

GUIDANCE DOCUMENTS INVITE BACKDOOR RULEMAKING

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GUIDANCE DOCUMENTS INCLUDE INTERPRETIVE rules and policy statements issued by agencies, ostensibly to advise the public about how they interpret the laws and regulations they enforce, as well as how they intend to use their discretionary authority. Guidance is not supposed to carry the force of law and should not be binding on the public;[1] it should merely help citizens and businesses understand the laws and regulations.

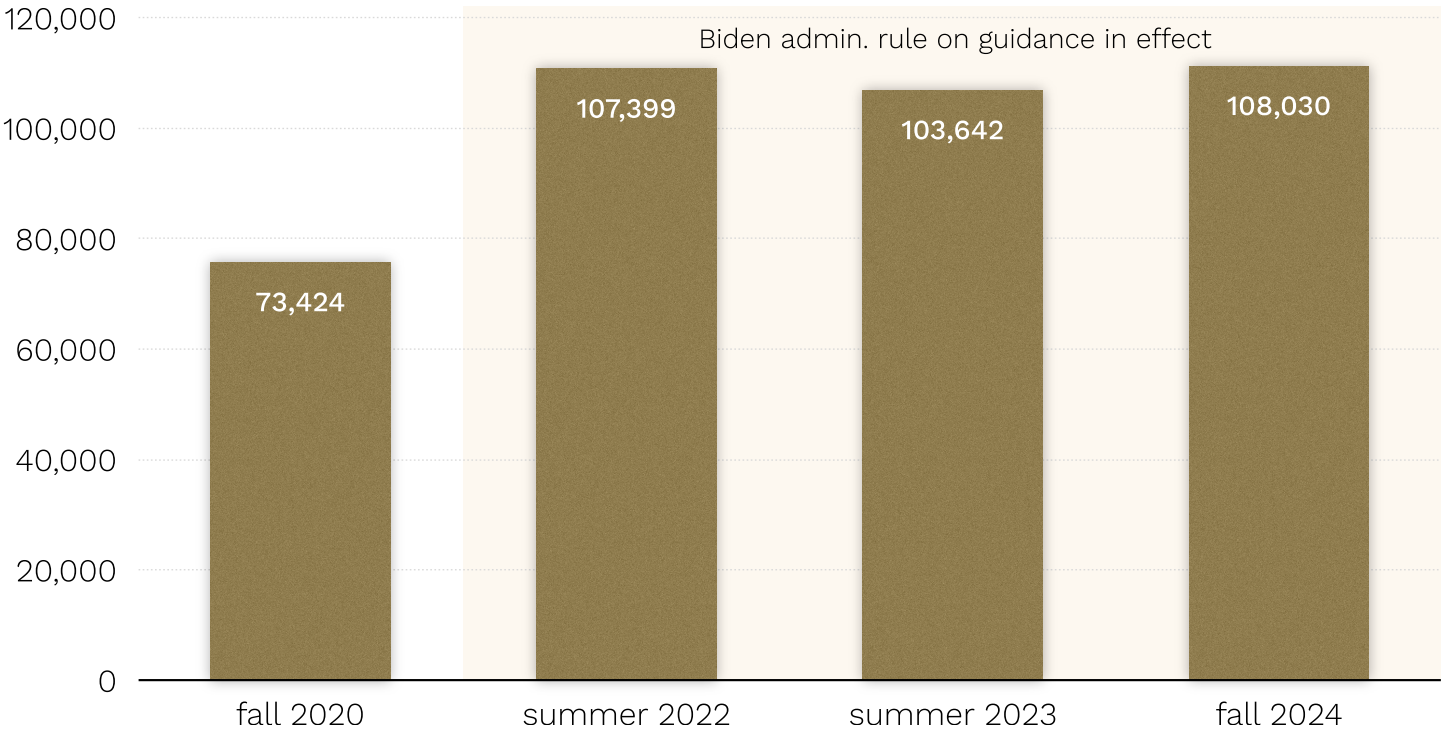
However, agencies frequently use this tool to change policy and to impose new requirements on private parties. While guidance should not be legally binding, it often allows an agency "to expand the scope of its power through nonbinding actions whose actual impact can be every bit as severe as a final agency action" while evading the lawmaking and rulemaking processes of the Constitution and the Administrative Procedure Act (APA).[2]

