Conduct Without Really Binding*, 53 ADMIN. L. REV. 1303, 1304 (2001).

91. Letter from Jane Oates, Assistant Sec’y, Emp’t & Training Admin., to State Workforce Agencies, Adm’rs, and Liaisons (July 30, 2012), available at [http://wdr.doleta.gov/directives/attach/TEGL/TEGL\\_3a\\_12.pdf](http://wdr.doleta.gov/directives/attach/TEGL/TEGL_3a_12.pdf), [<http://perma.cc/0QJLm77uamt>] [hereinafter Oates Letter].

92. Pub. L. No. 100-379, 102 Stat. 890 (1988) (codified at 29 U.S.C. §§ 2101–2109 (2012)).

93. 29 U.S.C. § 2012(a) (2012).

or “plant closings” as defined in the WARN Act.<sup>94</sup> One corporate interest group warned its members: “It is unclear whether all the federal courts would agree with the DOL’s guidance, but they generally defer to such agency pronouncements.”<sup>95</sup>

The next two examples are from the Office of Federal Contract Compliance Programs (OFCCP). OFCCP enforces federal affirmative action requirements on federal contractors. Both documents are instructions to OFCCP compliance officers. The first, Directive 306, outlines “the circumstances in which exclusions of applicants or employees based on their criminal records may violate existing nondiscrimination obligations.”<sup>96</sup> The Directive makes clear that if a tool used to screen job applicants for a criminal background has an adverse impact on the hiring of minority job candidates, the contractor could be in violation of federal antidiscrimination law.<sup>97</sup>

Similarly, Directive 2013-03 was issued by OFCCP to its enforcement officers and covers the detection of pay discrimination among federal contractors.<sup>98</sup> The Directive makes clear that enforcement officers do not need to run statistical analyses to cite a contractor for pay discrimination; anecdotal data are sufficient.<sup>99</sup> One advocate for federal contractors noted the clear impact of the directive, citing an increase in citations by OFCCP under the Obama Administration: “[T]he majority of compensation settlements were not based on statistical analyses of compensation at the job or job group level. Rather, OFCCP typically relied on a handful of employees with unex-

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94. The DOL reasoned that the exception in the Act for “unforeseeable business circumstances” applied, meaning that any job losses were not “mass layoffs” in the words of the Act. Oates Letter, *supra* note 91, at 2–4.

95. *Department of Labor Issues Guidance on Applicability of WARN to Layoffs Caused by Sequestration*, ARENT FOX (Aug. 1, 2012), [http://www.arentfox.com/newsroom/alerts/departement-labor-issues-guidance-applicability-warn-layoffs-caused-sequestration#.Uu6\\_e0L3CfR](http://www.arentfox.com/newsroom/alerts/departement-labor-issues-guidance-applicability-warn-layoffs-caused-sequestration#.Uu6_e0L3CfR), [http://perma.cc/03pfQZCweXV].

96. Directive 2013-02 from the Off. of Fed. Contract Compliance Programs (Jan. 29, 2013) [hereinafter Directive 2012-02], *available at* <http://www.dol.gov/ofccp/regs/compliance/directives/dir306.htm>, [http://perma.cc/0a3wFBYmvVV].

97. *Id.*

98. Directive 2013-03 from the Office of Contract Compliance Programs (Feb. 28, 2013) [hereinafter Directive 2013-03], *available at* <http://www.dol.gov/ofccp/regs/compliance/directives/dir307.htm>, [http://perma.cc/0t39jhtAbRQ].

