

Energy Efficiency Advisory

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DOE Proposes to Eliminate Rule on Guidance

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The Trump Administration apparently believed that the issuance of regulatory guidance was equivalent to additional regulation and, thus, to be treated with wariness. It therefore adopted a rule designed to make it more difficult for the Department of Energy (DOE) to issue regulatory guidance of any kind. The Biden Administration does not share this belief, and DOE is now proposing to dismantle the Trump-era rule on guidance documents.¹ Affected stakeholders include those with products covered by the appliance energy efficiency program² under the Energy Policy and Conservation Act (EPCA).³ All stakeholders have an opportunity to comment by April 26, 2021.

DOE Issues Rule on Guidance Documents. DOE publishes numerous guidance documents, including pursuant to its appliance efficiency program. On January 6, 2021, DOE published a rule⁴ establishing a new 10 C.F.R. Part 1061 on guidance documents. Part 1061 implemented Trump-era Executive Order 13891.⁵ In brief, Part 1061 includes requirements on the following:

- **Issuing Guidance Documents.** The guidance document, *e.g.*, must state that it does not have the force and effect of law and does not bind the public; must state that DOE will not rely on the document as an independent basis for enforcement or administrative penalty; and must avoid mandatory language.
- **Review and Clearance by DOE's Office of General Counsel.**

¹ See DOE, Office of General Counsel, Procedures for the Issuance of Guidance Documents, Notice of Proposed Rulemaking, 86 Fed. Reg. 16114 (March 26, 2021).

² 10 C.F.R. Parts 429-431.

³ 42 U.S.C. § 6291 *et seq.*

⁴ DOE, Office of General Counsel, Procedures for the Issuance of Guidance Documents, Final Rule, 86 Fed. Reg. 451 (Jan. 6, 2021).

⁵ Exec. Order No. 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents, 84 Fed. Reg. 55235 (Oct. 15, 2019).

- **Procedures for “Significant Guidance Documents.”** There are special rules for clearance of “significant guidance documents.”⁶ Under Part 1061, DOE must, among other things, provide for at least 30 days public comment before issuing final versions of significant guidance documents and must obtain review by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget. DOE may dispense with the procedures for public comment for good cause that notice and comment are impracticable, unnecessary, or contrary to the public interest. The special procedures for significant guidance documents also do not apply where DOE and OIRA agree that compelling cause warrants an exemption; or where there is a categorical exception approved by OIRA.
- **DOE Must Post Guidance Documents on its Website.**
- **Provisions for Withdrawal or Modification of Guidance Documents.**

DOE Now Proposes to Rescind Its Rule on Guidance Documents. On Inauguration Day, President Biden issued Executive Order 13992,⁷ which, among other things, revoked Executive Order 13891, and directed agencies to take steps to rescind orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing 13891.

Pursuant to this new directive, DOE has tentatively concluded that Part 1061 will hinder DOE in providing timely guidance in furtherance of the agency’s statutory duties. It believes that Part 1061 will hinder DOE’s ability to address the economic recovery and climate challenges. Therefore, DOE is proposing to rescind its internal agency procedures for issuing guidance documents published in Part 1061.

DOE says that even without Part 1061 there will be transparency; that DOE will continue, as appropriate, to solicit stakeholder input on guidance documents of significant stakeholder and public interest; and that stakeholders may still petition DOE to issue, withdraw, or revise guidance documents. And it acknowledges that guidance is nonbinding and does not have the force and effect of law.

Conclusion. The new proposal is further evidence of the Biden Administration’s vigorous action on energy—and its seeking stakeholder input as it proceeds. Interested parties should take advantage of such opportunities to help shape the Administration’s policies.

⁶ “Significant guidance documents” are defined as guidance documents that may reasonably be anticipated to (1) lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles of Executive Order 12866.

⁷ Exec. Order No. 13992, Revocation of Certain Executive Orders Concerning Federal Regulation, 86 Fed. Reg. 7049 (Jan. 25, 2021).

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