

DOT 2100.6A

June 7, 2021

Subject: RULEMAKING AND GUIDANCE PROCEDURES

1. PURPOSE

This Order sets forth updated policies and procedures governing the development and issuance of regulations and guidance documents by the U.S. Department of Transportation (the Department or DOT). This Order is intended to ensure that DOT, including each of its operating administrations (OAs) and all components of the Office of the Secretary of Transportation (OST), adheres to (i) all statutory requirements applicable to DOT rulemakings, including the rulemaking provisions of the Administrative Procedure Act (APA), referenced below; (ii) Executive Order 12866, as referenced below, and any amendment thereto; (iii) all applicable Office of Management and Budget (OMB) directives for rulemaking and guidance documents; (iv) the Department's Strategic Plan; and (v) best practices for rulemaking, including best practices for appropriate outreach to interested parties throughout the rulemaking process, and economic analyses. This Order shall be interpreted and applied to promote and to be consistent with the safe operation of the transportation systems and transportation activities over which DOT is granted regulatory authority.

2. CANCELLATIONS

The following are hereby canceled and superseded by this Order:

- a. DOT 2100.6: Policies and Procedures for Rulemaking (December 20, 2018)
- b. General Counsel memorandum, "Review and Clearance of Guidance Documents" (December 20, 2018)

3. EFFECTIVE DATE

This Order shall be effective upon issuance.

4. REFERENCES

- a. Administrative Procedure Act (APA), section 551 et. seq. of title 5 of the United States Code, which prescribes general procedural requirements of law applicable to all Federal agencies regarding the formulation and issuance of regulations.
- b. Executive Order 12866, "Regulatory Planning and Review" (October 4, 1993), which sets forth a regulatory philosophy and principles to which all Federal agencies should

adhere, including requirements to regulate in the “most cost-effective manner,” and to make “a reasoned determination that the benefits of the intended regulations justify its costs.”

- c. OMB Bulletin 07-02, “Agency Good Guidance Practices” (January 25, 2007), which established policies and procedures for the development, issuance, and use of significant guidance documents by Executive Branch departments and agencies.
- d. OMB Circular A-4, “Regulatory Analysis” (September 13, 2003), which provides guidance to Federal agencies on the development of regulatory analysis.
- e. Regulatory Flexibility Act, section 601 et. seq. of title 5 of the United State Code, which requires Federal agencies to consider the impact of their rules on small entities.

## **PART I: POLICIES AND PROCEDURES FOR RULEMAKINGS**

### **5. APPLICABILITY**

- a. This Part governs all DOT employees and contractors involved with all phases of rulemaking at DOT.
- b. Unless otherwise required by statute, this Part applies to all DOT regulations, which shall include all rules of general applicability promulgated by the Department’s OAs and all components of OST that affect the rights or obligations of persons outside the Department, including substantive rules, rules of interpretation, and rules prescribing agency procedures and practice requirements applicable to outside parties. This Part applies to all regulatory actions intended to lead to the promulgation of a rule. This Part also applies to any other generally applicable agency directives, circulars, or pronouncements concerning matters within the jurisdiction of an OA or component of OST that are intended to have the force and effect of law or that are required by statute to satisfy the rulemaking procedures specified in section 553 or section 556 of title 5, United States Code.
- c. This Part does not apply to:
  - (1) Regulations issued with respect to a military or foreign affairs function of the United States;
  - (2) Rules addressed solely to internal agency management or personnel matters;
  - (3) Regulations related to Federal Government procurement; or
  - (4) Guidance documents. See Part II for procedures concerning guidance documents.

### **6. RESPONSIBILITIES**

- a. The Secretary of Transportation supervises the overall planning, direction, and control of the Department’s Regulatory Agenda; and approves regulatory documents for

issuance and submission to OMB under Executive Order 12866.

