

GUIDANCE OUT OF DARKNESS ACT OF 2023

JULY 18, 2024.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. COMER, from the Committee on Oversight and Accountability, submitted the following

R E P O R T

[To accompany H.R. 890]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Accountability, to whom was referred the bill (H.R. 890) to increase access to agency guidance documents, having considered the same, reports favorably thereon with an amendment and recommends 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 of 2023” or the “GOOD Act of 2023”.

SEC. 2. 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) **DIRECTOR.**—The term “Director” means the Director of the Office of Management and Budget.

(3) **GUIDANCE DOCUMENT.**—

(A) **DEFINITION.**—The term “guidance document”—

(i) 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 comment procedures under section 553 of title 5, United States Code) that—

(I) does not have the force and effect of law; and

(II) is designated by an agency official as setting forth—

(aa) a policy on a statutory, regulatory, or technical issue; or

(bb) an interpretation of a statutory or regulatory issue; and

(ii) may include—

(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; and

(X) any combination of the items described in subclauses (I) through (IX).

(B) **RULE OF CONSTRUCTION.**—The term “guidance document”—

(i) shall be construed broadly to effectuate the purpose and intent of this Act; and

(ii) shall not be limited to the items described in subparagraph (A)(ii).

SEC. 3. PUBLICATION OF GUIDANCE DOCUMENTS ON THE INTERNET.

(a) **IN GENERAL.**—Subject to subsection (d), on the date on which an agency issues a guidance document, the agency shall publish the guidance document in accordance with the requirements under subsection (c).

(b) **PREVIOUSLY ISSUED GUIDANCE DOCUMENTS.**—Subject to subsection (d), not later than 180 days after the date of enactment of this Act, each agency shall publish, in accordance with the requirements under subsection (c), any guidance document issued by that agency that is in effect on that date.

(c) **SINGLE LOCATION.**—

(1) **IN GENERAL.**—All guidance documents published under subsections (a) and (b) by an agency shall be published in a single location on an internet website designated by the Director under paragraph (4).

(2) **AGENCY INTERNET WEBSITES.**—Each agency shall, for guidance documents published by the agency under subsections (a) and (b), publish a hyperlink on the internet website of the agency that provides access to the guidance documents at the location described in paragraph (1).

(3) **ORGANIZATION.**—

(A) **IN GENERAL.**—The guidance documents described in paragraph (1) shall be—

(i) categorized as guidance documents; and

(ii) further divided into subcategories as appropriate.

(B) **AGENCY INTERNET WEBSITES.**—The hyperlinks described in paragraph (2) shall be prominently displayed on the internet website of the agency.

(4) **DESIGNATION.**—Not later than 90 days after the date of enactment of this Act, the Director shall designate an internet website on which guidance documents shall be published under subsections (a) and (b).

(d) **DOCUMENTS AND INFORMATION EXEMPT FROM DISCLOSURE UNDER FOIA.**—If a guidance document issued by an agency is a document that is exempt from disclosure under section 552(b) of title 5, United States Code (commonly known as the “Freedom of Information Act”), or contains information that is exempt from disclosure under that section, that document or information, as the case may be, shall not be subject to the requirements under this Act.

(e) RESCINDED GUIDANCE DOCUMENTS.—On the date on which a guidance document issued by an agency is rescinded, or, in the case of a guidance document that is rescinded pursuant to a court order, not later than the date on which the order is entered, the agency shall, at the location described in subsection (c)(1)—

- (1) maintain the rescinded guidance document; and
- (2) indicate—
 - (A) that the guidance document is rescinded;
 - (B) if the guidance document was rescinded pursuant to a court order, the case number of the case in which the order was entered; and
 - (C) the date on which the guidance document was rescinded.

SUMMARY AND PURPOSE OF LEGISLATION

H.R. 890 ensures agency guidance is transparent by requiring agencies to publish legal and regulatory guidance documents online in a single location designated by the Director of the Office of Management and Budget. New guidance documents must be posted online the date they are issued. Guidance issued before the date of enactment must be published on the website within 180 days of enactment. Guidance documents that are rescinded by the agency must still be retained on the website, with disclaimers that they have been rescinded.

