

GUIDANCE OUT OF DARKNESS ACT

SEPTEMBER 25, 2018.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOWDY, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 4809]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 4809) to increase access to agency guidance documents, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Guidance Out Of Darkness Act” or the “GOOD Act”.

SEC. 2. PUBLICATION OF GUIDANCE DOCUMENTS ON THE INTERNET.

(a) **IN GENERAL.**—On the date on which an agency issues a guidance document, the head of the agency shall publish the guidance document in accordance with subsection (c).

(b) **PREVIOUSLY ISSUED GUIDANCE DOCUMENTS.**—With respect to any guidance document issued by an agency before the effective date of this Act that is in effect on the effective date of this Act, the head of each agency shall meet the requirements of subsection (c).

(c) **SINGLE LOCATION.**—The head of each agency shall:

(1) Publish any guidance document issued by the agency in a single location on the publicly accessible Federal Government website (commonly known as regulations.gov) described under section 206(d) of the E-Government Act of 2002 (Public Law 107-347; 44 U.S.C. 3501 note).

(2) With respect to a guidance document issued by an agency, include a hyperlink on the online portal of the agency that provides access to the guidance document published pursuant to paragraph (1).

(3) Ensure that any guidance document published pursuant to paragraph (1) is—

- (A) clearly identified as a guidance document;
- (B) sorted into subcategories, as appropriate;
- (C) published in a machine-readable and open format; and
- (D) searchable.

(4) Ensure that any hyperlink described in paragraph (2) be prominently displayed on the online portal of the agency.

(d) **RESCINDED GUIDANCE DOCUMENTS.**—Not later than the date on which a guidance document issued by an agency is rescinded, the head of the agency shall on the Federal Government website described in subsection (c)(1)—

(1) maintain a copy of the rescinded guidance document; and

(2) indicate—

- (A) that the guidance document is rescinded; and
- (B) the date on which the guidance document was rescinded.

SEC. 3. RULE OF CONSTRUCTION.

In this Act, the term “guidance document” shall be construed broadly.

SEC. 4. DEFINITIONS.

In this Act:

(1) **AGENCY.**—The term “agency” has the meaning given that term in section 551 of title 5, United States Code.

(2) **GUIDANCE DOCUMENT.**—The term “guidance document”—

(A) means an agency statement of general applicability (other than a rule that has the force and effect of law promulgated in accordance with the notice and public procedure under section 553 of title 5, United States Code) that—

- (i) does not have the force and effect of law; and
- (ii) sets forth—
 - (I) an agency decision or a policy on a statutory, regulatory, or technical issue; or
 - (II) an interpretation of a statutory or regulatory issue; and

(B) may include any of the following:

- (i) A memorandum.
- (ii) A notice.
- (iii) A bulletin.
- (iv) A directive.
- (v) A news release.
- (vi) A letter.
- (vii) A blog post.
- (viii) A no-action letter.
- (ix) A speech by an agency official.
- (x) An advisory.
- (xi) A manual.
- (xii) A circular.
- (xiii) Any combination of the items described in clauses (i) through (xii).

(3) RULE.—The term “rule” has the meaning given that term in section 551 of title 5, United States Code.

SEC. 5. EFFECTIVE DATE.

This Act shall take effect on the date that is 180 days after the date of the enactment of this Act.

SUMMARY AND PURPOSE OF LEGISLATION

H.R. 4809, the Guidance Out of Darkness Act or GOOD Act, requires agencies to post guidance documents online in one central location, thereby increasing transparency and access to the documents. Specifically, H.R. 4809 imposes a new requirement that agencies collect all current guidance documents and publish the documents on a federal website. The GOOD Act defines the term “guidance document” broadly by including any agency statement of general applicability, other than a rule which has gone through the notice and public procedure contained in section 553 of Title 5 of the United States Code, that constitutes an agency decision, policy, or interpretation on a statutory, regulatory, or technical issue. This definition is consistent with how the term has been defined in long-standing executive directives, such as the Office of Management and Budget’s Good Guidance Bulletin.¹ The Act also contains a non-exhaustive list of the forms guidance documents may take, such as memoranda, notices, bulletins, advisories, manuals, and circulars.

BACKGROUND AND NEED FOR LEGISLATION

Under current law, agencies are required to proactively disclose, “statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register.”² These statements of policy and interpretations are more commonly known as “guidance documents,”³ and constitute agency statements intended to inform the public of how an agency interprets the law or intends to exercise its discretion.⁴ Despite this obligation to publish, current law lacks guidelines or requirements for how agencies must publish this information. Agencies currently use a variety of methods to disseminate their guidance documents, including websites, e-mail, listservs, social media, newsletters, and third-party entities and services, among other methods.⁵

This variation in publication methods can burden entities seeking guidance, particularly small entities, which may lack the resources to hire legal counsel or compliance staff.⁶ This burden is augmented by the ubiquity of guidance documents in federal regulatory practice. Scholars have described their scale of use as “mas-

¹ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB M-07-07, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (2007), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2007/m07-07.pdf>.

