COMMENTS OF THE APPLIANCE STANDARDS AWARENESS PROJECT ON THE DEPARTMENT OF ENERGY'S PROPOSED RULE "PROCEDURES FOR THE ISSUANCE OF GUIDANCE DOCUMENTS" RIN 1990-AA50

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The Appliance Standards Awareness Project provides these comments in support of the Department of Energy's tentative conclusion in its notice of proposed rulemaking (NPRM) entitled "Procedures for the Issuance of Guidance Documents," 86 Fed. Reg. 16,114 (Mar. 26, 2021). ASAP leads a coalition to advance new appliance, equipment, and lighting standards to achieve monetary savings and environmental benefits. Consistent with that mission, ASAP supports the Department's proposal to withdraw the final rule published January 6, 2021, at 86 Fed. Reg. 451 (codified at 10 C.F.R. 1061.1–1061.4) ("Guidance Rule").

The Guidance Rule deprives DOE of necessary flexibility to clarify policies that address climate change and other pressing challenges in a timely manner, and thus, consistent with the policy directive in President Biden's Executive Order 13992, it should be withdrawn. As discussed below, ASAP has seen firsthand how the appropriate use of guidance documents provides clarification around issues such as product efficiency testing that benefits both regulated entities and consumers. Adding procedural hurdles to the use of guidance documents not only undermines those benefits, but also, as multiple studies demonstrate, imposes additional costs on agencies' time and resources, making the use of guidance less likely.

DOE should therefore withdraw the Guidance Rule, 10 C.F.R. 1061.1–1061.4, to increase government transparency and provide the Department with flexibility to meet evolving challenges.

I. Background.

The Guidance Rule stems from a concerted effort to hamstring agency guidance. On August 2, 2019, the New Civil Liberties Alliance—an organization that "strive[s] to tame"

federal agencies[1]—submitted a petition for rulemaking to DOE.[2] The petition requested "regulations prohibiting the issuance [of], reliance on or defense of improper agency guidance." In September 2019, President Trump issued Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents," which required (among other things) federal agencies to maintain complete records of all guidance documents, implement notice-and-comment procedures for "significant" guidance, and allow the public to petition agencies with regard to their guidance. 84 Fed. Reg. 55,235 (Oct. 9, 2019).

In response to both the executive order and NCLA's petition, DOE published a proposed rule entitled "Procedures for the Issuance of Guidance Documents" on July 1, 2020. 85 Fed. Reg. 39,495. On January 6, 2021, in the final days of the Trump administration, DOE published its final rule, implementing procedural requirements for guidance documents, and a notice-and-comment process for those that are "significant." 86 Fed. Reg. 451.

On his first day in office, President Biden issued Executive Order 13992, which revoked Executive Order 13891, and directed all agencies to promptly rescind any rules implementing or enforcing that order. 86 Fed. Reg. 7049. The revocation order states that it is federal policy for agencies to be "equipped with the flexibility to use robust regulatory action to address national priorities" given the "urgent challenges facing the Nation, including the [COVID-19 pandemic], economic recovery, racial justice, and climate change." *Id.* at 7049. DOE therefore delayed the effective date of its rule initially to March 21, 2021, 86 Fed. Reg. 7799, and then to June 17, 2021, 86 Fed. Reg. 14,807, before issuing this NPRM on March 26.

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[1] *See* New Civil Liberties Alliance, About Us, at https://nclalegal.org/about/# (last visited Apr. 22, 2021).
[2] New Civil Liberties Alliance, *Petition for Rulemaking to Promulgate Regulations Prohibiting the Issuance, Reliance on or Defense of Improper Agency Guidance* (Aug. 2, 2019) ("Pet."), https://nclalegal.org/wp-content/uploads/2019/08/Petition-for-Rulemaking-DOE.pdf; *see also* 84 Fed. Reg. 50,791.

II. Agencies, Regulated Entities, and Other Stakeholders All Benefit from Guidance.

The NPRM correctly states that "agencies must have flexibility to timely and effectively address" the challenges they face. 86 Fed. Reg. at 16,114. As numerous courts have explained, guidance documents offer precisely these benefits, and should be protected as a separate and distinct category that are not subject to the same procedural requirements as notice-and-comment rulemaking.

