



Comments of the Regulatory Action Center

RE: Withdrawal of Department of Energy Rule on Agency Guidance Documents

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The Regulatory Action Center at FreedomWorks Foundation is dedicated to educating Americans about the impact of government regulations on economic prosperity and individual liberty. FreedomWorks Foundation is committed to lowering the barrier between millions of FreedomWorks citizen activists and the rulemaking process of government agencies to which they are entitled to contribute.

On behalf of our activists nationwide, FreedomWorks Foundation appreciates the opportunity to offer these comments regarding the notice and request for comments on the withdrawal of the Department of Energy's rule on agency guidance documents.

On October 9, 2019, President Donald J. Trump issued Executive Order (EO) 13891, *Promoting the Rule of Law Through Improved Guidance Documents*. In signing this EO, President Trump noted that agencies in the Executive Branch adopt regulations that impose legally binding requirements on the public--under our Constitution, a power given solely to Congress--and when agencies do so, the Administrative Procedure Act (APA) requires agencies to engage in notice-and-comment rulemaking, which provides both notice to the public and an opportunity for the public to comment. Agencies then must consider and respond to these comments before publishing final rules.

The APA does provide an exception, however, for so-called "guidance documents." In theory, these documents are not binding, but agencies have sometimes used this exception to the notice-and-comment procedure to regulate the public. Even when a guidance document carries a disclaimer that it is not binding, it can present an implied threat of enforcement action if the public does not comply. To make matters worse, many of these guidance documents--also known as "regulatory dark matter"--are not made accessible to the public.

In issuing this EO, President Trump aimed to provide Americans "an open and fair regulatory process" by requiring that agencies use notice-and-comment rulemaking procedures when formulating new obligations on the public; guidance documents on which the agency relies would have to be published on a searchable website, and documents not published could no longer be used; and future guidance documents could be issued only after providing the public a



chance to comment. Agencies across the federal government were directed to review their guidance and make available to the public those documents that remained valid.

This effort to combat “bureaucratic abuse and hold federal agencies accountable” should have continued, and not been reversed by the Biden Administration. But on his first day in office, President Biden revoked this EO (and five others also requiring regulatory reform). EO 13992 directs agencies to “promptly take steps to rescind any orders, rules, regulations, guidelines, or policies...implementing or enforcing the [Trump] Executive Orders.”

The Department of Energy (DOE) is first to implement President Biden’s order. It proposes to withdraw its final rule implementing Trump’s regulatory transparency, claiming that the “urgent challenges facing the nation” mean that regulators need all “available tools...to tackle these challenges.” DOE further argues that the regulatory transparency rule will “hinder DOE in providing timely guidance in furtherance of DOE’s statutory duties,” including addressing the economic recovery and climate change issues. In defense of its position against transparency, DOE asserts that “procedures for public transparency and involvement in the development of agency guidance documents will remain unchanged by withdrawal [of the Trump Administration rule]” because “DOE guidance will continue to be available on DOE’s website.” DOE also promises to continue soliciting public input on “guidance documents of significant stakeholder and public interest.”

No matter how well-intentioned DOE may be, there is simply no substitute for requiring the public to be notified and provided an opportunity for input before DOE publishes *any* guidance document. Leaving to the agency to decide whether public input is warranted--i.e., when there is “significant stakeholder and public interest”--clouds transparency and leaves Americans vulnerable to being snared by “guidance” they didn’t know existed. And that such documents are not technically binding is small comfort to those who may be treated as violating “non-binding” guidance.

DOE is correct in its assertion that requiring transparency and public input may “hinder” its regulatory output. The policy underlying the Administrative Procedure Act is that administrative agencies may bind the public only through the rulemaking process, which provides notice and an opportunity to comment for any and all who may be affected by a proposed agency action. Mindful that congressional prerogatives were being delegated to the unelected, the APA made it difficult--not easy or quick--to adopt and impose regulations. While the APA does not require agencies to undertake the rulemaking process for guidance documents, experience has shown



that guidance documents often function as rules and viewed as binding by the public--no matter the intent of the agency that promulgated the guidance.

In conclusion, we oppose the Biden Administration's effort to give regulators more tools that make it easier to restrict our liberties without proper transparency. Americans have a right to know what their regulators are doing. Washington bureaucrats already have immense power over our lives and economy. We should at least be ensured of open, transparent government: fair notice and an opportunity for input on the rules that govern our lives and livelihoods. We urge DOE to leave the regulatory transparency rule in place.

Respectfully submitted,

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