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Calendar No. 346

117TH CONGRESS *2d Session*	SENATE	REPORT 117–95

GUIDANCE CLARITY ACT OF 2021

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 533

TO REQUIRE A GUIDANCE CLARITY STATEMENT ON CERTAIN AGENCY GUIDANCE, AND FOR OTHER PURPOSES

APRIL 27, 2022.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE
29–010 WASHINGTON : 2022

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Mr. PETERS, from the Committee on Homeland Security and Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 533]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 533), to require a guidance clarity statement on certain agency guidance, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

S. 533, the Guidance Clarity Act of 2021, requires federal agencies to state on the first page of guidance documents that the text of the document does not have the force and effect of law, and is intended only to provide clarity to the public about existing legal requirements or agency policies.

Excluded from this requirement is guidance issued by an agency that is not intended to have a substantial effect on the behavior of regulated parties, as well as internal executive branch legal advice or opinions addressed to executive branch officials.

II. BACKGROUND AND NEED FOR THE LEGISLATION

According to the Office of Management and Budget (OMB), agency guidance documents "should only clarify existing obligations; they should not be a vehicle for implementing new, binding requirements on the public."[1] Agency guidance documents can take the form of "policy statements, manuals, bulletins, advisories, and more."[2]

S. 533 further assists this effort by ensuring that regulated entities understand that guidance documents that have not gone through the rulemaking process do not have the force and effect of law. To accomplish this, the bill requires agencies to provide a guidance clarity statement on certain agency guidance, displayed on the first page of the document, which explains that the contents of the document do not have the force and effect of law, are not binding on the public, and are intended to only provide clarity about existing requirements under the law or agency policy. S. 533 will bring transparency and accountability to agency guidance documents and ensure that federal agencies do not utilize nonbinding guidance as de facto regulations. S. 533 requires the Office of Management and Budget to issue guidance on the implementation of this bill within 90 days of enactment.

III. LEGISLATIVE HISTORY

Senator James Lankford (R–OK) introduced S. 533, the Guidance Clarity Act of 2020, on March 2, 2021, with Senators Ron Johnson (R–WI) and James Risch (R–ID). The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 533 at a business meeting on July 14, 2021. During the business meeting, a substitute amendment was offered by Senator Lankford and Chairman Peters and adopted by voice vote *en bloc*. The amendment added language requiring the Director of the Office of Management and Budget to issue implementing guidance to agencies within 90 days after enactment and struck a definition detailing some forms of documents that could be considered "guidance," so as to give the Administration deference in identifying and clarifying the types of agency documents that may constitute guidance. The bill, as amended, was ordered to be reported favorably by voice vote *en bloc* with Senators Peters, Hassan, Rosen, Padilla, Ossoff, Portman, Johnson, Lankford, Romney, Scott, and Hawley present.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1—Short title

This section establishes the short title of the bill as the "Guidance Clarity Act of 2021."

Section 2—Guidance clarity statement required

This section requires each agency to include a guidance clarity statement on the first page of any guidance document it issues. The guidance clarity statement informs the reader that the text is

[1] Memorandum from Dominic J. Mancini, Acting Administrator, Office of Information & Regulatory Affairs (Oct. 31, 2019)
[2] *Id.*

simply guidance and does not have the force and effect of law and is intended solely to provide the public information about existing legal requirements or agency policies. This section also requires the Office of Management and Budget to provide guidance on the implementation of this bill no later than 90 days after the bill's enactment.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 15, 2021.

Hon. GARY PETERS,
Chairman, Committee on Homeland Security and Governmental Affairs, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 533, the Guidance Clarity Act of 2021.

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

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

S. 533, Guidance Clarity Act of 2021
As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on July 14, 2021

By Fiscal Year, Millions of Dollars	2021	2021-2026	2021-2031
Direct Spending (Outlays)	0	*	*
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	*	*
Spending Subject to Appropriation (Outlays)	0	*	not estimated

Statutory pay-as-you-go procedures apply?	Yes	**Mandate Effects**	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2032?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No

* = between zero and $500,000.

S. 533 would require federal agencies to include text in their guidance documents to clarify that such guidance is not legally binding. Guidance documents typically explain how regulations are interpreted by the agency but do not carry the force of law. Agencies disseminate guidance to the public in memorandums, notices, bulletins, directives, news releases, letters, blog posts, or speeches.

CBO expects that placing a clarifying statement in each guidance document would not significantly increase agencies' administrative costs. CBO estimates that the administrative expenses associated with implementing S. 533 would cost less than $500,000 over the 2022–2026 period; any spending would be subject to the availability of appropriated funds.

Enacting S. 533 could affect direct spending by some agencies that are allowed to use fees, receipts from the sale of goods, and other collections to cover operating costs. CBO estimates that any net changes in direct spending by those agencies would be negligible because most of them can adjust amounts collected to reflect changes in operating costs.

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

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

Because S. 533 would not repeal or amend any provision of current law, it would make no changes in existing law within the meaning of clauses (a) and (b) of paragraph 12 of rule XXVI of the Standing Rules of the Senate.

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