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## DEPARTMENT OF ENERGY

### 10 CFR Part 1061

RIN 1990-AA50

#### Procedures for the Issuance of Guidance Documents

**AGENCY:** Office of General Counsel, Department of Energy.

**ACTION:** Final rule; delay of effective date.

**SUMMARY:** This document further delays the effective date of a recently published final rule establishing procedures for the issuance of Department of Energy (DOE) guidance documents.

**DATES:** The effective date of the rule establishing 10 CFR part 1061 published January 6, 2021, at 86 FR 451, and delayed to March 21, 2021 at 86 FR 7799, February 2, 2021, is further delayed to June 17, 2021.

**FOR FURTHER INFORMATION CONTACT:** Mr. Matthew Ring, U.S. Department of Energy, Office of the General Counsel, Forrestal Building, GC-33, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586-2555, Email: [Guidance@hq.doe.gov](mailto:Guidance@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:** On February 2, 2021, the United States Department of Energy ("DOE") postponed the effective date of its final rule establishing procedures for the issuance of DOE guidance documents, published in the **Federal Register** on January 6, 2021 (86 FR 451), until March 21, 2021 (86 FR 7799, February 2, 2021). The January 6, 2021, rule implemented Executive Order 13891 (84 FR 55235), which the President revoked on January 20, 2021, in Executive Order 13992 (86 FR 7049). Executive Order 13992 directed the Director of the Office of Management and Budget and the heads of agencies to promptly take steps to rescind any rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing Executive Order 13891, among other

Executive orders, as appropriate and consistent with applicable law, including the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* DOE's delay of the effective date of its January 6, 2021, guidance rule was necessary to give DOE officials the opportunity to promptly take steps to rescind the rule as directed by Executive Order 13992. DOE also sought comment on any further delay of the effective date, including the impacts of such delay, as well as comment on the legal, factual, or policy issues raised by the rule. DOE received no comments on these issues.

DOE intends to publish a separate notice of proposed rulemaking in the future to withdraw the January 6, 2021, guidance rule. Further delay of the effective date of the guidance rule is necessary to allow DOE to consider comments on the proposed withdrawal and further review its regulations in light of Executive Order 13992 before the rule goes into effect. Accordingly, DOE delays the effective date of 10 CFR part 1061 to June 17, 2021.

To the extent that 5 U.S.C. 553 applies to this action, it is exempt from notice and comment because it constitutes a rule of procedure under 5 U.S.C. 553(b)(A). Alternatively, DOE's implementation of this action without opportunity for public comment, effective immediately upon publication in the **Federal Register**, is based on the good cause exceptions in 5 U.S.C. 553(b)(B) and 5 U.S.C. 553(d)(3). Pursuant to 5 U.S.C. 553(b)(B), DOE has determined that good cause exists to forego the requirement to provide prior notice and an opportunity for public comment thereon for this rule as such procedures would be impracticable, unnecessary or contrary to the public interest. As an initial matter, DOE provided an opportunity for comment related to the earlier extension of the effective date, and no comments were submitted. Further, DOE has tentatively concluded that, if it goes into effect, the January 6, 2021 final rule will hinder DOE in providing timely guidance in furtherance of DOE's statutory duties. The final rule will in particular hinder DOE's ability to address the economic recovery and climate change challenges enumerated in Executive Order 13992. As discussed in the Executive Order, agencies must have flexibility to timely and effectively address these challenges. The procedures of 10 CFR part 1061 are

not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), and they limit the regulatory tools available to DOE to address the challenges listed in Executive Order 13992. Part 1061 deprives DOE of flexibility in determining when and how best to issue guidance based on particular facts and circumstances, and restricts DOE's ability to provide timely guidance on which the public can confidently rely.

In addition, DOE's stated purpose in issuing part 1061 was to promote transparency and public involvement in the development and amendment of DOE guidance documents. DOE notes, however, that its procedures for public transparency and involvement in the development of agency guidance documents will remain unchanged by withdrawal of part 1061. DOE guidance documents will continue to be available on DOE's website. DOE will also continue its practice, as appropriate, of soliciting stakeholder input on guidance documents of significant stakeholder and public interest. Additionally, stakeholders may still petition DOE at any time to issue, withdraw or revise DOE guidance documents, or inquire about DOE guidance documents, by emailing petitions or inquiries to [Guidance@hq.doe.gov](mailto:Guidance@hq.doe.gov). The benefits of binding DOE to the procedures of part 1061 therefore appear outweighed by the need for DOE to have the ability to issue guidance timely and effectively to address the challenges listed in the Executive Order, and otherwise to meet its statutory duties. Moreover, DOE notes that guidance, whether issued under part 1061 or otherwise, is non-binding, and does not have the force and effect of law.

As a result, seeking public comment on this delay is unnecessary and contrary to the public interest. For these same reasons DOE finds good cause to waive the 30-day delay in effective date provided for in 5 U.S.C. 553(d).

#### Signing Authority

This document of the Department of Energy was signed on March 13, 2021, by John T. Lucas, Acting General Counsel, Office of the General Counsel, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal

Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on March 15, 2021.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

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## **BUREAU OF CONSUMER FINANCIAL PROTECTION**

### **12 CFR Chapter X**

#### **Statement of Policy Regarding Prohibition on Abusive Acts or Practices; Rescission**

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Rescission of statement of policy.

**SUMMARY:** The Bureau of Consumer Financial Protection is rescinding the Statement of Policy Regarding Prohibition on Abusive Acts or Practices.

**DATES:** This rescission of the policy statement published at 85 FR 6733 on February 6, 2020, is applicable on March 19, 2021.

**FOR FURTHER INFORMATION CONTACT:** Mehul Madia, Division of Supervision, Enforcement, and Fair Lending, at (202) 435-7104. If you require this document in an alternative electronic format, please contact [CFPB\\_Accessibility@cfpb.gov](mailto:CFPB_Accessibility@cfpb.gov).

**SUPPLEMENTARY INFORMATION:** Section 1031(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) provides that the Bureau of Consumer Financial Protection (Bureau) may use its authorities, among other things, to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.<sup>1</sup>

Section 1031(d) of the Dodd-Frank Act sets forth standards for when the Bureau may declare that an act or practice is abusive for purposes of the Dodd-Frank Act.

On January 24, 2020, the Bureau announced a policy statement entitled “Statement of Policy Regarding Prohibition on Abusive Acts or Practices” (Policy Statement), which provided a framework for the Bureau’s exercise of its supervisory and enforcement authority to address abusive acts or practices.<sup>2</sup> Specifically, the Policy Statement provided that the Bureau intended to apply the following three principles during its supervision and enforcement work. *First*, the Bureau stated that it intended to focus on citing conduct as abusive in supervision or challenging conduct as abusive in enforcement if the Bureau concluded that the harms to consumers from the conduct outweighed its benefits to consumers.<sup>3</sup> *Second*, the Bureau stated that it would generally avoid challenging conduct as abusive that relied on all or nearly all of the same facts that the Bureau alleged are unfair or deceptive.<sup>4</sup> The Bureau stated that where it nevertheless decided to include an alleged abusiveness violation, the Bureau intended to plead such claims in a manner designed to clearly demonstrate the nexus between the cited facts and the Bureau’s legal analysis of the claim. The Bureau stated that, in its supervision activity, the Bureau similarly intended to provide more clarity as to the specific factual basis for determining that a covered person had violated the abusiveness standard.<sup>5</sup> *Third*, the Bureau stated that it generally did not intend to seek certain types of monetary relief for abusiveness violations where the covered person was making a good-faith effort to comply with the abusiveness standard.<sup>6</sup>

The Bureau asserted that the Policy Statement was necessary to address the uncertainty of the abusiveness standard based on the Bureau’s conclusions that such uncertainty was “not beneficial,” presented “significant challenges” to businesses, imposed “substantial costs, including impeding innovation,” and may cause consumers to “lose the benefits of improved products or services and lower prices.”<sup>7</sup> As the Policy Statement referenced, some panelists at the Bureau’s June 2019

Symposium on Abusive Acts or Practices urged the Bureau to resolve the abusiveness standard’s uncertainty for these and other reasons,<sup>8</sup> while others expressed the view that the statutory definition of abusiveness is sufficiently clear and that no evidence supported the claims that the uncertainty had affected business practices, including chilling innovation.<sup>9</sup>

Based on its review of, and experience in applying, the Policy Statement, however, the Bureau has concluded that the principles set forth in the Policy Statement do not actually deliver clarity to regulated entities. In fact, the Policy Statement’s intended principles, including “making a good-faith effort to comply with the abusiveness standard,” themselves afford the Bureau considerable discretion in its application and add uncertainty to market participants. Additionally, the Bureau’s further consideration of and experience under the Policy Statement have led it to conclude that the intended principles have the effect of hampering certainty over time. Not asserting abusiveness claims solely because of their overlap with unfair or deceptive conduct or based on the other intended principles articulated in the Policy Statement has the effect of slowing the Bureau’s ability to clarify the statutory abusiveness standard by articulating abusiveness claims as well as through the ensuing issuance of judicial and administrative decisions. It is thus counterproductive to the purpose of the original Policy Statement.

<sup>8</sup> *Id.* at 6735 n.16 (citing panelists from the Bureau’s June 2019 Symposium on Abusive Acts or Practices).

<sup>9</sup> See, e.g., Adam J. Levitin, “Abusive” Acts and Practices: Towards a Definition?, Written Submission Prepared for CFPB Symposium on “Abusive” at 6–7, 9, [https://files.consumerfinance.gov/f/documents/cfpb\\_levitin-written-statement\\_symposium-abusive.pdf](https://files.consumerfinance.gov/f/documents/cfpb_levitin-written-statement_symposium-abusive.pdf) (arguing that the “statutory language of the [Dodd-Frank Act] and the Bureau’s enforcement actions to date provide a sense of the scope of ‘abusive,’” that “[t]he Bureau would do better to allow the term to be better defined through the common law process,” and that “there is no evidence that uncertainty on the issue is affecting business practices at all; the claims of certain trade associations on the matter are completely unsubstantiated”); Nicholas F.B. Smyth, presenting on behalf of Pennsylvania Attorney General Josh Shapiro, Statement submitted to the Bureau for the symposium on Abusive Acts or Practices at 1, 5 (June 25, 2019), [https://files.consumerfinance.gov/f/documents/cfpb\\_smyth-written-statement\\_symposium-abusive.pdf](https://files.consumerfinance.gov/f/documents/cfpb_smyth-written-statement_symposium-abusive.pdf) (asserting that the abusiveness standard “does not stifle innovation any more than the prohibitions on unfairness or deception do,” and that “[e]very time Congress creates a new standard, there is a period of time when some uncertainty may exist as to what conduct violates that standard and what does not. This is perfectly normal, and the Courts are well equipped to interpret new standards.”).

<sup>1</sup> Public Law 111–203, tit. X, sec. 1031(a), 124 Stat. 1376, 2005 (2010) (codified at 12 U.S.C.

5531(a)); see also 12 U.S.C. 5536(a)(1)(B) (making it unlawful for any covered person or service provider to engage in any abusive act or practice).

<sup>2</sup> 85 FR 6733 (Feb. 6, 2020).

<sup>3</sup> *Id.* at 6736.

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

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 6735–36.