- b. The General Counsel of DOT is the chief legal officer of the Department with final authority on all questions of law for all OAs and components of OST; and serves as the Department's Regulatory Policy Officer pursuant to section 6(a)(2) of Executive Order 12866. The General Counsel submits certain regulatory documents to the Secretary for approval before issuance or submission to OMB.
- c. DOT's Assistant General Counsel for Regulation supervises the Office of Regulation within the Office of the General Counsel (OGC); oversees the process for DOT rulemakings; provides legal advice on compliance with all APA and other administrative law requirements and with executive orders, OMB directives, and other regulatory procedures; circulates regulatory documents for departmental review and seeks concurrence from reviewing officials; and coordinates with the Office of Information and Regulatory Affairs (OIRA) within OMB on the designation and review of regulatory documents and the preparation of the Unified Agenda of Regulatory and Deregulatory Actions. The Office of Regulation will share "good practices" across OAs to promote consistent and efficient rulemaking practices throughout DOT.
- d. Pursuant to delegations from the Secretary under 49 CFR 1.81(a)(3), OA Administrators and Secretarial officers exercise the Secretary's rulemaking authority under section 322(a) of title 49 of the United States Code, and they have responsibility for ensuring that the regulatory data included in the Regulatory Management System or a successor data management system for their OAs and OST components is accurate and is updated at least monthly by the last business day of the month.
- e. OA Chief Counsels supervise the legal staff of the OAs; interpret and provide guidance on enabling statutes, implementing regulations, executive orders, and other legal requirements governing the operation and authorities of their respective OAs; and review all rulemaking documents for legal sufficiency.
- f. Each OA or OST component responsible for rulemaking must ensure that, before a rulemaking document is submitted to the Office of Regulation, it is written clearly, technically sound, and of general high quality. Upon or prior to submission of a rulemaking document to the Office of Regulation, OA and OST components should identify for OST any areas of new, innovative, or uncertain use of statutory authorities.

## 7. REGULATORY LEADERSHIP GROUP

- a. Purpose. The Regulatory Leadership Group (RLG) provides legal and policy management of the Department's regulatory agenda. The RLG provides substantive direction on individual regulations prior to publication of documents at each stage in the rulemaking proceeding to ensure all DOT regulations reflect senior departmental leaders' goals and priorities.
- b. Working Groups. The RLG has authority to establish one or more Working Groups, as necessary to provide recommendations to the RLG on specific regulatory matters.

- c. Membership.
- (1) The RLG comprises the following:
    - (a) The Department's General Counsel, who serves as Chair and Regulatory Policy Officer, designated under section 6(a)(2) of Executive Order 12866;
    - (b) At least one Deputy General Counsel, designated by the General Counsel;
    - (c) The Chief of Staff, or designee;
    - (d) The Deputy Secretary, or designee;
    - (e) A representative from the Office of the Under Secretary of Transportation for Policy; and
    - (f) At least two additional senior agency officials as determined by the Secretary.
  - (2) At a minimum, Working Groups comprise the following:
    - (a) The Assistant General Counsel for Regulation, as chair of the working group, and at least one other senior official from OGC, as determined by the General Counsel;
    - (b) At least one senior agency official from the Office of the Under Secretary of Transportation for Policy, as determined by the Under Secretary of Transportation for Policy; and
    - (c) Other senior agency officials from the Office of the Secretary, as determined by the General Counsel.
- d. Functions and responsibilities. The RLG performs the following duties: considers regulation and regulatory policy questions (which may include proposed guidance documents) and makes recommendations to the Secretary to resolve those questions.
- e. Support. The Office of Regulation within OGC provides support to the RLG.
- f. Meetings. The RLG meets periodically and holds specially scheduled meetings when necessary to address particular regulatory matters. The Working Group(s) meets as needed to focus on specific tasks assigned by the RLG.
- g. Agenda. The Office of Regulation prepares an agenda for each meeting of the RLG and distributes it to the RLG members and any invited OA or OST component representatives in advance of the meeting, together with any documents to be discussed at the meeting. The OA or OST component responsible for matters on the agenda will be invited to attend the RLG and Working Group meetings to make presentations and respond to questions.

- h. Minutes. The Office of Regulation prepares summary minutes following each meeting and distributes them to the meeting's attendees.

