COMMENTS OF DEMOCRACY FORWARD FOUNDATION ON THE DEPARTMENT OF JUSTICE'S INTERIM FINAL RULE "PROCESSES AND PROCEDURES FOR THE ISSUANCE AND USE OF GUIDANCE DOCUMENTS" RIN 1105-AB61

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Democracy Forward Foundation provides these comments in support of the Department of Justice's interim final rule entitled "Processes and Procedures for the Issuance and Use of Guidance Documents," 86 Fed. Reg. 37,674 (July 16, 2021). Democracy Forward Foundation supports the Department's decision to revoke the regulations at 28 C.F.R. 50.26 and 50.27 (the "Guidance Rules").

The Guidance Rules deprive DOJ of necessary flexibility to clarify policies that address pressing challenges in a timely manner, and thus, consistent with the policy directive in President Biden's Executive Order 13992, they should be withdrawn. Guidance documents provide clarification benefiting regulated entities and the general public alike. 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.

DOJ should therefore maintain its interim final rule to increase government transparency and provide the Department with flexibility to meet evolving challenges.

I. Background.

The Guidance Rules stemmed from a concerted effort to hamstring agency guidance. On November 16, 2017, then-Attorney General Jeff Sessions issued a memorandum entitled "Prohibition on Improper Guidance Documents," which noted that guidance could neither substitute for rulemaking nor impose requirements on entities outside the Executive Branch.[1] A few months later, on January 25, 2018, then-Associate Attorney General Rachel Brand issued another memorandum, entitled "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases," further clarifying that failure to comply with guidance should not be

[1] Jeff Sessions, Memorandum, *Prohibition on Improper Guidance Documents* (Nov. 16, 2017), https://www.justice.gov/opa/press-release/file/1012271/download.

viewed as evidence that a party violated the relevant statute or regulation.[2] And then, on July 18, 2018, the New Civil Liberties Alliance—an organization that "strive[s] to tame" federal agencies[3]—submitted a petition for rulemaking to DOJ.[4] The petition requested "regulations prohibiting the issuance [of], reliance on or defense of improper agency guidance." The petition specifically addressed the Sessions and Brand memoranda, arguing that—as guidance themselves—the memoranda were insufficiently binding.[5] The petition therefore encouraged DOJ to "issue binding and final rules."[6]

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 the executive order, DOJ published an interim final rule entitled "Prohibition on the Issuance of Improper Guidance Documents Within the Justice Department" on August 19, 2020. 85 Fed. Reg. 50,951. The rule codified the principles in the Sessions memorandum, requiring that guidance documents contain certain disclaimers, avoid certain language, and precluding the Department from using guidance "for the purpose of coercing persons or entities outside of the Executive Branch." *Id.*; *see also* 28 C.F.R. § 50.26.

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[2] Rachel Brand, Memorandum, *Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases* (Jan. 25, 2018), https://www.justice.gov/file/1028756/download.
[3] *See* New Civil Liberties Alliance, *About Us*, at https://nclalegal.org/about/# (last visited Aug. 12, 2021).
[4] New Civil Liberties Alliance, *Petition for Rulemaking to Promulgate Regulations Prohibiting the Issuance, Reliance on or Defense of Improper Agency Guidance* (July 18, 2018) ("Pet."), https://nclalegal.org/wp-content/uploads/2018/11/PetitionforGuidanceRulemaking-DOJ1.pdf.
[5] Pet. at 17.
[6] *Id.*

A few months later, on October 7, 2020, DOJ published another interim final rule, entitled "Processes and Procedures for Issuance and Use of Guidance Documents." 85 Fed. Reg. 63,200. This second rule defined "significant guidance documents" to include any that "may reasonably be anticipated to" lead to certain economic effects, interfere with the plans of other agencies, or "[r]aise novel legal or policy issues." 28 C.F.R. § 50.27(a)(2). The rule created additional requirements for "significant guidance documents," including non-delegable approval by high-level political appointees, submission to the Office of Information and Regulatory Affairs before issuance, and a public notice-and-comment process. *Id.* § 50.27(c)(2). Disability rights organizations commented at the time that the rule would "hamper the Justice Department's ability to issue important guidance to help stakeholders comply with" federal law, including the Americans with Disabilities Act and the Rehabilitation Act.[7]