99. *See id.*

plained compensation disparities to support their findings of compensation discrimination.”<sup>100</sup>

The final two examples come from OSHA. OSHA sent a memorandum to its regional enforcement administrators in March 2012 clarifying enforcement of regulatory provisions prohibiting discrimination against whistleblowers.<sup>101</sup> Contained within this memo is an explanation of how employee incentive programs—programs that reward employees (usually via a raffle or lottery) for remaining injury free for a certain period of time—may be in violation of OSHA regulations.<sup>102</sup> OSHA argues that these programs are problematic because they discourage the reporting of injuries and workplace hazards.<sup>103</sup>

The second OSHA example is particularly noteworthy. OSHA used a notice-and-comment process to propose<sup>104</sup> a change in the way that the Agency interpreted the term “feasible” in its regulations governing exposure to occupational noise.<sup>105</sup> This example shows the effect of procedural requirements on the issuance of nonlegislative rules. After considerable public outcry, including the attention of Senators Olympia Snowe and Joseph Lieberman, OSHA withdrew the proposal and promised to address the problem of occupational noise through other means.<sup>106</sup>

These documents fall neatly within the discussion above on nonlegislative rules. All have a clear impact on both the regu-

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100. Matt Nusbaum, *Research Confirms OFCCP Compensation Settlements and Conciliations on the Rise*, PROSKAUER, May 17, 2013, <http://www.governmentcontractorcomplianceupdate.com/2013/05/17/research-confirms-ofccp-compensation-settlements-and-conciliations-on-the-rise/>, [http://perma.cc/0TDE78r311V].

101. See Memorandum from Richard E. Fairfax, Deputy Assistant Secretary, U.S. Dep’t of Labor, to Reg’l Adm’rs, Whistleblower Program Managers (Mar. 12, 2012), available at <https://www.osha.gov/as/opa/whistleblowermemo.html>, [http://perma.cc/0FC5DVSbxgU].

102. *Id.*

103. *Id.*

104. Interpretation of OSHA’s Provisions for Feasible Administrative or Engineering Controls of Occupational Noise, 75 Fed. Reg. 64,216 (proposed Oct. 19, 2010) (to be codified at 29 C.F.R. pts. 1910 & 1926).

105. Occupational Noise Exposure, 29 C.F.R. § 1910.95 (2010).

106. See Press Release, U.S. Dep’t of Labor, US Department of Labor’s OSHA withdraws proposed interpretation on occupational noise: Agency examines other approaches to prevent work-related hearing loss (Jan. 19, 2011), available at [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=19119](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=19119) [http://perma.cc/0DcQntyJaHQ].

lated parties and the beneficiaries of regulation. Any attempt to impose greater procedural constraints on the issuance of non-legislative rules surely would ensnare these documents.

How would OSHA, ETA, and OFCCP respond to a requirement for notice-and-comment or OMB review of these documents? Any answer to this question is necessarily speculative (except in the case of the OSHA noise policy, which did go through a public comment phase), but, as commenters on both sides of the debate on nonlegislative rules have noted, the imposition of procedural constraints on agency action would certainly have delayed the issuance of these documents. In the case of the WARN Act letter, where timeliness was an issue (ETA clearly needed to issue it before sequestration occurred), the Agency likely would have avoided notice-and-comment by issuing an interim final rule.<sup>107</sup> The OFCCP directives and the OSHA memo on incentive programs likely would be implemented without any documentation, but rather via word-of-mouth instruction to enforcement personnel, as Strauss envisioned. Alternatively, OSHA and OFCCP might, as described below, have used information disseminated to employees of contractors to increase awareness of pay discrimination and the use of criminal background checks in a discriminatory manner. This strategy would result in less consistent enforcement (and less of an impact) than Directives 2013-02 and 2013-03, but also in less notice to regulated parties that OFCCP might cite them for use of criminal background checks or pay discrimination. OSHA could have taken similar actions with its policies on safety incentive programs.

#### *B. Agency Use of Information Collection*

Information collections are different from the information disseminations described in the other subsections of this Part. Rather than giving out information, the agency is collecting it. I include it in this discussion for two reasons. First, because information collections are subject to a different oversight regime (the Paperwork Reduction Act),<sup>108</sup> their use by regulators provides more information on agency reaction to oversight. Second, information collection is an alternative to writing a new regulation for agencies

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107. See Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(B) (2012).