² 5 U.S.C. § 552(a)(2)(B).

³ JARED P. COLE & TODD GARVEY, CONG. RESEARCH SERV., R44468, GENERAL POLICY STATEMENTS: LEGAL OVERVIEW 1 (2016); Jessica Mantel, *Procedural Safeguards for Agency Guidance*, 61 ADMIN. L. REV. 343, 350 (2009).

⁴ Mantel, *supra* note 4, at 350.

⁵ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-368, REGULATORY GUIDANCE PROCESSES: SELECTED DEPARTMENTS COULD STRENGTHEN INTERNAL CONTROL AND DISSEMINATION PRACTICES 31 (2015).

⁶ See NAT’L FED’N OF INDEP. BUS., THE FOURTH BRANCH & UNDERGROUND REGULATIONS 5 (2015), available at <https://www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf>.

sive”⁷ and “oceanic.”⁸ In some agencies, guidance documents may account for as much as 90 percent of regulatory rules.⁹ However, there is no comprehensive compilation of guidance documents,¹⁰ making one of the most frequently used regulatory tools also one of the least transparent.

In late 2017, the Committee undertook an oversight project, requesting information on guidance documents issued in the prior 10 years from 46 agencies. The Committee then held a hearing on March 14, 2018, which discussed findings from the project. As of that date, agencies had produced information on nearly 13,000 guidance documents. This figure—which does not include responses that came in after the hearing—shows the prodigious rate at which guidance documents are used by federal agencies.

H.R. 4809 alleviates the aforementioned burden on regulated entities and also addresses the known unknown that is the precise scope of agency use of guidance documents. The Act requires agencies to publish guidance documents in one central location, similar to how agencies currently publish regulations through the Federal Register. Upon the effective date, agencies must publish all guidance documents in effect at that time and commence publishing new guidance documents on the same day they are issued.

Centralized publishing will make searching for guidance documents more efficient, while also allowing for transparency about the number and substance of guidance documents in effect. This latter purpose is achieved both through centralized publishing and the requirements for publishing. In complying with H.R. 4809, agencies must publish their guidance documents in a machine-readable and searchable format, allowing regulated entities and interested parties to more easily find and review information on guidance documents. Agencies must also store copies of rescinded guidance documents on the federal government website, thereby preserving prior agency policies for the public to examine.

Increased transparency through public involvement is a principal supported by the Administrative Conference of the United States, a governmental entity which brings together representatives from government, academia, and the private sector to find ways to improve the regulatory system. In December 2017, the Conference recommended, “All written policy statements affecting the interests of regulated parties, regulatory beneficiaries, or other interested parties should be promptly made available electronically and indexed, in a matter in which they may readily be found.”¹¹ The GOOD Act implements this recommendation.

⁷ Mantel, *supra* note 4, at 353.

⁸ NICHOLAS R. PARRILLO, ADMIN. CONFERENCE OF THE UNITED STATES, FEDERAL AGENCY GUIDANCE: AN INSTITUTIONAL PERSPECTIVE 35 (2017), available at <https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf>.

⁹ See Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 284 (1998).

¹⁰ PARRILLO, *supra* note 9, at 35.

¹¹ ADMIN. CONFERENCE OF THE UNITED STATES, ADMINISTRATIVE CONFERENCE RECOMMENDATION 2017-5 at 11 (2017), available at https://www.acus.gov/sites/default/files/documents/Recommendation%202017-5%20%28Agency%20Through%20Policy%20Statements%29_2.pdf.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE
COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the previous section.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal or objective of this bill is to increase access to agency guidance documents.

LEGISLATIVE HISTORY

On January 16, 2018, Representative Mark Walker (R-NC) introduced H.R. 4809, the Guidance Out of Darkness Act, or the GOOD Act. H.R. 4809 was referred to the Committee on Oversight and Government Reform. The Committee considered H.R. 4809 at a business meeting on March 15, 2018, and ordered the bill favorably reported, as amended, by voice vote.

Senator Ron Johnson (R-WI) introduced S. 2296, the Senate companion to H.R. 4809, on January 11, 2018. The Senate Committee on Homeland Security and Governmental Affairs considered S. 2296 at a business meeting on February 14, 2018, and ordered the bill favorably reported, as amended, by voice vote.

COMMITTEE CONSIDERATION

On March 15, 2018, the Committee met in open session and, with a quorum being present, ordered the bill favorably reported, as amended, by voice vote.

ROLL CALL VOTES

There were no roll call votes requested or conducted during Committee consideration of H.R. 4809.

EXPLANATION OF AMENDMENTS

During Committee consideration of the bill, Representative Mark Walker (R-NC) offered an amendment in the nature of a substitute. The amendment expands and clarifies the definition of "guidance document," defines additional necessary terms, adds a rule of construction stating that the term "guidance document" should be construed broadly, changes the location where agencies must publish their guidance documents, requires that guidance documents be published in a machine-readable open format and be searchable, and makes additional technical changes throughout the bill. The Walker amendment was adopted by voice vote.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104-1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill is to increase access to

agency guidance documents. As such, this bill does not relate to employment or access to public services and accommodations.