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 (Jan. 20, 2021). 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. DOJ therefore issued this interim final rule revoking the Guidance Rules, and Attorney General Merrick Garland issued a memorandum rescinding those issued by Sessions and Brand.[8]

[7] Consortium for Citizens with Disabilities Rights Task Force, Comment Letter on the Processes and Procedures for Issuance and Use of Guidance Documents Interim Final Rule (Nov. 6, 2020), https://www.regulations.gov/comment/DOJ-OAG-2020-0005-0004 ("CCD Letter").
[8] Merrick Garland, Memorandum, *Issuance and Use of Guidance Documents by the Department of Justice* (July 1, 2021), https://www.justice.gov/opa/page/file/1408606/download ("Garland Memo").

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

The interim final rule correctly states that the Guidance Rules "are unnecessary and unduly burdensome, lack flexibility and nuance, and limit the ability of the Department to do its work effectively." 86 Fed. Reg. at 37,675. As numerous courts have explained, guidance documents offer the flexibility and nuance required, 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.

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.[9] 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.[10] 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."[11] 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."[12] Determining whether notice-and-comment processes are beneficial therefore "involves a context-specific judgment," in the exercise of agency discretion.[13]

For example, notice-and-comment procedures can take well over a year, on average, to complete.[14] Extended rulemakings necessarily entail a significant use of agency resources, including time spent analyzing and addressing each comment. Although this longer process is 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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[9] Nicholas R. Parrillo, *Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study*, 71 Admin. L. Rev. 57, 58 (2019).
[10] *Id.* at 70.
[11] *Id.* at 71 (emphasis omitted).
[12] *Id.*
[13] *Id.* at 72.
[14] *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. This necessity has become acutely apparent during the COVID-19 pandemic, which has evolved on a near-daily basis. As disability rights organizations previously informed DOJ, guidance related to the application of disability rights laws to standards of care, workplace issues, and safety procedures in congregate care settings "have been critical to help stakeholders understand rights and obligations during a time of immediate need."[15] Such guidance could not have been issued with the timeliness required had a notice-and-comment period been required.

B. Guidance documents benefit the public by promoting transparency.

As the D.C. Circuit has explained, guidance documents also 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 regulations implicating civil rights, which value equitable access as their core value. 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).

[15] CCD Letter, *supra* n.7, at 2.

Transparency is equally important to individuals who benefit from regulation. When the interpretation of a statute or rule is ambiguous, regulated entities may take different approaches, leaving individuals without appropriate information to determine whether, for instance, they have the right to demand a certain accommodation. For example, DOJ's Civil Rights Division has issued an "ADA Checklist for Polling Places" with concrete examples of potential violations—and, critically, examples of potential solutions.[16] Such guidance benefits both the polling place and voters who use it. Rulemaking, especially in complex areas, and especially in times of crisis, necessarily leaves gaps that are not always apparent until they are implemented. Guidance is an essential tool for agencies to fill those gaps and ensure a transparent, level playing field and meaningful efficiency information for consumers.

These benefits need not come at the cost of transparency. To the contrary, the interim final rule makes clear that DOJ "continues to believe that guidance documents should be clear, transparent, and readily accessible to the public." 86 Fed. Reg. at 37,675. And Attorney General Garland's recent memorandum makes clear that guidance documents should be appropriately labelled as such, and that they should be posted to the Department's Online Guidance Portal (with unique numbers and issuance and revision dates) "whenever practicable."[17]

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

The Guidance Rules, if retained, would increase the time and cost to DOJ when issuing or withdrawing guidance. This is not a hypothetical concern. Even in the short time those rules have been in place, DOJ has already observed that "they have discouraged Department

[16] *Americans with Disabilities Act: ADA Checklist for Polling Places*, U.S. Dep't of Justice Civil Rights Division, Disability Rights Section, https://www.ada.gov/votingchecklist.htm.
[17] Garland Memo, *supra* n.8, at 2–3.

components from preparing and issuing guidance that would be helpful to members of the public." 86 Fed. Reg. at 37,675.