108. See Paperwork Reduction Act, 44 U.S.C. § 3501-3549 (2006).

attempting to facilitate enforcement of existing regulations, yet it is generally ignored in discussions of alternatives to rulemaking.

Many information collections take place directly pursuant to a regulation, but others rely on agency discretion in interpreting their regulations. Two recent examples of this reliance are the OFCCP “scheduling letter” and the Worker Classification Survey from the Wage and Hour Division.

Before visiting a contractor for a compliance audit, OFCCP sends a “scheduling letter.” In this letter, OFCCP asks the contractor to send information to OFCCP before the audit. Usually this is information that OFCCP regulations clearly require contractors to maintain.<sup>109</sup> Historically, however, there have been controversies over whether OFCCP regulations require that contractors maintain some of the information requested in the scheduling letter.<sup>110</sup> On May 12, 2011, as required under the Paperwork Reduction Act (PRA), OFCCP published notice of its intention to change the scheduling letter. These changes included requiring additional data on compensation and leave policies and additional demographic information on hires and applicants.<sup>111</sup> As of this writing, the changes to this collection have not been approved by OMB.<sup>112</sup> Yet OMB approval is required under the PRA.<sup>113</sup>

The Worker Classification Survey also required public comment and OMB approval under the PRA. According to the Federal Register notice published by DOL, the purpose of the Survey is “to collect information about employment experiences and workers’ knowledge of basic employment laws and rules so as to better understand employees’ experience with

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109. See Reports and Other Required Information, 41 C.F.R. § 60-1.7 (2013); Affirmative Action Programs, 41 C.F.R. § 60-1.40 (2013).

110. When I was the OFCCP desk officer at the Office of Management and Budget in 1999–2000, I was involved in one of these controversies. OFCCP wished to have contractors provide information on compensation of employees at a level of detail that arguably went beyond what was required in their regulations.

111. *Proposed Changes to OFCCP Scheduling Letter*, HUSCH BLACKWELL, (May 24, 2011), available at <http://www.huschblackwell.com/proposed-changes-to-ofccp-scheduling-letter/> [<http://perma.cc/0eMjWCqj4ro>].

112. Dara L. DeHaven & Leigh M. Nason, *OFCCP’s New Compensation Directive: The Agency’s Continued Search for Systemic—or Any—Discrimination in Compensation*, MARTINDALE, Apr. 15, 2013, [http://www.martindale.com/labor-employment-law/article\\_Ogletree-Deakins-Nash-Smoak-Stewart-PC\\_1759040.htm](http://www.martindale.com/labor-employment-law/article_Ogletree-Deakins-Nash-Smoak-Stewart-PC_1759040.htm) [<http://perma.cc/0WdRMc5bGgW>].

113. Paperwork Reduction Act, 44 U.S.C. § 3507 (2006).

worker misclassification.”<sup>114</sup> Worker misclassification is the practice of an employer treating a worker as a contractor, hence escaping its obligations under statutes that govern the treatment of employees.<sup>115</sup> DOL submitted the survey to OMB for the second review required under the PRA. As of this writing, OMB has not yet made a decision on approval of the survey.<sup>116</sup> Employer groups have a number of criticisms of the survey.<sup>117</sup>

The experience with these two information collections under the PRA is informative. Information collections, unlike many of the other activities discussed in this article, are subject to procedural constraints under the PRA.<sup>118</sup> They must be published for public comment twice before use and approved by OMB, also before use.<sup>119</sup> On the one hand, agencies have thousands of approved collections of information, so it is hard to argue that the PRA deters agencies from using this policy tool.<sup>120</sup> A subset of controversial collections of information, however, is contested by public comments and not necessarily approved readily by OMB.

