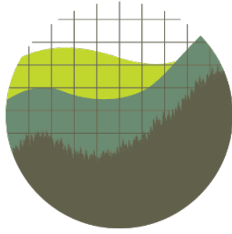

November 4, 2020

Lynn Mahaffie, U.S. Department of Education

Subject: Comments on Interim Final Rule on "Rulemaking and Guidance Procedures"

The Institute for Policy Integrity at New York University School of Law[1] submits these comments on the Department of Education's interim final rule on Rulemaking and Guidance Procedures.[2] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

The interim final rule contains many misguided provisions. As such, the Department of Educations should withdraw the interim final rule. If the Department wishes to propose provisions along these lines, it should submit a notice of proposed rulemaking subject to a full and adequate public comment period. While the Department claims that the rulemaking is exempt from any requirement to provide an adequate opportunity for public comment, by its own terms the rule's goal is to provide *the public* with "increased transparency," and so it is not at all clear that the rule would qualify as the kind of procedural rule "directed toward improving the efficient and effective operations *of an agency*" that may fall within the Administrative Procedure Act's narrow exemption to notice-and-comment rulemaking.[3] Regardless, according to the criteria set out by the Administrative Conference of the United States, the Department "should" allow for public comment on all aspects of this rulemaking.[4] By releasing the rule as an "interim final rule," the Department has obscured and curtailed the public's opportunity to comment. The rule should be withdrawn and either not re-proposed at all (given its many misguided provisions as described below), or else re-proposed with a full opportunity for public comment.

Several controversial provisions in the rule highlight the need for a full public comment period. Most glaring and problematic are the multiple additional hurdles that the rule seeks to erect for significant and "high-impact" rulemakings. In erecting these new obstacles, the rule fails to satisfy its own standard for clearly stating a demonstrated "need" for the proposed regulation: the rule never adequately explains why additional procedural hurdles, like formal hearings, are necessary or beneficial. The rule

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[1] This document does not purport to present New York University School of Law's views, if any.

[2] 85 Fed. Reg. 62,597 (Oct. 5, 2020).

[3] AFL-CIO v. NLRB, 2020 WL 3041384 at *14 (D.C. Cir., June 7, 2020) (emphasis added); *see also id.* at *13 (explaining that the APA "establishes that an agency rule is essentially *presumed* to be substantive for the purpose of the notice-and-comment requirement, and that notice-and-comment rulemaking is thus generally required *unless* a rule satisfies one of the listed exceptions"); *id.* at *15 ("[I]f the agency cannot show that the default assumptions of the APA have been properly displaced because the rule at issue is, in fact, directed at the agency's internal processes despite the incidental effect on the parties, then the rule cannot be characterized as fitting within the APA's narrow procedural exemption, and notice-and-comment is required.").

[4] ACUS Recommendation 92-1, *The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements* § 2 (1992) ("For rules falling within the 'procedure or practice' exception in 5 U.S.C. 553(b)(A), agencies should use notice-and-comment procedures voluntarily except in situations in which the costs of such procedures will outweigh the benefits of having public input and information on the scope and impact of the rules, and of the enhanced public acceptance of the rules that would derive from public comment.").

further fails to consider the costs of these additional hurdles in terms of delayed regulatory benefits. These comments hereby incorporate the arguments against such procedural hurdles detailed in Policy Integrity's attached issue brief on why similar requirements proposed in the un-enacted Regulatory Accountability Act were "misguided and wasteful."[5]

The rule is also arbitrarily biased in favor of deregulation and against full consideration of regulatory benefits. For example, the rule announces that deregulatory rulemakings will be assessed for cost savings, but fails to clarify that forgone benefits must also be assessed. The provisions on retrospective review include a review of the "cost justification" to test whether the rule "is no longer net beneficial," but the rule fails to provide for a review of whether the net benefits of existing rules could be *increased* by modifying the stringency or scope or structure of the regulation. And at several points, the rule requires that regulatory benefits must "exceed" or "outweigh" costs, when the appropriate language (as articulated by Executive Order 12,866) is that benefits should "justify" costs—language that better allows analysts and decisionmakers to give due weight to unquantified benefits.

The rule also contains problematically vague language. For example, the rule adopts many threshold criteria for proposing a new regulation, including that the rulemaking interpretations must raise no "major questions." The rule does not define this loaded term. Perhaps the Department intended to apply the smattering of vague and controversial pronouncements from recent court decisions about so-called "major question," but invoking such undefined and controversial language is problematic—especially given that the Department has obscured and curtailed any public comment on this rule.

Finally, the rule is inconsistent with best practices as articulated in recommendations from the Administrative Conference of the United States. For example, the rule instructs that public petitions for rulemaking must be submitted through the "docket designated for petitions on regulations.gov." Currently on regulations.gov, there is a docket ED-2020-OGC-0163-0001 open for comment, but is difficult for unsophisticated petitioners to find that one particular docket among dozens or hundreds of other dockets, and the comment period for that docket seemingly closes on December 31, 2021. The only document in that docket is a set of instructions for submitting petitions, but the instructions generically refer petitioners to submit petitions to docket "ED-XXXX-OGC-XXXX"—a docket that does not exist. Potential public petitioners are thus likely to be confused as to the proper procedure. The Department should ensure that it is transparently facilitating the petition process, consistent with the recommendations from the Administrative Conference.[6]

For all these reasons, among others, the interim final rule should be withdrawn.

Sincerely,

Jason A. Schwartz, Legal Director
Institute for Policy Integrity

Attached: Policy Integrity, *The Senate's Misguided and Wasteful Regulatory Accountability Act* (May 2017)

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[5] Policy Integrity, *The Senate's Misguided and Wasteful Regulatory Accountability Act* (Policy Integrity Issue Brief, May 2017), https://policyintegrity.org/files/publications/SenateRAA.pdf.

[6] *Available at* https://www.acus.gov/sites/default/files/documents/Final%2520Petitions%2520for%2520Rulemaking%2520Recommendation%2520%255B12-9-14%255D.pdf. Note that Jason A. Schwartz, author of these comments, was the consultant to ACUS on these recommendations.