

**Calendar No. 590**

116TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
116-297

GUIDANCE CLARITY ACT OF 2020

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R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

TO ACCOMPANY

S. 3412

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



NOVEMBER 17, 2020.—Ordered to be printed

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

**R E P O R T**

[To accompany S. 3412]

[Including the cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 3412) to require a guidance clarity statement on certain agency guidance, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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I. PURPOSE AND SUMMARY

S. 3412, the Guidance Clarity Act of 2020, requires agencies to provide a guidance clarity statement on certain agency guidance that the contents of the document do not have the force and effect of law and are not meant to bind the public in any way, and are intended to only provide clarity to the public about existing requirements under the law or agency policy.

II. BACKGROUND AND THE NEED FOR 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 re-

quirements on the public.”<sup>1</sup> Agency guidance documents can take the form of “policy statements, manuals, bulletins, advisories, and more.”<sup>2</sup>

The October 9, 2019, Executive Order, *Promoting the Rule of Law Through Improved Agency Guidance Documents*, described how agencies utilized non-binding guidance documents inappropriately to regulate the public without following the rulemaking procedures of the Administrative Procedures Act.<sup>3</sup> The Executive Order clarified agency use of non-binding guidance documents and instructed agencies to ensure transparency of guidance documents by establishing a single, searchable, indexed database that contains links to all guidance documents in effect from the agency.<sup>4</sup> The website would also note that guidance documents lack the force and effect of law.<sup>5</sup>

S. 3412 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. 3412 will bring transparency and accountability to agency guidance documents and ensure that Federal agencies do not utilize non-binding guidance as *de facto* regulations.

### III. LEGISLATIVE HISTORY

Senator James Lankford (R-OK) introduced S. 3412, the Guidance Clarity Act of 2020, on March 5, 2020. The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 3412 at a business meeting on March 11, 2020. The bill was ordered reported favorably *en bloc* by voice vote. Senators Johnson, Portman, Lankford, Romney, Scott, Enzi, Hawley, Peters, Carper, Hassan, Harris, Sinema and Rosen were present for the vote.

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

#### *Section 1. Short title*

This section provides that the short title of the bill is the “Guidance Clarity Act of 2020.”

#### *Section 2. Guidance clarity statement required*

This section defines the terms “agency”, “rule”, and “guidance”. It also requires that certain agency guidance documents contain a disclaimer on the first page that the contents of the document do not have the force and effect of law or bind the public in any way,

<sup>1</sup>Memorandum from Dominic J. Mancini, Acting Administrator, Office of Info. & Regulatory Affairs (Oct. 31, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf>.

<sup>2</sup>*Id.*

<sup>3</sup>*Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents*, White House (Oct. 9, 2019), <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-improved-agency-guidance-documents/>.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

and that the document is only intended to provide the public with clarity regarding existing requirements under the law.

#### 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 ESTIMATES

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, November 10, 2020.*

Hon. RON JOHNSON,  
*Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 3412, the Guidance Clarity Act of 2020.

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.

<b>S. 3412, Guidance Clarity Act of 2020</b>			
As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on March 11, 2020			
By Fiscal Year, Millions of Dollars	2021	2021-2025	2021-2030
Direct Spending (Outlays)	*	*	*
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	*	*	*
Spending Subject to Appropriation (Outlays)	*	*	not estimated
Statutory pay-as-you-go procedures apply?	Yes	<b>Mandate Effects</b>	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2031?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
* = between zero and \$500,000.			

S. 3412 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. Agen-

cies 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. 3412 would cost less than \$500,000 over the 2021–2025 period; any spending would be subject to the availability of appropriated funds.

Enacting S. 3412 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. 3412 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.