This dynamic provides insight into how the proceduralization of other activities would play out. The vast majority would probably sail through the procedural gantlet without much attention (indeed, subjecting them to the procedural gantlet may be a waste of taxpayer dollars, as has been said of the PRA).<sup>121</sup> On the other hand, truly significant nonlegislative rules could be delayed and perhaps stopped if they are required to go through public notice and OMB review. In the latter scenario, increased proceduralization would likely lead agencies to continue issuing the vast majority of nonlegislative rules, while shying away from

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114. Proposed Information Collection Request (ICR) for the Worker Classification Survey; Comment Request, 78 Fed. Reg. 2447 (Jan. 11, 2013).

115. *Id.* at 2447–48.

116. Pending collections are listed on OMB’s website here: <http://www.reginfo.gov/public/do/PRAMain>.

117. *See, e.g.*, Letter from Michael P. Aitken, Vice President for Gov’t Affairs, Soc’y for Human Res. Mgmt., to Mary Ziegler, Dir., U.S. Dep’t of Labor, Wage & Hour Dir. (Mar. 12, 2013), available at <http://www.shrm.org/Advocacy/PublicPolicyStatusReports/Courts-Regulations/Documents/SHRM%20comment%20on%20Worker%20Classification%20Survey.pdf> [<http://perma.cc/0NdUNajdeje>].

118. *See* Paperwork Reduction Act, 44 U.S.C. § 3507.

119. *Id.*

120. *See* Stuart Shapiro, *The Paperwork Reduction Act: Benefits, costs and directions for reform*, 30 GOV’T INFO. Q. 204, 205–06 (2013).

121. *Id.* at 210.

the most controversial ones and examining alternative, less formal approaches not covered by the new procedures.

C. *Information Dissemination to Regulatory Beneficiaries*

On June 24, 2010, DOL initiated the “We Can Help” campaign.<sup>122</sup> This campaign, designed to inform workers of their rights under the various laws enforced by the Wage and Hour Division, in a sense gives guidance directly to the beneficiaries of regulation. The literature on nonlegislative rules by agencies generally focuses on agency communication to its own personnel (as in OFCCP Directives 2012-02 and 2013-03, discussed above) or to the regulated community. Communicating with regulatory beneficiaries is a different approach at improving enforcement of federal regulations.<sup>123</sup> It also is likely to increase litigation between employers and employees.

None of the proposals for proceduralization of agency nonlegislative rules likely would cover this information dissemination approach. Any definition of covered “agency action” is unlikely to encompass publicity campaigns.<sup>124</sup> Such campaigns, while clearly intended to supplement the enforcement of agency regulations, likely fall in Strauss’s fourth category of agency documents,<sup>125</sup> which none of the proposals for proceduralization would cover. If some of the nonlegislative rules were regulated more tightly, this type of information dissemination would be one option for agencies to explore. One effect of this change would be an increase in private legal action in which regulatory beneficiaries sue regulated firms.

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122. See *We Can Help*, U.S. DEP’T OF LABOR, <http://www.dol.gov/wecanhelpl/>, [<http://perma.cc/0xprdWMihv2>].

123. *But see* Mendelson, *supra* note 25, at 424–25 (discussing how regulatory beneficiaries are generally given less consideration than regulated parties in discussions on nonlegislative rules).

124. Indeed, such campaigns would not be covered under Executive Order No. 13,422 or the Regulatory Accountability Act. Even discussions of the milder reforms, such as those mentioned by Asimow, *supra* note 73, and Levin, *supra* note 21, describe only the types of nonlegislative rules discussed above (guidance documents for regulated parties and instructions for enforcement personnel).

125. Strauss, *supra* note 2, at 1468 (describing nonlegislative rules as his fourth category, “publication rules”). Strauss would likely put information dissemination to workers into his fourth “everything else” category. *See id.*



A different example of involving regulatory beneficiaries comes from OSHA's letter to a union representative on walk-around inspections.<sup>126</sup> This letter interprets OSHA's authorizing statute and regulations to allow representatives of the employees to accompany OSHA enforcement personnel on inspections of their workplace.<sup>127</sup> Doing so empowers regulatory beneficiaries (in this case, workers) both to highlight workplace hazards for OSHA and better ensure that OSHA findings are followed up on after the agency leaves the worksite.

