

## Energy Efficiency Advisory

June 16, 2021

### **DOE Drops Trump-Era Rule on Guidance Documents**

*Scott Blake Harris, John A. Hodges, and Stephanie S. Weiner*

The Biden Administration continues its efforts to clear away Trump-era rules it considers impediments to its ambitious goals. A prime example is the Department of Energy’s (DOE) withdrawal of a rule adding 10 C.F.R. Part 1061—procedures for issuing regulatory guidance documents.<sup>1</sup> DOE believes Part 1061’s requirements would hinder its ability to carry out climate change and economic recovery policies.

DOE has sought to assure commenters that it is not attempting to run roughshod over its normal transparency and public participation practices for issuing guidance documents. But it has concluded that the benefit of increased transparency and public input on certain guidance documents provided by Part 1061 is outweighed by the need for maximum agency flexibility.

**DOE Issues Part 1061.** Published in the final days of the Trump Administration,<sup>2</sup> Part 1061 would have made it more difficult for DOE to issue regulatory guidance, including in its appliance efficiency program<sup>3</sup> under the Energy Policy and Conservation Act (EPCA).<sup>4</sup> In particular, it generally required that, before issuing final versions of “significant guidance documents,”<sup>5</sup> DOE had to give at least 30 days public comment and obtain review by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget.<sup>6</sup> The Trump

---

<sup>1</sup> See DOE, Office of General Counsel, Procedures for the Issuance of Guidance Documents, Final Rule; Withdrawal, 86 Fed. Reg. 29932 (June 4, 2021).

<sup>2</sup> DOE, Office of General Counsel, Procedures for the Issuance of Guidance Documents, Final Rule, 86 Fed. Reg. 451 (Jan. 6, 2021).

<sup>3</sup> 10 C.F.R. Parts 429–31.

<sup>4</sup> 42 U.S.C. § 6291 *et seq.*

<sup>5</sup> “Significant guidance documents” were defined as guidance documents that may reasonably be anticipated to (1) lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles of Executive Order 12866.

<sup>6</sup> Part 1061 provided that DOE may dispense with the procedures for public comment for good cause that notice and comment are impracticable, unnecessary, or contrary to the public interest. The special procedures for

Administration apparently believed—wrongly, we think—that guidance documents generally mean the imposition of what amount to new rules (which it instinctively opposed). As most in industry know, however, DOE has often used guidance documents efficiently to resolve difficult issues created by new technology or unanticipated market developments.

**DOE Withdraws Part 1061.** On Inauguration Day, President Biden issued Executive Order 13992,<sup>7</sup> which targeted Trump-era regulatory actions. DOE quickly postponed the effective date of Part 1061—and it has now formally withdrawn the rule.

DOE has concluded that the procedures of Part 1061 are not required by the Administrative Procedure Act<sup>8</sup> and limit the regulatory tools available to DOE to address challenges identified by the Biden Administration. It states, “Part 1061 deprives DOE of flexibility in determining when and how best to issue guidance based on particular facts and circumstances, and restricts DOE’s ability to provide timely guidance on which the public can confidently rely.”

Much of DOE’s withdrawal notice is devoted to addressing expectations and concerns of commenters. DOE says that it will continue its normal transparency and public participation practices with respect to guidance documents, but needs the flexibility to deviate from those practices when necessary, “and part 1061 would hinder any such deviation.” While Part 1061 offered DOE some flexibility to issue significant guidance documents quickly in urgent situations, DOE would still have been required to conduct internal review procedures and to communicate with OIRA. This could result in “unnecessary or harmful delay” in DOE’s issuance of important guidance documents. DOE also notes that guidance documents are non-binding. And it stresses that stakeholders may still petition DOE to issue, withdraw, or revise DOE guidance documents, or inquire about DOE guidance documents.

**Conclusion.** DOE’s withdrawal of Part 1061 helps clear the decks for expeditious agency action on energy. At the same time, DOE stresses opportunities for stakeholder input. Stakeholders should be vigilant and take advantage of such opportunities to make their views known on matters affecting their interests.

\* \* \* \*

For more information regarding Harris, Wiltshire & Grannis LLP’s energy practice, please contact [Scott Blake Harris](#), [Stephanie Weiner](#), or [John A. Hodges](#).

*This advisory is not intended to convey legal advice. It is circulated to our clients and others as a convenience and is not intended to reflect or create an attorney-client relationship as to its subject matter.*

---

significant guidance documents also do not apply where DOE and OIRA agree that compelling cause warrants an exemption; or where there is a categorical exception approved by OIRA.

<sup>7</sup> Exec. Order No. 13992, Revocation of Certain Executive Orders Concerning Federal Regulation, 86 Fed. Reg. 7049 (Jan. 25, 2021).

<sup>8</sup> 5 U.S.C. § 551 *et seq.*