## 8. INITIATING A RULEMAKING

- a. The Department issues regulations for the primary purpose of ensuring the United States transportation system is the safest and most efficient in the world, while also addressing the urgent challenges facing the Nation including stimulating economic recovery and growth, remedying inequitable distribution of transportation benefits and impacts, mitigating environmental harms, reducing greenhouse gas emissions, and building a resilient transportation system. Before an OA or component of OST requests to initiate a new rulemaking, the Administrator of the OA or the Secretarial officer who heads the OST component must consider the regulatory purpose of DOT and the OA, if applicable, and the principles of regulation contained in Executive Order 12866 and other applicable executive orders on regulation. If the OA Administrator or OST component head determines that rulemaking is warranted, consistent with the Department's regulatory purpose and executive order principles, the Administrator or component head may prepare a Rulemaking Initiation Request.
- b. The Rulemaking Initiation Request should specifically state or describe:
  - (1) A proposed title for the rulemaking;
  - (2) The need for the regulation, including a description of any statutory mandate, market failure, or social purpose necessitating the rulemaking;
  - (3) The legal authority for the rulemaking;
  - (4) Whether the rulemaking is expected to be significant, as defined by section 3(f) of Executive Order 12866 and, if so, whether it is expected to have an annual effect on the economy of \$100 million or more, as described in section 3(f)(1) of Executive Order 12866);
  - (5) Whether the rulemaking is expected to be "of special note to the Department," as defined in section 10(a)(2) of this Order;
  - (6) A description of the potential economic impact associated with the rulemaking, including whether the rulemaking is likely to impose quantifiable or nonquantifiable costs or benefits;
  - (7) A description of any effects, including quantifiable or nonquantifiable costs or benefits, the potential rule may have on safety, equity, and the environment;
  - (8) A description of stakeholder engagement, including anticipated support and opposition for the rulemaking, sense of the degree of controversy, any communications with stakeholders regarding the issues involved in the rulemaking to date, and whether there have been balanced opportunities for parties to weigh in on the issues involved in the rulemaking, consistent with

section 11 of this Order;

- (9) The tentative target dates for completing the first stage of the rulemaking;
  - (10) Whether the subject matter of the rulemaking involves a technology that could present a cybersecurity risk, and, if so, whether the rulemaking will address that risk; and,
  - (11) Whether there is a statutory or judicial deadline, or some other urgency, associated with the rulemaking.
- c. The OA or OST component submits the Rulemaking Initiation Request to the Office of Regulation, together with any other documents that may assist in consideration of the request.
  - d. The General Counsel will approve or deny Rulemaking Initiation Requests, and the Office of Regulation will inform the OA or OST component of the General Counsel's determination. Upon submission of a Rulemaking Initiation Request, the General Counsel will identify, in coordination with the RLG, whether a rulemaking, regardless of whether the rule is expected to or would be significant under Executive Order 12866, is nevertheless "of special note to the Department," as defined in section 10(a)(2) of this Order.
  - e. The OA or OST component may assign a Regulatory Information Number (RIN) to the rulemaking only upon notification that the Rulemaking Initiation Request is approved.
  - f. The process for initiating a rulemaking as described herein may be waived or modified for any rule or category of rules with the approval of the General Counsel. Unless otherwise determined by the General Counsel, the Administrator of the Federal Aviation Administration (FAA) may promulgate an emergency rule under section 106(f)(3)(B)(ii) or section 46105(c) of title 49, United States Code, without first submitting a Rulemaking Initiation Request.
  - g. Rulemaking Initiation Requests will be considered on a rolling basis; however, the Office of Regulation may establish deadlines for submission of Rulemaking Initiation Requests so that new rulemakings may be included in the Unified Agenda of Regulatory and Deregulatory Actions.

## 9. UNIFIED AGENDA OF REGULATORY AND DEREGULATORY ACTIONS

- a. The Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda) provides uniform reporting of data on regulatory and deregulatory activities under development throughout the Federal Government, covering approximately 60 departments, agencies, and commissions.
- b. Fall editions of the Unified Agenda include the Regulatory Plan, which presents the Department's statement of regulatory priorities for the coming year. Fall editions also include the outcome and status of the Department's reviews of existing regulations,



conducted in accordance with section 10(d) of this Order.

- c. The OAs and components of OST with rulemaking authority must:
- (1) Carefully consider the principles contained Executive Order 12866 and any other relevant existing Executive Orders in the preparation of all submissions for the Unified Agenda;
  - (2) Ensure that all data pertaining to the OA's or OST component's rulemakings are accurately reflected in the Department's Unified Agenda submission; and
  - (3) Timely submit all data to the Office of Regulation in accordance with the deadlines and procedures communicated by that office.

## 10. GENERAL RULEMAKING PROCEDURES

a. Definitions.