Although the "We Can Help" campaign and employee presence on OSHA inspections may not create any new obligations for regulated parties, it is easy to envision ways in which this type of information dissemination could do so. If telling regulated parties that wage discrimination or criminal background checks are going to be a focus of enforcement (as in OFCCP Directives 2012-02 and 2013-03) becomes more difficult for agencies procedurally, this information dissemination presents a compelling alternative. Agencies could just publicize to workers that they should contact OFCCP if they have been subjected to a criminal background check or feel they have been subjected to wage discrimination. One could see this approach as less desirable for employers than the guidance approach currently used.

#### *D. Sharing Information with Other Governmental Entities*

A similar approach that would likely fall outside the scope of any attempts to regulate the use nonlegislative rules can be seen in two recent Obama Administration initiatives. These two initiatives, the Bridge to Justice program and the Employee Misclassification Initiative, attempt to leverage outside parties to assist in the enforcement of DOL regulations. Like the "We Can Help" campaign, these programs provide information to parties besides agency personnel and the regulated community in an attempt to strengthen DOL enforcement.

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126. See Letter from Richard E. Fairfax, Deputy Assistant Sec'y, Occupational Safety & Health Admin., to Steve Sallman, Health & Safety Specialist, United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union (Feb. 21, 2013), available at [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=28604](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604) [<http://perma.cc/0cBLHasb7ky>].

127. *Id.*

The Bridge to Justice initiative connects workers whose complaints regarding possible employer violations of employment-related regulations have not been pursued by the Wage and Hour Division with attorneys who can initiate civil action on behalf of the workers.<sup>128</sup> DOL acknowledges that it does not have the resources to pursue all worker complaints and is therefore, in a sense, deputizing attorneys through this “ABA Approved Attorney Referral System”<sup>129</sup> to enforce the regulations that the Wage and Hour Division cannot. DOL will also provide workers with its own findings to assist workers and their attorneys in pursuing a remedy. Employers have voiced concerns about the program.<sup>130</sup>

The Employee Misclassification Initiative deputizes other government entities rather than private attorneys.<sup>131</sup> Through a series of Memoranda of Understanding (MOUs) with the Internal Revenue Service (IRS) and with state governments, DOL has agreed to share information on the misclassification of employees. This information is useful to the IRS and state revenue departments because the misclassification of employees can be used to lower a firm’s tax payments.<sup>132</sup> In possession of this information, the IRS and state revenue departments will have incentives to enforce the proper classification of employees to increase tax revenues. In effect, this arrangement deputizes these agencies to enforce DOL regulations.

The deputizing of private attorneys and other government agencies is first and foremost a response to limited resources. Agencies like DOL always face limited resources, but in a time of increased concern regarding fiscal constraints, these limitations have hit harder on agency regulatory enforcement. These initiatives also give us an idea of what would happen if agencies

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128. See *Bridge to Justice*, U.S. DEP’T OF LABOR, <http://www.dol.gov/whd/resources/ABAReferralPolicy.htm>, [<http://perma.cc/0Mneuvemx7R>].

129. *Id.*

130. One attorney said, “What will ultimately arise out of the ‘new partnerships’ of the government and the private sector is open to speculation, but it will certainly create another arena for employees to pursue alleged violations, which will certainly increase employers’ costs in litigation.” Walter J. Liszka, *A Bridge to Justice—A Bridge Too Far?*, WESSELS SHERMAN, (July 2011) available at [http://www.w-p.com/CM/Articles/A\\_Bridge\\_to\\_Justice\\_A\\_Bridge\\_Too\\_Far.asp](http://www.w-p.com/CM/Articles/A_Bridge_to_Justice_A_Bridge_Too_Far.asp), [<http://perma.cc/05s64RzASGH>].