President Donald Trump issued Executive Order 13891 in 2019 to limit the use of guidance, but President Biden's Executive Order 13992 revoked the policy in 2021.[3] The Department of Justice (DOJ) then issued an interim rule in July 2021 (finalized three days before President Trump took office again in 2025) implementing President Biden's order by revoking "limitations on the issuance and use of guidance documents."[4] While President Trump revoked President Biden's Executive Order 13992 on January 20, 2025,[5] the DOJ's rule on guidance is still in effect as of April 2026.

FREQUENCY OF USE

TRACKING GUIDANCE IS DIFFICULT. THE FIRST TRUMP administration reviewed and published all guidance online per Executive Order 13891, but the Biden administration took down many of those portals. As of September 2020, the Trump administration had identified over 73,000 guidance documents across federal agencies in official portals. The Biden administration issued thousands of additional guidance documents, growing the total by 46 percent in just two years, according to research by the Competitive Enterprise Institute. Guidance material remained north of 100,000 total documents for three years under President Biden (see Figure 1).[6] Although many of these documents likely contained legitimate guidance, the large increase in guidance issued during the Biden administration warrants deeper investigation as to the proportion of binding language contained therein.

FIGURE 1. **Annual Estimates of Total Federal Guidance Material, 2020–2024**



Source: Clyde Wayne Crews Jr., "The Darklore Depository: An Unofficial Portal Inventorying Regulatory Dark Matter, Fall 2025," Competitive Enterprise Institute, October 31, 2025, https://docs.google.com/spreadsheets/d/e/2PACX-1vTKefmGInbL1wOtKgln9m-kGmtd2PBLbkRfspALBTM5Xk-B2dRpFATZUEvYFavzfQ/pubhtml.

PROBLEMATIC USES OF AGENCY GUIDANCE, 2021–2024

GUIDANCE BECOMES PROBLEMATIC WHEN IT SEEKS to fundamentally change policy and use binding language or implied threats of enforcement without going through the Constitution's lawmaking or the APA's rulemaking processes. The following examples from the Biden administration exemplify that problem.[7]

Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity

In June 2021, the Department of Education issued guidance interpreting its enforcement authority over discrimination based on sexual orientation and gender identity. The guidance applied the Supreme Court's ruling in *Bostock v. Clayton County* (2020)—prohibiting employment discrimination based on sexual orientation and gender identity under Title VII of the Civil Rights Act of 1964—to sex-based discrimination in education under Title IX.[8]

The federal government sought to impose new conditions on states based on this interpretation, sending a "Letter to Educators" clarifying that the department "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities" receiving federal funding.[9] A federal court ruled that the department "engaged in unlawful agency action taken in excess of their authority, all while failing to adhere to the appropriate notice and comments requirements when doing so."[10]

Federal Law Constraints on Post-Election Audits

In July 2021, the DOJ issued guidance related to states' audits of their elections, asserting that certain state audits could violate federal records-preservation requirements and could represent voter intimidation.[11] The guidance followed a warning letter to the Arizona Senate president in May 2021 regarding the state's required audit of the 2020 federal election in Maricopa County.[12]

The DOJ cited criminal statutes and enforcement authority to ensure compliance, noting its willingness to use "every tool in [its] arsenal" and the criminal penalties for failing to comply.[13] With this guidance, the federal government claimed authority and made enforcement threats over an area traditionally left to states, which legal experts described as "a brazen abuse of power."[14]

Adding Equity to the National Electric Vehicle Infrastructure (NEVI) Formula Program Guidance

In June 2023, the Federal Highway Administration updated its guidance for implementing the NEVI Formula Program, a grant program established by the 2021 Infrastructure Investment and Jobs Act to expand the network of electric vehicle charging stations.[15]

Under the 2023 update, states would develop their EV Infrastructure Deployment Plans (for how they intend to use program funds) "to ensure that the deployment, installation, operation, and use of EV charging infrastructure achieves equitable and fair distribution of benefits and services" and to explain how they will create projects that "target at least 40 percent of the benefits towards disadvantaged communities," per the Justice40 Initiative.[16] These policies were not part of the original program enacted under the infrastructure law.

Changing Merger Guidelines

In December 2023, the Federal Trade Commission and DOJ together released guidance identifying fact patterns that would "assist the Agencies in assessing whether a merger presents sufficient risk to warrant an enforcement action" under federal antitrust laws.[17] The most significant changes from prior guidance included presuming illegality based on market shares and "dominant" market position, departing from the consumer welfare standard, dismissing procompetitive effects, and focusing on harm to rivals and labor.[18]

The effect of these changes was to raise the standards and costs of mergers, make it easier for the agencies to challenge mergers, and increase the agencies' scope to demand information from merging parties. The new merger policies, codified in this guidance, represented a "government always wins" standard for antitrust enforcement, according to economist Ted Bolema, who wrote that the agencies "bragg[ed] about how their merger policies are succeeding because the agencies can point to numerous mergers that have

been abandoned after the agencies indicated that they were looking to block the mergers."[19]

Enforcement Guidance on Harassment in the Workplace

In April 2024, the Equal Employment Opportunity Commission (EEOC) issued guidance addressing how workplace harassment of protected classes is defined under EEOC-enforced statutes and whether employer liability is established.[20]

The EEOC expanded the definition of "sex" under Title VII of the Civil Rights Act of 1964 to include sexual orientation and gender identity for the purpose of prohibiting sex-based employment discrimination.[21] Texas sued, and a federal court ruled that the EEOC exceeded its authority by issuing this guidance and by enforcing bathroom, dress, and pronoun accommodations in the workplace.[22]

CONCLUSION

GUIDANCE IS NOT A SUBSTITUTE FOR LAWMAKING OR rulemaking, yet agencies often use it as such. Current federal policy on guidance removed limits on issuing these documents, allowing for guidance that goes beyond mere interpretations of statutes, regulations, or agency authority. Instead, it allows for guidance that imposes new requirements based on unrelated court rulings, asserts authority over policy areas traditionally left to the states, and significantly changes agency enforcement practices (see appendix, Table A1, for additional examples).

Reversing the Biden administration's rule on guidance and returning to the policies of the first Trump administration would accord with the traditional understanding that guidance is nonbinding. Doing so would also make all guidance publicly available. Presidential administrations can make such changes by issuing an executive order or a new rule. Congress can do so with the Congressional Review Act, preventing future presidential administrations from issuing a substantially similar rule to the Biden administration's on guidance. With the Congressional Review Act, Congress can also review and strike down existing and future guidance that takes the form of a rule.[23]

APPENDIX

TABLE A1. Additional Examples of Guidance Abuse, 2021–2024

GUIDANCE	AGENCY	PURPOSE
Guidance Concerning Federal Statutes Affecting Methods of Voting	Department of Justice	After the 2020 election, some states permanently adopted their COVID-19 voting modifications, while others rolled them back. The DOJ's guidance clarified that its enforcement policy did not consider a jurisdiction's re-adoption of prior voting procedures to be "presumptively lawful."[a] Legal experts claimed, "There is nothing inherently suspect in a state deciding to end a temporary COVID-related election procedure. A state's election laws that were lawful pre-COVID do not suddenly become unlawful when reinstated."[b]
Carbon Capture, Utilization, and Sequestration (CCUS) Guidance	Council on Environmental Quality	This guidance was meant to facilitate reviews and promote the efficient development and permitting of CCUS projects in line with the administration's climate goals, stating that "responsible CCUS projects should . . . incorporate environmental justice and equity considerations."[c] This constituted a new policy added onto CCUS project review and deployment.
Joint Statement on Fair Lending and Credit Opportunities for Noncitizen Borrowers	Department of Justice; Consumer Financial Protection Bureau	This joint guidance announced potential civil rights risks and implications of a creditor considering an individual's immigration or citizenship status under the Equal Credit Opportunity Act (ECOA). This created the misleading impression that the ECOA limits such considerations when evaluating an application for credit, while the text of the statute does not prohibit consideration of immigration or citizenship status or list them as protected categories.[d]
Issuance of Revised OMB Circular No. A-4, "Regulatory Analysis"	Office of Management and Budget	Elements of these revisions to Circular A-4, which has provided guidance to federal agencies on developing regulatory analysis since 2003, "appear[ed] designed to steer analytical results to support this administration's policy preferences, rather than present objective evidence and estimates," according to regulatory economist Susan Dudley.[e]
Guidance on Federal Law Regarding Voter Registration	Department of Justice	The DOJ's guidance interpreting the National Voter Registration Act clarified limits on the procedures that states can adopt when maintaining their voter registration lists, including prohibiting programs from systematically removing ineligible voters within 90 days of a federal election.[f] This 90-day deadline for removal, however, applies to those who have changed their residence, not to those who were never eligible to register in the first place, according to legal experts.[g]

Sources:

a. US Department of Justice, *Guidance Concerning Federal Statutes Affecting Methods of Voting,* July 28, 2021, 1.

b. J. Christian Adams, *RE: Response to United States Department of Justice July 28, 2021 Guidance* (Alexandria, VA: Public Interest Legal Foundation, August 26, 2021).

c. Carbon Capture, Utilization, and Sequestration Guidance, 87 Fed. Reg. 8808 (Feb. 16, 2022).

d. Joint Statement on Fair Lending and Credit Opportunities for Noncitizen Borrowers Under the Equal Credit Opportunity Act, 88 Fed. Reg. 71845 (Oct. 18, 2023).

e. Issuance of Revised OMB Circular No. A-4, "Regulatory Analysis," 88 Fed. Reg. 77615 (Nov. 13, 2023); Susan E. Dudley, "Public Interest Comment on the Office of Management and Budget's Proposed Revisions: Circular A-4 Regulatory Impact Analysis" (public interest comment, George Washington University Regulatory Studies Center, Washington, DC, June 14, 2023), 19.

f. US Department of Justice, "Justice Department Issues New Guidance on Federal Law Regarding Voter Registration," news release, September 9, 2024, https://www.justice.gov/archives/opa/pr/justice-department-issues-new-guidance-federal-law-regarding-voter-registration.

g. Hans von Spakovsky, "The National Voter Registration Act Does Not Prevent States from Removing Aliens from Voter Registration Rolls at Any Time" (legal memorandum no. 362, Heritage Foundation, Washington, DC, October 23, 2024).

NOTES

1. Kate R. Bowers, "Agency Use of Guidance Documents" (CRS report no. LSB10591, Congressional Research Service, Washington, DC, April 19, 2021).

2. Richard A. Epstein, "The Role of Guidance in Modern Administrative Procedure: The Case for De Novo Review," *Journal of Legal Analysis* 8, no. 1 (2016): 91.

3. Exec. Order No. 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents, 84 Fed. Reg. 55235 (Oct. 15, 2019); Exec. Order No. 13992, Revocation of Certain Executive Orders Concerning Federal Regulation, 86 Fed. Reg. 7049 (Jan. 25, 2021). Executive Order 13891 required, among other things, "that agencies treat guidance documents as non-binding both in law and in practice."

4. Processes and Procedures for Issuance and Use of Guidance Documents, 86 Fed. Reg. 37674 (July 16, 2021); Processes and Procedures for Issuance and Use of Guidance Documents, 90 Fed. Reg. 6804 (Jan. 21, 2025).