- (1) "Significant rulemaking" means a regulatory action designated as such by OIRA under Executive Order 12866.
- (2) A rulemaking "of special note to the Department" means a regulatory action, designated as such by the General Counsel, that is subject to review by OST under section 10(b) of this Order that may reasonably be anticipated:
  - (a) To relate to a major program, policy, or activity of the Department or a high-profile issue pending for decision before the Department;
  - (b) To involve one of the Secretary's top policy priorities;
  - (c) To garner significant press or congressional attention; or
  - (d) To raise significant questions or concerns from constituencies of importance to the Department, such as Committees of Congress, States or Indian tribes, the White House or other departments of the Executive Branch, courts, consumer or public interest groups, labor, cities and counties, or leading representatives of industry.
- (3) Unless they raise novel legal or policy issues, the following rulemakings are not "of special note to the Department": (i) Modifications to existing regulations consisting of amendments that are ministerial in character and not legally discretionary; (ii) technical or editorial corrections to rules or notices that do not materially affect the substance of the underlying rulemaking document; (iii) Final rules that are limited to the adoption of statutory language, without interpretation; and (iv) final rules for which no substantive comments were received and which do not differ from a proposed rule that was not designated "of special note to the Department."

- (4) “Nonsignificant rulemaking” means a regulatory action not designated significant by OIRA. OGC may designate a nonsignificant rulemaking as “of special note to the Department,” as defined in section 10(a)(2), which would subject such nonsignificant rule to review, as applicable, by OST under subsection (b).
- b. Departmental review process.
- (1) OST review and clearance.
    - (a) Except as provided herein or as otherwise provided in writing by OGC, significant rulemakings and rulemakings “of special note to the Department” are to be reviewed and cleared by OST. Nonsignificant rulemakings that are not designated “of special note to the Department” may be issued by OA leadership without review and clearance by OST.
    - (b) Except as provided herein or as otherwise provided in writing by OGC, all rulemakings issued by OST are to be reviewed and cleared by OST.
    - (c) The FAA Administrator may promulgate emergency rules pursuant to sections 106(f)(3)(B)(ii) and 46105(c) of title 49, United States Code, without prior approval from the Secretary, or the Secretary’s designee; provided that to the maximum extent practicable and consistent with law, the FAA Administrator will give OST advance notice of such emergency rules and will allow OST to review the rules in accordance with the provisions of this Order at the earliest opportunity after they are promulgated.
  - (2) To effectuate departmental review under this Order, the following Secretarial offices ordinarily review and approve DOT rulemakings subject to review by OST: the Office of the Under Secretary for Policy, the Office of Public Affairs, the Office of Budget and Programs and Chief Financial Officer, OGC, and the Office of Governmental Affairs. OGC’s Office of Regulation may also require review and clearance by other Secretarial offices and OAs depending on the nature of the specific rulemaking document.
  - (3) Reviewing offices should provide comments or otherwise concur on rulemaking documents within 7 calendar days, unless exceptional circumstances apply that require expedited review or, conversely, if additional time is needed for review for particularly lengthy or complex rulemakings.
  - (4) The Office of Regulation provides a pass-back of comments to the proposing OA or OST component for resolution. Comments should be resolved and a revised draft submitted to the Office of Regulation by the OA or OST component within 14 calendar days or on a schedule negotiated between the Office of Regulation



and the OA based on the length and complexity of the rulemaking and the nature of the comments. Additional time may be needed for comment resolution and revision if the rulemaking is particularly lengthy or complex. The Office of Regulation will endeavor to inform the OA or OST component of exceptional circumstances as expeditiously as possible.

- (5) The Office of Regulation prepares a rulemaking package for the General Counsel to request the Secretary's approval for the rulemaking to be submitted to the OIRA for review. These rulemaking packages are submitted through the General Counsel to the Office of the Executive Secretariat.
  - (6) The Office of Regulation notifies the proposing OA or OST component when the Secretary approves or disapproves the submission of the rulemaking to OIRA or publication in the Federal Register.
  - (7) The Office of Regulation is responsible for coordination with OIRA staff on the designation of all rulemaking documents, submission and clearance of all significant rulemaking documents, and all discussions or meetings with OIRA concerning these documents. OAs and OST components should not schedule their own meetings with OIRA without Office of Regulation involvement. Each OA or OST component should coordinate with the Office of Regulation before holding any discussions with OIRA concerning regulatory policy or agreements to modify regulatory documents.
- c. Petitions for rulemaking are handled in accordance with the procedures found in 49 CFR 5.3.
- d. