

September 29, 2023

The Honorable James Comer
Chairman
Committee on Oversight and Accountability
United States House of Representatives
Washington, DC 20515

The Honorable Jamie Raskin
Ranking Member
Committee on Oversight and Accountability
United States House of Representatives
Washington, DC 20515

The Honorable Gary C. Peters
Chairman
U.S. Senate Committee on Homeland
Security & Governmental Affairs
Washington, DC 20510

The Honorable Paul Rand
Ranking Member
U.S. Senate Committee on Homeland
Security & Governmental Affairs
Washington, DC 20510

Dear Chairman Comer, Ranking Member Raskin, Chairman Peters, and Ranking Member Paul,

The Coalition for Sensible Safeguards (CSS), an alliance of over 180 labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, and allied organizations cannot support H.R. 890/ S. 791, the Guidance Out of Darkness Act (GOOD Act), in its current form. The bill would require agencies to establish and maintain a website that archives their existing and repealed guidance documents.

We agree with the legislation's nominal objective of making agency guidance more accessible and transparent to affected members of the public. Yet, we have serious concerns that the GOOD Act, as currently drafted, would actually undermine accessibility and transparency.

The crux of the GOOD Act is its purported definition of "guidance document." At the outset, it is important to emphasize that the term "guidance document" has never been defined in federal law. Instead, over time, the term has come to encompass a broad array of communications issued by agencies, consistent with the invaluable role they play in ensuring the effective functioning of our regulatory system. Crucially, courts have provided a backstop, scrutinizing any potential improper use of "guidance documents" by agencies.

Given this time-tested approach, any attempt to define the concept of "guidance document" should proceed with the utmost care and caution. Unfortunately, this bill does not take such an approach. Rather, it purports to adopt a comprehensive definition – that is, it attempts to define what is practically undefinable – and in doing so, risks creating confusion for both agencies and the public. The only attempt the bill makes to bring clarity to this definition – a non-exhaustive list of examples of guidance – is likely to create more confusion rather than reduce it.

Even if a workable and comprehensive definition could be established, it is unlikely that the webpages required by the GOOD Act would promote the desired goals of transparency and accessibility. As noted above, the concept of guidance documents is meant to give agencies flexibility and broad discretion to use these actions as appropriate. As a result, a truly comprehensive list of guidance documents for each agency would include hundreds if not

thousands of items. Such lists would defeat transparency and accessibility by proving unusable for most members of the public who will struggle to identify which guidance documents apply to them.

For the agencies themselves, assembling websites that provide a comprehensive archive of all their guidance documents would prove costly and time-consuming. Given that these websites would tend to undermine, rather than promote, the public interest in accessibility and transparency, implementation of the bill risks wasting a significant amount of taxpayer and agency resources. These expenditures would come at a time when agencies are already facing significant budget shortfalls that undermine their ability to carry out their congressionally-assigned mandates in an effective and timely manner.

A far better approach to achieving the bill's goals of transparency and accessibility would be to define the concept of guidance documents in the generic terms suggested by the Administrative Procedure Act (APA) and leave it to the discretion of agency leaders to decide which of their guidance documents are of greatest public interest and thus should be included on a website archive.

Guidance documents have long been used both to provide crucial clarifying information that benefits both those subject to regulations and those who are intended to benefit from them, and to provide a voluntary path to serving the agency's mission. Rather than oppose guidance documents, regulated industry has long welcomed them since they enable firms to meet their regulatory responsibilities as cost-effectively as possible and to meet agency goals through voluntary means.. One unfortunate unintended consequence of this bill is that it might even discourage agencies from issuing guidance at all, to the particular detriment of regulated industry.

In addition, the bill must be explicit regarding any perceived non-compliance with the bill's requirements. Specifically, if an agency believes that a statement is not a guidance document subject to the bill's posting requirements and elects not to publicly post the statement, the bill should make clear that this would have no impact on the validity of the statement or whether it is subject to the Congressional Review Act (CRA), and it would remain in effect. Unfortunately, the bill is currently silent on these important issues.

There is a potential path here to put a good policy in place, and we stand ready to be a helpful resource in reaching a solution that will make the legislation more manageable, practical, and useful. However, for these reasons stated above, we cannot support H.R. 890/ S. 791 in its current form.

Sincerely,

Coalition for Sensible Safeguards

AFL-CIO

Center for Progressive Reform

Clean Water Action

Consumer Action

Consumer Federation of America

Delaware Community Reinvestment Action Council, Inc.

Earthjustice

Economic Policy Institute

Endangered Species Coalition

Government Information Watch

Impact Fund

Institute for Agriculture and Trade Policy

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

National Employment Law Project

Natural Resources Defense Council

New Jersey Association on Correction

Public Citizen

Public Justice Center

Union of Concerned Scientists

URGE: Unite for Reproductive and Gender Equity

CC: Members of House Oversight Committee

Members of Senate Committee on Homeland Security & Governmental Affairs