A. Guidance documents serve a critical role in administrative practice separate from notice-and-comment rulemaking.

As the NPRM notes, *see* 86 Fed. Reg. 16,114, the distinction between guidance and notice-and-comment rulemaking is enshrined in the Administrative Procedure Act itself: the requirements for rulemaking explicitly do not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). These exceptions "accommodate situations where the policies promoted by public participation in rulemaking are outweighed by the countervailing considerations of effectiveness, efficiency, expedition, and reduction in expense." *American Hospital Ass'n* v. *Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (internal quotation marks and citation omitted). As courts have explained, understanding those exceptions "as an attempt to preserve agency flexibility" is "most consonant with Congress' purposes in adopting the APA." *Id.* Accordingly, the APA creates a scheme under which agencies are empowered to choose the appropriate tools for the job, depending on whether extensive input or rapid output are more important for the issue at hand.

Requiring guidance documents to go through the same processes as rulemaking would upset the careful balance the APA created. The APA gives agencies the discretion to voluntarily engage in notice-and-comment procedures for guidance if they so choose. As one recent empirical study found, the discretion for an agency to make that choice on a case-by-case basis is

meaningful.[3] Based on over one hundred interviews with current and former agency officials and stakeholders, the study concluded that the benefits of public participation in guidance are "less predictable and more qualified, and the drawbacks sometimes more perverse" than is often acknowledged.[4] Although "notice-and-comment can foster legitimacy by deflecting charges that an agency is biased in terms of which voices it is willing to hear," undertaking notice-and-comment procedures can sometimes "lead agencies . . . to close off any interchanges with stakeholders that occur outside the public-comment process, which . . . prevents iterative and informal dialogue that may be optimal for agency learning."[5] And "[a]gainst the potentially great yet uncertain benefits of notice-and-comment on guidance (technical and political information and legitimacy), one must measure the costs, both in time and resources."[6] Determining whether notice-and-comment processes are beneficial therefore "involves a context-specific judgment," in the exercise of agency discretion.[7]

For example, notice-and-comment procedures can take well over a year, on average, to complete.[8] Extended rulemakings necessarily entail a significant use of agency resources, including time spent analyzing and addressing each comment. Although this longer process may be appropriate in some instances, agencies should retain discretion to determine whether such diversion of resources to notice-and-comment procedures is necessary for non-binding guidance that will not have the force of law.

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[3] Nicholas R. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, 71 Admin. L. Rev. 57, 58 (2019).
[4] *Id.* at 70.
[5] *Id.* at 71 (emphasis omitted).
[6] *Id.*
[7] *Id.* at 72.
[8] *See* Jacob E. Gerson & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 Penn. L. Rev. 923, 945 (2008) (finding that the average duration between an initial notice of proposed rulemaking and a final rule is 528 days for rulemakings without deadlines and 427 days for rulemakings with deadlines).

That flexibility is required to enable agencies to nimbly address evolving issues. For example, as manufacturers gain experience with a test procedure, it may become clear that additional specifications would help ensure that all manufacturers and testing labs are testing in a consistent manner. It is useful for all stakeholders if the agency can quickly clarify how a specific section of a test procedure should be implemented, and the ability to issue guidance in a streamlined manner is critical to that mission.

B. Guidance documents benefit the public by promoting transparency.

As the D.C. Circuit has explained, guidance documents provide a significant benefit to stakeholders and the public at large of increased transparency:

> By providing a formal method by which an agency can express its views, the general statement of policy encourages public dissemination of the agency's policies prior to their actual application in particular situations. Thus the agency's initial views do not remain secret but are disclosed well in advance of their actual application.

Pacific Gas & Electric Co. v. *Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974). Publication of guidance documents likewise "facilitates long range planning within the regulated industry and promotes uniformity in areas of national concern." *Id.* Such uniformity is particularly critical for test procedures, which "are the means by which DOE maintains a level marketplace for all competitors and eventual end-users."[9] Requiring an agency "to undertake notice and comment whenever it refines an interpretation of its rules," however, "would discourage the agency from synthesizing and documenting helpful and reliable advice." *POET Biorefining, LLC* v. *EPA*, 970 F.3d 392, 408 (D.C. Cir. 2020).

[9] *See* Carrier Corp., Comment Letter on Proposed Rule on Test Procedure Interim Waiver Process 1 (Aug. 5, 2019), https://www.regulations.gov/comment/EERE-2019-BT-NOA-0011-0036; *see also* A.O. Smith Corp., Comment Letter on Proposed Rule on Test Procedure Interim Waiver Process 3 (Aug. 6, 2019), https://www.regulations.gov/comment/EERE-2019-BT-NOA-0011-0044 (explaining that the technical review of interim test waiver methodology has "the benefit of providing transparency such that all manufacturers of the covered product in question continue to play by the same rules and that a level playing field is maintained in the marketplace").