131. *Employee Misclassification as Independent Contractors*, U.S. DEP’T OF LABOR, <http://www.dol.gov/whd/workers/misclassification/>, [<http://perma.cc/0S4Pzn9hC5N>].

132. See *id.*

were required to expend more resources on traditional nonlegislative rules, such as the distribution of information to enforcement personnel or regulated parties. In cases where new procedures made guidance to the regulated community excessively burdensome, the agency may turn to other parties to assist in improving regulatory compliance (although this may not always be a practical alternative—not all agencies may have the options for outside enforcement that DOL does). The substitution is not a perfect one, and would likely increase litigation, but it does highlight that agencies do have alternatives if one means of improving regulatory enforcement is foreclosed.

#### IV. CONCLUSION: INFORMATION JUST WANTS TO BE FREE?<sup>133</sup>

Legislation inevitably gives agencies discretion to make policy choices. Over the past half-century, informal rulemaking has become the preeminent way that agencies make these choices. As a result, there have been increasing attempts to proceduralize the informal rulemaking process so as to give it a greater sense of democratic accountability.

At the same time, agencies also have experimented with new means of regulation. The older approach, command-and-control regulation, popular at the dawn of social regulation, has been criticized for being inefficient and stifling innovation.<sup>134</sup> As a result, agencies have experimented with more flexible means of regulation, such as management-based approaches,<sup>135</sup> performance-based regulation,<sup>136</sup> and market-based regulation.<sup>137</sup>

Each of these newer approaches brings advantages in flexibility for the regulated party, while decreasing certainty for both the regulating agency and the regulated party. As a result, agencies have three choices. They can grant greater discretion

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131. See *Information wants to be free*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Information\\_wants\\_to\\_be\\_free](http://en.wikipedia.org/wiki/Information_wants_to_be_free), [http://perma.cc/5884-3J25].

134. See Nathaniel O. Keohane et al., *The Choice of Regulatory Instruments in Environmental Policy*, 22 HARV. ENVTL. L. REV. 313, 313–14 (1998).

135. See generally Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691 (2003).

136. See generally Cary Coglianese et al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 ADMIN. L. REV. 705 (2003).

137. See generally Robert W. Hahn & Robert N. Stavins, *Economic Incentives for Environmental Protection: Integrating Theory and Practice*, 82 AM. ECON. REV. 464 (1992).

to enforcement personnel, issue further regulations to clarify their existing regulations, or issue additional documentation from agency policy officials.<sup>138</sup> Because the cost of rulemaking to agencies has risen, agencies frequently turn to nonlegislative rules to fill this gap. Because of the cost of uneven enforcement, agencies use guidance documents or other nonlegislative rules to fill this gap. Often these policymaking approaches involve the provision of information to those enforcing regulations or those who have to comply with them.

Requiring agencies to go through more procedures to provide this type of information may have any number of consequences. Experience with Executive Order No. 12,866 and the PRA (which govern rulemaking and information collection, respectively) indicates that mere proceduralization will not stop (or noticeably slow down) the activity being controlled, although it may deter or delay the most ambitious plans of agencies. It is unclear that the procedures have had significant substantive effects on policy,<sup>139</sup> although they may have made agencies more accountable to the elected branches of government.<sup>140</sup>

Those suggesting reform must take into account the possibility that many of the proposals raised to proceduralize nonlegislative rules will not significantly affect the vast majority of them. Many actions will be declared exempt from the new procedures as “not significant” or “merely interpretive,” much as agencies now determine that many rules are insufficiently burdensome to trigger the requirements of the Regulatory Flexibility Act.<sup>141</sup> In fact, it

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138. Command-and-control regulations also occasionally require clarification. As technological advances are made, the command-and-control regulations may become out of date, requiring enforcement personnel to make judgments on whether firms using new technologies are in compliance with outdated rules.