DUPLICATION OF FEDERAL PROGRAMS.

In accordance with clause 2(c)(5) of rule XIII no provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

This bill does not direct the completion of any specific rule makings within the meaning of section 551 of title 5, United States Code.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of Section 5(b) of the appendix to title 5, United States Code.

UNFUNDED MANDATES STATEMENT

Pursuant to section 423 of the *Congressional Budget and Impoundment Control Act* (Pub. L. 113-67) the Committee has included a letter received from the Congressional Budget Office below.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the House of Representatives.

COMMITTEE ESTIMATE

Pursuant to clause 3(d)(2)(B) of rule XIII of the Rules of the House of Representatives, the Committee includes below a cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the *Congressional Budget Act of 1974*.

NEW BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the House of Representatives, the cost estimate prepared by the Congressional Budget Office and submitted pursuant to section 402 of the *Congressional Budget Act of 1974* is as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 10, 2018.

Hon. TREY GOWDY,
*Chairman, Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4809, the GOOD Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 4809—GOOD Act

H.R. 4809 would require agencies to post their regulatory guidance documents online. Typically, such documents explain how regulations are interpreted by the agency but are not themselves legally binding. Agencies often disseminate such guidance to the public in memorandums, notices, bulletins, directives, news releases, letters, blog posts, or speeches.

Federal policies require agencies to post important information online to promote open and transparent government. According to the Government Accountability Office, many agencies already provide guidance documents using websites, email, meetings, social media, mass media, and newsletters. Thus, CBO estimates that implementing the bill would have no significant cost.

Enacting H.R. 4809 could affect direct spending by agencies that use fees, receipts from the sale of goods, and other collections to cover operating costs. Therefore, pay-as-you-go procedures apply. Because most agencies can adjust the amounts collected as their operating costs change, CBO estimates that any net changes in direct spending by those agencies would be insignificant. Enacting the bill would not affect revenues.

CBO estimates that enacting H.R. 4809 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

H.R. 4809 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

On March 26, 2018, CBO transmitted a cost estimate for S. 2296, the GOOD Act, as ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on February 14, 2018. The two pieces of legislation are similar and CBO's estimates of their budgetary effects are the same.

The CBO staff contact for this estimate is Matthew Pickford. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 establishes the short title of the bill.

Sec. 2. Publication of guidance documents on the Internet

Section 2 requires each agency to publish guidance documents on an online portal. After the Act goes into effect (180 days after enactment), subsection (a) requires each agency to publish each new guidance document when the document is issued. Each agency must also publish guidance documents which existed before the effective date of the Act on the portal pursuant to subsection (b). Section 5 (relating to the effective date of the Act) applies to subsection (b) of this section by requiring publication of such pre-existing guidance documents no later than the effective date of the Act.

Each agency must prominently display on the home page of its website a link to the page on which its guidance documents can be found. The guidance documents must also be clearly identified as guidance documents, categorized appropriately, searchable, machine-readable, and in an open format. Open format means platform-independent and made available to the public without restrictions that would impede the reuse of that information.¹²

Section 2 also requires each agency to maintain rescinded guidance documents on its website with the notation that the guidance document has been rescinded and the date on which it was rescinded.

Sec. 3. Rule of construction

Section 3 makes clear that the term, guidance document, should be interpreted broadly, including but not limited to the examples provided in section 4(2)(B).

Sec. 4. Definitions

Section 4 sets forth definitions of key terms used in the bill. Two terms—“agency” and “rule”—are defined by reference to the terms’ existing definitions in section 551 of title 5, United States Code. The term “guidance document” is also defined in section 4, and a non-exhaustive list of examples are included. The definition of guidance document remains subject to section 3 of the Act.

Sec. 5. Effective date

Section 5 establishes an effective date of the Act that is the date that is 180 days after the date of enactment of the Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, this bill would not change existing law.

¹² See, e.g., 34 C.F.R. 668.6(b)(2)(ii).

ADDITIONAL VIEWS

During Committee consideration of this bill, Vice Ranking Member Gerry Connolly asked the bill sponsor, Rep. Mark Walker, if he would work with the minority to ensure the bill does not have unintended consequences. Specifically, Rep. Connolly cited a news report that quoted Senator Ron Johnson as stating:

It would open all kinds of mischievous types of guidance under the Obama Administration to outright repeal. All the Trump Administration would have to do is finally issue the report on a guidance, and the clock would start ticking, so we have total ball control on this.¹

Rep. Walker agreed to work with the minority. Pursuant to this agreement, it is the understanding of the minority that when the bill is brought to the floor, language will be included clarifying that the bill is not intended to impact consideration of whether guidance is a rule for purposes of the Congressional Review Act.

ELIJAH E. CUMMINGS,
Ranking Member.

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¹*Transparency Bill Could Expose More Obama-era Rules to Repeal*, Washington Examiner (Jan. 23, 2018) (online at www.washingtonexaminer.com/transparency-bill-could-expose-more-obama-era-rules-to-repeal).