Transparency is equally important to end-user consumers of regulated goods. Where the interpretation of a statute or rule is ambiguous, regulated entities may take different approaches, leaving consumers with inaccurate comparative information. In the DOE context in particular, providing clear guidance assists both manufacturers, by increasing predictability, and consumers, by, among other things, ensuring that all manufacturers do things in the same way, thus providing a reliable benchmark for consumers to compare.

ASAP has seen firsthand the benefits of a robust guidance practice. For example:

- The DOE test procedure for measuring the efficiency of clothes washers is based in part on the washers' capacity in cubic feet—but was once not specific as to *how* that capacity should actually be measured. DOE issued guidance explaining in detail how to conduct those measurements, including multiple diagrams.[10] This guidance provided a benchmark to ensure that all manufacturers were measuring capacity the same way, and so resulted in consistent information about capacity and efficiency for consumers choosing between different models.
- When heat pump water heaters were new to the market, there was some confusion as to the appropriate way to test their energy efficiency. The DOE test procedure in place did not specify which operational mode a manufacturer should select for testing (as older water heaters had only one mode), and the various modes available on these newer models could provide very different energy efficiency performance. In response to this changing technology, DOE issued guidance specifying the appropriate operational mode for testing.[11] This guidance ensured that all manufacturers were testing their products consistently and in accordance with consumer usage.
- DOE used guidance to clarify—in response to a manufacturer's question—that DOE's energy-conservation standards apply to custom-built, as well as mass-market, products.[12] In the absence of this guidance, custom manufacturers may have erroneously assumed that they were not subject to DOE standards—and ultimately injured consumers by failing to comply with those standards.

As these examples illustrate, rulemaking, especially in complex areas like these, necessarily leaves gaps that are not always apparent until they are implemented. Guidance is an essential

[10] U.S. Dep't of Energy, *Response to Clothes Washers Question* (July 6, 2010), https://www1.eere.energy.gov/buildings/appliance_standards/pdfs/clotheswashers_faq1_2010-07-06.pdf.
[11] U.S. Dep't of Energy, *Response to Residential Water Heaters Question* (June 5, 2012), https://www1.eere.energy.gov/buildings/appliance_standards/pdfs/waterheaters_faq_2012-06-05.pdf.
[12] U.S. Dep't of Energy, *Response to Scope of Coverage Question* (Jan. 19, 2012), https://www1.eere.energy.gov/buildings/appliance_standards/pdfs/cert_faq_2012-01-19.pdf.

tool for agencies to fill those gaps and ensure a transparent, level playing field and meaningful efficiency information for consumers.[13]

These benefits need not come at the cost of transparency. On the contrary, the NPRM makes clear that DOE plans to exercise its discretion to continue its practice of making guidance documents available on the DOE website, to solicit stakeholder input on guidance documents as appropriate, and to permit stakeholders to petition DOE regarding guidance documents. 86 Fed. Reg. at 16,115. ASAP welcomes these statements, and encourages DOE to explore additional procedures to amplify these efforts. For example, DOE should consider methods of publishing its guidance documents electronically in a manner that is more easily searchable, so that a reader can readily determine what new guidance has been issued since her last visit to the website. DOE should also consider creating a website function that would enable interested stakeholders to use their e-mail addresses to sign up for alerts when new guidance is issued.[14] These practices, however, need not be enshrined in a rule, but are better left to agency discretion.

III. The Guidance Rule Harms DOE's Regulatory Capabilities.

The Guidance Rule, if allowed to become effective, would increase the time and cost to DOE when issuing or withdrawing guidance. Those greater costs may well lead DOE to diminish or abandon its use of guidance as a useful regulatory tool, ultimately harming the public.

[13] In two of these scenarios, DOE solicited public comment, and in one it did not. This illustrates that DOE is capable of exercising its discretion to seek public input when it is appropriate for guidance documents—and that hamstringing the exercise of that discretion through a rule is unnecessary. With discretion, DOE is able to balance the degree of input that is useful with the need to issue guidance quickly. This balance cannot be struck if DOE must abide by set comment periods.

[14] For example, DOE already has a webpage that provides an option to sign up for updates from the Appliance and Equipment Standards Program: https://www.energy.gov/node/773531. DOE should consider including updates regarding guidance documents through that function.

A. The Guidance Rule increases the costs of issuing guidance.

Agency time and resources are scarce,[15] and the Guidance Rule risks wasting those limited resources without achieving commensurate benefits. In addition to requiring notice and comment for certain agency guidance, the Guidance Rule requires agencies to respond to petitions regarding agency guidance within 90 days, adding further strain to staff resources.