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.”¹ These statements of policy and interpretations are more commonly known as “guidance documents”² and constitute agency statements intended to inform the public of how an agency interprets the law or intends to exercise its discretion.³ Despite this obligation to publish, current law lacks guidelines or requirements for how agencies must publish this information. Agencies typically have used 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.⁴

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.⁵ This burden is augmented by the ubiquity of guidance documents in federal regulatory practice. Scholars have described their scale of use as “massive”⁶ and “oceanic.”⁷ However, there is no comprehensive compilation of guidance documents,⁸ 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

¹ 5 U.S.C. Sec. 552(a)(2)(B).

² 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).

³ Mantel, *supra* note 2, at 350.

⁴ See U.S. Gov’t Accountability Office, GAO–15–368, *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices* at 31 (2015).

⁵ 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>.

⁶ Mantel, *supra* note 4, at 353.

⁷ 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>.

⁸ *Id.* at 35.

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.

Building upon Congress’ work in this area, reforms contained in H.R. 890 and its predecessor bills during the 115th and 116th Congresses were implemented by a 2019 executive order. The order was in effect during 2019 and 2020 but has since been rescinded.⁹ H.R. 890 would codify these reforms in statute and permanently alleviate the burdens on entities seeking these guidance documents. The bill requires agencies to publish guidance documents in one central location. 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. 890, 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 public examination.

Increased transparency through public involvement is a principle supported by the Administrative Conference of the United States (ACUS), 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 manner in which they may readily be found.”¹⁰ The GOOD Act implements this recommendation.

The American public will benefit greatly from the GOOD Act’s requirement that guidance documents be centrally published. By making guidance documents easier to discover and navigate, the bill will help the American public, especially small entities, better understand the law, agencies’ understanding of their obligations, and how to conduct their affairs in light of agency views.

SECTION-BY-SECTION ANALYSIS

Sec. 1. Short title

The short title is the “Guidance Out of Darkness Act of 2023” or the “GOOD Act of 2023”.

⁹ Exec. Order No. 13891, 84 Fed. Reg. 55235 (secs. 1–3) (Oct. 9, 2019). *See also*, Exec. Order No. 13992, 86 Fed. Reg. 7049 (sec. 2) (Jan. 20, 2021).

¹⁰ 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%20Guidance%20Through%20Policy%20Statements%29_2.pdf.

Section 2. Definitions

- Sets forth definitions of key terms used in the act.
 - Defines the term “agency” by reference to section 551 of title 5, United States Code, where that term has been previously defined.
 - Defines the term “Director” to mean the Director of the Office of Management and Budget.
 - Defines the term “guidance document” to mean a “statement of general applicability” that “does not have the force and effect of law” and is designated by an agency official as setting forth “a policy on a statutory, regulatory, or technical issue” or an “interpretation of a statutory or regulatory issue.”
 - Includes within the term “guidance document” agency memoranda, notices, bulletins, directives, news releases, letters, blogs, no-action letters, agency officials’ speeches, or any combination thereof.
 - Sets forth a rule of construction that the term, “guidance document” should be interpreted broadly and not be constrained to the aforesaid examples.

Section 3. Publication of guidance documents on the internet

- Requires agencies to publish their guidance documents at a single location on the internet as determined by the OMB Director within 90 days of enactment (presumably to be Regulations.gov), and sets certain agency publishing requirements, including:
 - Publishing new guidance documents when the documents are issued;
 - Publishing preexisting guidance documents not later than 180 days after the date the Act takes effect;
 - Prominently displaying on the agencies’ websites hyperlinks to the location of their respective guidance documents at the website designated by the Director; and
 - Clearly categorizing guidance documents as such, with appropriate subcategories.
- Provides that, if a guidance document is exempt from disclosure under section 552(b) of title 5, United States Code (known as the Freedom of Information Act (FOIA)), or contains information that is exempt under FOIA, that document or information is not subject to the Act’s requirements.
- Requires agencies to maintain rescinded guidance documents online with notations that the guidance documents have been rescinded and the dates on which they were rescinded, including any relevant case numbers if rescinded pursuant to court orders.

