

“Pulling Back the Curtain”
EPA Proposing to Increase Transparency for Guidance Documents¹

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The Environmental Protection Agency (EPA) is proposing to give the regulated community a more active role and voice in developing, modifying, and potentially withdrawing EPA’s significant guidance documents. The proposed rule, titled “EPA Guidance; Administrative Procedures for Issuance and Public Petitions” (“Proposed Rule”) was published in the Federal Register on May 22, 2020 and is intended to provide “procedures for developing and issuing guidance documents and to establish a petition process for public requests to modify or withdraw an active guidance document.”

EPA guidance documents—which can be in the form of interpretive memoranda, policy statements, manuals, bulletins, advisories, etc.—are legally non-binding methods of clarifying existing obligations and providing information to assist regulated entities in compliance with EPA regulations. In the past, however, EPA has arguably utilized these guidance documents to create new regulatory requirements outside of the normal notice-and-comment process. Currently, EPA guidance documents are not subject to the Administrative Procedure Act’s notice-and-comment requirements; are not required to meet any specific set of criteria; or be published on a specific webpage. Such issues may create difficulties for regulated entities to monitor these documents. To address these topics, the Proposed Rule purports to ensure that “EPA’s guidance documents are: developed with appropriate review; accessible and transparent to the public; and provided for public participation in the development of significant guidance documents.”

Notably, this action implements, in part, President Trump’s October 2019 Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents” (“Executive Order”). A central underlying principle of this Executive Order is to clarify that guidance documents should only explain existing obligations and should not be a vehicle for implementing new, binding requirements on regulated entities. The Executive Order seeks to establish a method for allowing thorough public review of “significant guidance documents” prior to issuance.² The Executive Order also seeks to make guidance documents more accessible to the public by requiring each federal agency to “establish or maintain on its website a single, searchable, indexed database that contains or links to all guidance documents in

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² The Executive Order defines a “significant guidance document” as: (1) a document that would “have an annual effect on the economy of \$100 million or more, or adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or governments or communities in a material way”; (2) a document that would “create a serious inconsistency or otherwise interfere with an action taken or planned by another agency”; (3) a document that would materially alter the budgetary impact of entitlements, grants, user fees, loan programs or the rights and obligations of recipients thereof”; or (4) a document that would “raise novel legal or policy issues arising out of legal mandate, the president’s priorities, or the principles of Executive Order 12866”—an executive order issued by President Clinton in 1993 titled “Regulatory Planning and Review.”

effect from such agency or component.” The EPA Guidance Documents portal was created on February 28, 2020 to “provide links to all of EPA’s guidance documents.”

The Proposed Rule closely tracks the objectives of the Executive Order, and does the following, among other things:

- Defines “significant guidance document” using the same four categories as the Executive Order;
- Requires EPA to publish a notice in the Federal Register announcing a new draft significant guidance document and provide a 30-day public comment opportunity prior to issuing the final guidance document;
- Requires EPA to publish a notice in the Federal Register announcing the proposed modification or withdrawal of an existing significant guidance document and provide a 30-day public comment opportunity before finalizing the modification or withdrawal of such a document;
- Creates a set of criteria that every guidance document must contain, including a summary of the guidance and a list of activities impacted by the guidance; and
- Provides the public with an avenue to request modification or withdrawal of existing guidance documents.

The Proposed Rule presents an opportunity for stakeholders to actively participate in the creation, drafting, and finalization of guidance documents that have significant impacts on regulatory obligations and compliance with EPA regulations. Specifically, affected entities can provide written comment on proposed guidance documents to highlight potential shortcomings or negative impacts of such guidance. Such comments potentially allow for affected entities to influence a guidance document before relying on the documents for compliance assistance.

The Proposed Rule also presents an opportunity for stakeholders to petition EPA for the modification or withdrawal of an active guidance document. The petition must provide an explanation of the interest of the petitioner in the requested action; specify of the text that the petitioner request be modified or withdrawn; provide suggested text for EPA to consider; and provide a rationale for the requested modification or withdrawal. EPA will have 90 days to respond to a request, with a possible one-time extension.

The Proposed Rule will be open for public comment until June 21, 2020. EPA is soliciting comments “on whether the issuance of a modification to an active significant guidance document or the withdrawal of an active significant guidance document should be announced via the *Federal Register* and subject to a 30-day public comment period, or if other means of public engagement, such as the EPA’s Guidance Portal or other Agency website, could be used to announce such actions.”