

118TH CONGRESS }
1st Session }

SENATE

{ REPORT
118-19

GUIDANCE CLARITY ACT OF 2023

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 108

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



MAY 9, 2023.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

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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. 108]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 108) 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. 108, the Guidance Clarity Act of 2023, would require 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.¹

Excluded from this requirement is guidance issued by an agency that is not intended to have a substantial effect on the behavior of

¹On July 14, 2021, the Committee approved S. 533, the Guidance Clarity Act of 2021. That bill is substantially similar to S. 108. Accordingly, this committee report is in many respects similar to the committee report for S. 533. See S. Rep. No. 117-95.

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.”² Agency guidance documents can take the form of “policy statements, manuals, bulletins, advisories, and more.”³

S. 108 would further assist 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. 108 would bring transparency and accountability to agency guidance documents and ensure federal agencies do not utilize nonbinding guidance as de facto regulations. The bill requires OMB to issue guidance on the implementation of this bill within 90 days of enactment.

III. LEGISLATIVE HISTORY

Senator James Lankford (R-OK) introduced S. 108, the Guidance Clarity Act of 2023, on January 26, 2023, with original cosponsors Senators Kyrsten Sinema (I-AZ), Ron Johnson (R-WI), James Risch (R-ID), and Mike Braun (R-IN). The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 108 at a business meeting on March 29, 2023. At the business meeting, the bill was ordered reported favorably by roll call vote of 12 yeas to 0 nays, with Senators Peters, Hassan, Sinema, Rosen, Padilla, Ossoff, Blumenthal, Paul, Lankford, Romney, Scott, and Hawley voting in the affirmative, and with Senators Carper, Johnson, and Marshall voting yeas by proxy, for the record only.

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 2023.”

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 simply guidance and does not have the force and effect of law and is intended solely to provide the public information about existing

² Office of Information and Regulatory Affairs, *Memorandum for Regulatory Policy Officers at Executive Departments and Agencies and Managing and Executive Directors of Certain Agencies and Commissions* (OMB Memo M-20-02) (Oct. 31, 2019).

³ *Id.*

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

S. 108, Guidance Clarity Act of 2023			
As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on March 29, 2023			
By Fiscal Year, Millions of Dollars	2023	2023-2028	2023-2033
Direct Spending (Outlays)	*	*	*
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	*	*	*
Spending Subject to Appropriation (Outlays)	*	*	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.			

S. 108 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. 108 would cost less than \$500,000 over the 2023–2028 period; any spending would be subject to the availability of appropriated funds.

Enacting S. 108 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.

PHILLIP L. SWAGEL,
Director, Congressional Budget Office.

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

Because S. 108 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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