139. See generally Stuart Shapiro & John F. Morrall III, *The triumph of regulatory politics: Benefit-cost analysis and political salience*, 6 REG. & GOVERNANCE 189 (2012) (discussing the impacts of regulatory impact analyses); William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66 (2004) (discussing the impacts of notice-and-comment rulemaking).

140. West, *supra* note 139, at 66 (noting that “notice and comment requirements [may] serve as ‘fire alarms’ that facilitate elected officials’ efforts to ensure that bureaucracy is responsive to their constituents”).

141. See Sarah E. Shive, *If You’ve Always Done It That Way, It’s Probably Wrong: How the Regulatory Flexibility Act Has Failed to Change Agency Behavior, and How Congress Can Fix It*, 1 ENTREPRENEURIAL BUS. L.J. 153, 157–59 (2006).

may be easier for nonlegislative rules to escape the clutches of any procedure that has a threshold for coverage,<sup>142</sup> because agencies can always claim that they are merely “providing information” that will be “helpful” and that the document is not binding.<sup>143</sup>

But what of that small fraction of documents that will be covered by new procedures? Some of the recent actions by DOL in reaction to constraints on its budget provide a clue. By providing information to regulatory beneficiaries and to outside parties that can help enforce regulation, DOL has come up with a way of providing guidance without providing guidance. Instead of—although in these cases it may be in addition to—providing information to its personnel or to the regulated community, DOL has provided it to other parties. In doing so, it can be fairly confident that regulated firms have “gotten the message.”

In that sense, attempts to regulate agency avoidance of the rulemaking process may resemble a game of Whac-a-Mole. For the small fraction of agency nonlegislative rules that will be caught by such a system, agencies like DOL that have the option of doing so, may just turn to other means of communicating the information that they desire to disseminate. These means may be word of mouth, the issuance of proclamations on agencies’ websites, or communication of information to regulatory beneficiaries about their rights under agency regulations as interpreted by the agency. It is not clear that even these less formal methods of improving regulatory enforcement are to the advantage of regulated parties when compared to current nonlegislative rules. At least with guidance documents, regulated parties get notice of agency intentions regarding enforcement directly.

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142. Virtually every procedural control on agency action has a threshold—“significant” rules are covered under Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); rules with a “significant economic impact on a substantial number of small entities” are covered by the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (2012). Agencies can even bypass notice-and-comment by issuing an interim final rule. 5 U.S.C. 553(b)(3)(B) (2012).

143. The Information Quality Act (IQA) may apply to such disseminations of information. Pub. L. 106-554, 114 Stat. 2763 (2000). To date, the IQA, passed in 2000, has not had much of an impact on agency disseminations due largely to a lack of judicial reviewability under the Act. See Stephen M. Johnson, *Ruminations on Dissemination: Limits on Administrative and Judicial Review Under the Information Quality Act*, 55 CATH. U. L. REV. 59, 79 (2005).

It is important to note that the extent to which agencies will be dissuaded from using nonlegislative rules will vary with the burden imposed by the procedural reform addressing these documents. A requirement to engage in pre-issuance notice-and-comment will give agencies the greatest incentive to declare their documents exempt from the requirement or to turn to more informal methods of information dissemination. A “substantive impact” test like that in the Regulatory Accountability Act likely will lead to many claims that impacts are minimal. More modest proposals like those contained in the MSAPA and put forth by Professor Asimow<sup>144</sup> are less likely to lead to a game of Whac-a-Mole.

Agencies turn to nonlegislative rules largely because they are free of many of the costs imposed on informal rulemaking. Those who advocate tightening the knot on these activities may be correct (at least in a small number of cases) that this will deter agencies from engaging in them. As the recent examples from the Department of Labor surveyed in this paper show, however, the alternative may not be a reversion to informal rulemaking and greater accountability for agencies or an abandonment of guidance documents altogether. Instead, the movement may be in the opposite direction: agencies may find other ways to communicate their preferences, and advocates of control over agencies will have to decide whether it is worth trying to proceduralize these new methods.

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144. Asimow, *supra* note 38, at 402–25.