5. Exec. Order No. 14148, Initial Rescissions of Harmful Executive Orders and Actions, 90 Fed. Reg. 8237 (Jan. 28, 2025).

6. Clyde Wayne Crews Jr., "The Darklore Depository: An Unofficial Portal Inventorying Regulatory Dark Matter, Fall 2025," Competitive Enterprise Institute, October 31, 2025, https://docs.google.com/spreadsheets/d/e/2PACX-1vTKefmGInbL1wOtKgln9m-kGmtd2PBLbkRfspALBTM5Xk-B2dRpFATZUEvYFavzfQ/pubhtml.

7. Seemingly problematic guidance is not limited to the Biden administration, and federal agencies have used this tool before and after. This research, however, focuses on the change in guidance policy implemented during the Biden administration.

8. Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021).

9. US Department of Education Office of Civil Rights, *Letter to Educators* on Title IX's 49th Anniversary, June 23, 2021, 2, https://www.jacksonlewis.com/sites/default/files/docs/educator-202106-tix.pdf.

10. State of Texas v. Cardona, 4:23-cv-00604-O, 1–2 (N.D. Tex. June 11, 2024), https://www.govinfo.gov/content/pkg/USCOURTS-txnd-4_23-cv-00604/pdf/USCOURTS-txnd-4_23-cv-00604-0.pdf.

11. US Department of Justice, "Federal Law Constraints on Post-Election 'Audits,'" news release, July 28, 2021, https://www.justice.gov/archives/opa/press-release/file/1417796/dl?inline.

12. Letter from Pamela S. Karlan, Princ. Dep. Ass't Att'y Gen., U.S. Dep't of Just. C.R. Div., to Hon. Karen Fann, Pres't, Ariz. State Sen. (May 5, 2021), https://www.justice.gov/d9/case-documents/attachments/2021/05/05/civil_rights_division_letter_to_arizona_senate_president_5-5_final_ro_tag_prop.pdf.

13. US Department of Justice, "Justice Department Issues Guidance on Federal Statutes Regarding Voting Methods and Post-Election 'Audits,'" news release, July 28, 2021, https://www.justice.gov/archives/opa/pr/justice-department-issues-guidance-federal-statutes-regarding-voting-methods-and-post.

14. J. Christian Adams, *RE: Response to United States Department of Justice July 28, 2021 Guidance* (Alexandria, VA: Public Interest Legal Foundation, August 26, 2021), https://publicinterestlegal.org/wp-content/uploads/2021/08/Letter-Dated-August-26-2021.pdf.

15. Derrell Turner, *National Electric Vehicle Infrastructure Formula Program Guidance (Update)* (Washington, DC: US Department of Transportation Federal Highway Administration, June 2, 2023), 17.

16. Turner, *National Electric Vehicle Infrastructure Formula Program Guidance* (Update).

17. US Department of Justice and Federal Trade Commission, *2023 Merger Guidelines*, December 18, 2023, 1.

18. Ted Bolema, *Decoding the 2023 FTC and DOJ Merger Guidelines: Insights into Shifting Antitrust Enforcement* (Arlington, VA: Mercatus Center at George Mason University, February 15, 2024).

19. Bolema, *Decoding the 2023 FTC and DOJ Merger Guidelines*; Editorial Board, "Lina Khan's FTC Wants to Transform Antitrust. Is There a Better Way?," *Washington Post*, August 14, 2023; Leah Nylen and Michelle F. Davis, "US Antitrust Enforcers Are Chilling Big Mergers," *Bloomberg*, May 10, 2023.

20. Equal Employment Opportunity Commission, "Enforcement Guidance on Harassment in the Workplace" (notice no. 915.064, Equal Employment Opportunity Commission, Washington, DC, April 29, 2024), https://web.archive.org/web/20240429161610/https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace.

21. US Equal Employment Opportunity Commission, "Enforcement Guidance."

22. Texas, et al. v. EEOC, 2:24-CV-173, 1 (N.D. Tex. May 15, 2025).

23. 5 U.S.C. § 801.

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