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

Agency time and resources are scarce,[18] and the Guidance Rules waste those limited resources without achieving commensurate benefits. In addition to requiring notice and comment for certain agency guidance, one of the Guidance Rules requires agencies to respond to petitions regarding agency guidance within 90 days, *see* 28 C.F.R. § 50.27(f)(4), adding further strain to staff resources. And DOJ has already observed that the Guidance Rules have "caused Department staff to expend significant resources determining whether each agency document, product or communication constituted 'guidance' and was therefore subject to these regulations." 86 Fed. Reg. at 37,675.

Decades of scholarship show that the issuance of guidance is "quite sensitive" to increases in bureaucratic costs.[19] 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.[20]

Adding procedural hurdles to DOJ'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.[21] 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

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[18] *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.")
[19] *See* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 405 (1985).
[20] *Id.* at 416.
[21] *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).

decisions in formal or informal adjudications, or simply derived from the practices of the staff."[22] All of these methods are considerably less transparent or useful to the public than guidance.[23]

These problems are avoidable. DOJ already has the authority to solicit notice and comment on significant guidance. And, as the Attorney General has explained, it can and will continue making its guidance available to the public online. Beyond that, there are certainly instances where adopting a rule through notice and comment would be the best course. DOJ, however, should not be compelled to do so in the wooden manner required by the Guidance Rules.

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.[24] 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.[25] DOJ's experience to date suggests that it may well

[22] *See* Asimow, *supra* n.19, at 409.
[23] *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/.
[24] *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).
[25] *Id.* at 179.

encounter similar difficulties, burdening regulated entities and individuals who benefit from regulation, along with the agency.

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

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

To the extent that the Guidance Rules were based in any part on NCLA's petition for rulemaking, rescission is especially appropriate because NCLA's petition 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 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."[26] The study concluded that "consternation over guidance documents raised in both the academic and policy realms is overstated."[27] 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.[28] Based on these metrics, most policy is made

[26] Raso, *supra* n.18, at 821.
[27] *Id.*
[28] *Id.* at 813.

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 misuse of guidance documents is unreviewable, Pet. at 2, 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).[29]

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,[30] 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). We agree

[29] 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).

[30] 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.").

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 Guidance Rules 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 Rules, no longer reflects the policy of the United States. The interim final 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 (Jan. 20, 2021). And the interim final rule is likewise consistent with other agency practice: agencies such as the Department of Energy,[31] Department of Labor,[32] Department of Transportation,[33] Department of the Interior,[34] USAID,[35] and the Social Security Administration[36] have already withdrawn similar burdensome guidance rules as part of their efforts to comply with President Biden's executive order.

Although DOJ's position does constitute a reversal, it is an appropriate one. As explained above, the policy set forth in the interim final rule 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 DOJ 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," DOJ has "show[n] that there are good reasons for the new policy," DOJ "believes it to be better," and DOJ has provided a

[31] Procedures for the Issuance of Guidance Documents, 86 Fed. Reg. 29,932 (June 4, 2021).
[32] Rescission of Department of Labor Rule on Guidance, 86 Fed. Reg. 7237 (Jan. 27, 2021).
[33] Administrative Rulemaking, Guidance, and Enforcement Procedures, 86 Fed. Reg. 17,292 (Apr. 2, 2021).
[34] Procedures for Issuing Guidance Documents, 86 Fed. Reg. 19,786 (Apr. 15, 2021).
[35] Procedures for the Review and Clearance of USAID's Guidance Documents; Rescission, 86 Fed. Reg. 18,444 (Apr. 9, 2021).
[36] Rescission of Rules on Improved Agency Guidance Documents, 86 Fed. Reg. 20,631 (Apr. 21, 2021).

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

We commend the Department of Justice for taking swift action to withdraw its Guidance Rules. Thank you for your consideration of these comments. We would be happy to discuss our views with you further.