Decades of scholarship show that the issuance of guidance is "quite sensitive" to increases in bureaucratic costs.[16] As an administrative law scholar explains:

> A broadened requirement of pre-adoption procedure will impose additional bureaucratic costs on agencies, discouraging the adoption of nonlegislative rules [i.e., guidance documents]. The publication of fewer nonlegislative rules will result in poorer administration and less guidance to the public.[17]

Adding procedural hurdles to DOE's ability to issue guidance would incentivize more informal means of setting policy, such as internal memoranda and word-of-mouth instruction to enforcement personnel.[18] But, as articulated above, published guidance is "much more useful than the same material tucked [amidst] the trivia in a staff manual, embedded in particularized decisions in formal or informal adjudications, or simply derived from the practices of the staff."[19] All of these methods are considerably less transparent or useful to the public than guidance.[20]

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[15] *See* Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 Yale L.J. 782, 804 (2010) ("Almost all agencies face meaningful resource constraints."); Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1472 (1992) (explaining that increased rulemaking procedures are "so expensive to [an agency's] limited resources and so conducive to frustrating their choices about how to use those resources.")
[16] *See* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 405 (1985).
[17] *Id.* at 416.
[18] *See* Stuart Shapiro, *Agency Oversight as "Whac-a-Mole": The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 Harv. J. Law & Pub. Pol'y 523, 537 (2014).
[19] *See* Asimow, supra n.16, at 409.
[20] *See* Stuart Shapiro, *The Role of Guidance Documents in Agency Regulation*, Yale J. on Reg., Symposium (May 9, 2019), https://www.yalejreg.com/nc/the-role-of-guidance-documents-in-agency-regulation-by-stuart-shapiro/.

These problems are avoidable. DOE already has the authority to solicit notice and comment on significant guidance. And, as has been DOE's practice predating the regulations, it can continue making its guidance available to the public on its websites.

B. Similar procedural mandates regarding guidance have proven ineffective.

Procedural barriers to issuing guidance at other agencies have strained their resources to the point that the agency cannot process the comments for a substantial number of documents and refrains from finalizing them, leaving them instead as drafts indefinitely. This "draft" status is ambiguous and confusing to regulated parties who must adjust their activities to follow the guidance, even though the document is not yet finalized.[21] This process has occurred at agencies like the FDA, where guidance documents often remain in published draft form for years before they are finalized or withdrawn. Other agencies, like USCIS and EPA, must also resort to leaving guidance in draft form for years.[22]

IV. The Original Bases for the Guidance Rule Are Fatally Flawed.

A. NCLA's original petition for rulemaking rests on inaccurate premises.

Rescission of the Guidance Rule is especially appropriate because NCLA's petition for rulemaking sets forth an inaccurate and incomplete view of agency action. In NCLA's view, "federal agencies often engage in the commonplace and dangerous acts" of issuing guidance that "make[s] law simply by declaring their views about what the public should do." Pet. at 1 (internal quotation marks and citation omitted). NCLA characterizes this practice as "evad[ing] legal requirements . . . for the purpose of coercing persons or entities" and as "a form of illegal

[21] *See* Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective*, Admin. Conf. of the United States 21 (Oct. 12, 2017), https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf (detailing incentives to leave guidance in draft form, and incentives for regulated entities to comply with draft guidance).
[22] *Id.* at 179.

and unconstitutional 'extortion' where agencies obtain compliance through 'extralegal lawmaking'" that is "typically immunized from judicial review." *Id.* at 1–2 (alterations, internal quotation marks, and citations omitted).

NCLA's rhetoric is inconsistent with reality. An empirical study about the use of guidance found that "[a]gencies do not commonly use guidance to make important policy decisions outside of the notice and comment process" and that "[n]o evidence exists that agencies use nonsignificant guidance strategically."[23] The study concluded that "consternation over guidance documents raised in both the academic and policy realms is overstated."[24] The study found that, between 1993 and 2008, the Office of Management and Budget had reviewed over 10,800 significant legislative rules across agencies—while only 723 significant guidance documents were in effect in August 2008.[25] Based on these metrics, most policy is made through legislative rulemaking, and agencies are exercising their discretion to use guidance only in limited circumstances. NCLA offers no evidence or data to the contrary.