LEGISLATIVE HISTORY

H.R. 890 was introduced on February 9, 2023, by Representative James Comer. The bill was referred to the Committee on Oversight and Accountability. The following Representatives are cosponsors of the bill: Perry PA (R-R), Andy Biggs (R-AZ), Clay Higgins (R-LA), Tim Burchett (R-TN), Pete Sessions (R-TX), Virginia Foxx (R-NC), Nancy Mace (R-SC), Lauren Boebert (R-CO), Russell Fry (R-SC),

Gary J. Palmer (R–AL), Nicholas A. Langworthy (R–NY), Eric Burlison (R–MO), Harriet M. Hageman (R–WY), Ro Khanna (D–CA), and Pat Fallon (R–TX). The Committee on Oversight and Accountability held a hearing related to and used for development and consideration of the bill on June 14, 2023. The Committee considered H.R. 890 at a business meeting on July 12, 2023, and ordered the bill as amended favorably reported by a recorded vote.

The Senate companion to H.R. 890 is S. 791, which was introduced by Senator Ron Johnson (R–WI) on March 14, 2023, and was referred to the Senate Committee on Homeland Security and Governmental Affairs.

During the 115th Congress, a similar bill—H.R. 4809—was considered by the Committee, ordered favorably reported on March 15, 2018, and subsequently passed the House under suspension of the rules by a voice vote on September 26, 2018.¹¹

COMMITTEE CONSIDERATION

On July 12, 2023, the Committee met in open session and ordered the bill, H.R. 890, favorably reported with an amendment in the nature of a substitute, by a roll call vote of 41–0, a quorum being present.

ROLL CALL VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the following roll call votes occurred during the Committee’s consideration of H.R. 890:

The first and only roll call vote was on final passage of H.R. 890. The bill was agreed to in a recorded vote of 41–0.

¹¹H. Rept. 115–972 at 5 (Sept. 25, 2018).

COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY
 118TH CONGRESS
 RATIO 26-20
 ROLL CALL

Vote on: Final Passage of H.R. 890

Date: 7/12/2023

VOTE #: 11

Republicans	Aye	No	Present	Democrats	Aye	No	Present
MR. COMER (KY) <i>(Chairman)</i>	X			MR. RASKIN (MD) <i>(Ranking Member)</i>	X		
MR. JORDAN (OH)				MS. NORTON (DC)	X		
MR. TURNER (OH)				MR. LYNCH (MA)	X		
MR. GOSAR (AZ)	X			MR. CONNOLLY (VA)	X		
MS. FOXX (NC)	X			MR. KRISHNAMOORTHY (IL)	X		
MR. GROTHMAN (WI)	X			MR. KHANNA (CA)	X		
MR. PALMER (AL)	X			MR. MFUME (MD)	X		
MR. HIGGINS (LA)				MS. OCASIO-CORTEZ (NY)	X		
MR. SESSIONS (TX)	X			MS. PORTER (CA)	X		
MR. BIGGS (AZ)	X			MS. BUSH (MO)	X		
MS. MACE (SC)	X			MR. GOMEZ (CA)	X		
MR. LATURNER (KS)	X			MS. BROWN (OH)	X		
MR. FALLON (TX)	X			MS. STANSBURY (NM)	X		
MR. DONALDS (FL)				MR. GARCIA (CA)	X		
MR. ARMSTRONG (ND)	X			MR. FROST (FL)	X		
MR. PERRY (PA)	X			MS. LEE of PENNSYLVANIA (PA)	X		
MR. TIMMONS (SC)	X			MR. CASAR (TX)	X		
MR. BURCHETT (TN)	X			MS. CROCKETT (TX)	X		
MS. GREENE OF GEORGIA (GA)				MR. GOLDMAN (NY)	X		
MRS. MCCLAIN (MI)	X			MR. MOSKOWITZ (FL)	X		
MRS. BOEBERT (CO)	X			VACANCY			
MR. FRY (SC)	X						
MRS. LUNA (FL)	X						
MR. EDWARDS (NC)	X						
MR. LANGWORTHY (NY)	X						
MR. BURLISON (MO)	X						

Roll Call Totals: Ayes: 41 Nays: 0 Present:

Passed: X Failed:

EXPLANATION OF AMENDMENTS

During Committee consideration of the bill, Representative James Comer (R–KY), Chairman of the Committee, offered an amendment in the nature of a substitute that would make certain technical changes to the bill. The amendment in the nature of a substitute passed by voice vote.