Second, courts already can, and do, undertake judicial review of purported guidance documents where agencies have incorrectly determined that notice-and-comment rulemaking was unnecessary. Indeed, the very case that NCLA cites for the proposition that agency mis-use of guidance documents is unreviewable, Pet. at 1, 8, 10, actually undertakes a review of documents that EPA claimed were guidance, and sets aside the guidance for failure to comply with notice-and-comment rulemaking procedures. *See Appalachian Power Co.* v. *EPA*, 208 F.3d 1015, 1023, 1028 (D.C. Cir. 2000).[26]

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[23] Raso, *supra* n.15, at 821.
[24] *Id.*
[25] *Id.* at 813.
[26] The *Appalachian Power* decision is hardly aberrational. *See,e.g.*, *Hoctor* v. *U.S. Dep't of Agriculture*, 82 F.3d 165, 172 (7th Cir. 1996); *U.S. Telephone Ass'n* v. *FCC*, 28 F.3d 1232, 1233 (D.C. Cir. 1994); *Jerri's Ceramic Arts, Inc.* v. *Consumer Product Safety Comm'n*, 874 F.2d 205, 206 (4th Cir. 1989).

Finally, NCLA's petition also fails to account for the benefits of robust guidance described above. NCLA expresses an unsubstantiated concern that agencies "thuggishly" use guidance to force regulated entities to comply with the agencies' interpretation of rules and statutes. Pet. at 10. Even if that were a legitimate concern, and NCLA presented no evidence it is,[27] hiding the ball from regulated entities is hardly a solution. If regulated entities have the option of finding out that an agency interprets its rule in a certain way, it is far preferable to know before the entity has inadvertently violated the rule. As Judge Posner has explained, "[e]very governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement." *Hoctor* v. *U.S. Dep't of Agriculture*, 82 F.3d 165, 167 (7th Cir. 1996). ASAP agrees that "[i]t would be no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities." *Id.*

B. Rescinding the prior rule will promote the goals of President Biden's recent executive order.

President Trump's executive order, Exec. Order No. 13891, 84 Fed. Reg. 55,235 (Oct. 9, 2019), which apparently prompted the Guidance Rule, no longer reflects the policy of the United States. The proposed rule is consistent with the policy set forth in President Biden's January 20, 2021 executive order, which revoked President Trump's order. *See* Executive Order 13992, 86 Fed. Reg. 7049. And the proposed rule is likewise consistent with other agency practice: agencies such as the Department of Labor,[28] Department of Transportation,[29] Department of the

[27] NCLA's petition cites as support a book written by its own president, but that book does not itself contain any supporting evidence for the segments quoted in the petition. *See* Philip Hamburger, *Is Administrative Law Unlawful?* (2014) at 335. Indeed, the book that forms the basis for much of NCLA's argument is the subject of significant criticism. *See, e.g.*, Adrian Vermeule, *No*, 93 Tex. L. Rev. 1547, 1547 (2015) (reviewing Philip Hamburger, *Is Administrative Law Unlawful?* (2014)) ("The book makes crippling mistakes about the administrative law of the United States; it misunderstands what that body of law actually holds and how it actually works.").
[28] Rescission of Department of Labor Rule on Guidance, 86 Fed. Reg. 7237 (Jan. 27, 2021).
[29] Administrative Rulemaking, Guidance, and Enforcement Procedures, 86 Fed. Reg. 17,292 (Apr. 2, 2021).

Interior,[30] USAID,[31] and the Social Security Administration[32] have already withdrawn similar burdensome guidance rules as part of their efforts to comply with President Biden's executive order.

Although DOE's position does constitute a reversal, it is an appropriate one: because the prior rule has not yet been put in effect, no entity could reasonably claim a reliance interest in its contents. And, as explained above, the policy set forth in DOE's notice of proposed rulemaking is not merely a reflection of a new executive policy, but rather a return to the basic structure of the APA itself. Moreover, that structure reflects a sound policy judgment supported by experience and research, and DOE is well-positioned to determine that reverting to its longstanding prior approach is the better course of action. The new policy is thus "permissible under the statute," DOE has "show[n] that there are good reasons for the new policy," DOE "believes it to be better," and DOE has provided a reasoned explanation for its change. *See FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Physicians for Social Responsibility* v. *Wheeler*, 956 F.3d 634, 646 (D.C. Cir. 2020).

V. Conclusion

ASAP commends the Department of Energy for taking swift action to withdraw its Guidance Rule. Thank you for your consideration of these comments. We would be happy to discuss our views with you further.

[30] Procedures for Issuing Guidance Documents, 86 Fed. Reg. 19,786 (Apr. 15, 2021).
[31] Procedures for the Review and Clearance of USAID's Guidance Documents; Rescission, 86 Fed. Reg. 18,444 (Apr. 9, 2021).
[32] Rescission of Rules on Improved Agency Guidance Documents, 86 Fed. Reg. 20,631 (Apr. 21, 2021).