LIST OF RELATED COMMITTEE HEARINGS

In accordance with House rule XIII, clause 3(c)(6)(A), (1) the following Committee hearing was used to develop or consider H.R. 890:

On June 14, 2023, the Committee held a hearing titled “Death by a Thousand Regulations: The Biden Administration’s Campaign to Bury America in Red Tape” with Mr. Anthony P. Campau, Principal, Clark Hill Public Strategies; Prof. Casey Mulligan, University of Chicago; Mr. Adam J. White, Senior Fellow, American Enterprise Institute, and Co-Executive Director, the C. Boyden Gray Center for the Study of the Administrative State, George Mason University Antonin Scalia Law School; and Prof. Sally Katzen, New York University School of Law.

(2) The following hearing related to H.R. 890 was held:

On June 14, 2023, the Committee held a hearing titled “Death by a Thousand Regulations: The Biden Administration’s Campaign to Bury America in Red Tape” with Mr. Anthony P. Campau, Principal, Clark Hill Public Strategies; Prof. Casey Mulligan, University of Chicago; Mr. Adam J. White, Senior Fellow, American Enterprise Institute, and Co-Executive Director, the C. Boyden Gray Center for the Study of the Administrative State, George Mason University Antonin Scalia Law School; and Prof. Sally Katzen, New York University School of Law.

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 Background and Need for Legislation section above.

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 goals or objectives of this bill are to ensure and streamline public access to agency guidance documents, and for other purposes.

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 does not relate to employment or access to public services and accommodations in the legislative branch.

DUPLICATION OF FEDERAL PROGRAMS

In accordance with clause 3(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, U.S.C.

FEDERAL ADVISORY COMMITTEE ACT STATEMENT

The Committee finds that this legislation does not direct the establishment of advisory committees within the definition of Section 5(b) of the appendix to title 5, U.S.C.

UNFUNDED MANDATES REFORM ACT STATEMENT

Pursuant to section 423 of the *Congressional Budget Act of 1974* 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 COST ESTIMATE

Pursuant to clause 3(d) 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:

H.R. 890, Guidance Out Of Darkness Act of 2023			
As ordered reported by the House Committee on Oversight and Accountability on July 12, 2023			
By Fiscal Year, Millions of Dollars	2023	2023-2028	2023-2033
Direct Spending (Outlays)	0	*	*
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	*	*
Spending Subject to Appropriation (Outlays)	0	6	not estimated
Increases <i>net direct spending</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Statutory pay-as-you-go procedures apply?	Yes
		Mandate Effects	
Increases <i>on-budget deficits</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
* = between zero and \$500,000.			

H.R. 890 would require agencies to post their guidance documents (such as memorandums, directives, blog posts, and speeches by agency officials) on a single website designated by the Office of Management and Budget.

According to the Government Accountability Office, many agencies already provide guidance documents on their websites. Thus, CBO expects that implementing the bill would increase agencies' administrative expenses mostly for consolidating and uploading documents in a single location. Using information on the cost for similar activities, CBO estimates that the cost would be \$6 million over the 2023–2028 period. Any spending would be subject to the availability of appropriated funds.

Enacting H.R. 890 would 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 Kelly Durand. The estimate was reviewed by Christina Hawley Anthony, Deputy Director of Budget Analysis.

PHILLIP L. SWAGEL,
Director, Congressional Budget Office.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

The requirements of clause 3(e) of rule XIII of the Rules of the House of Representatives do not apply to H.R. 890.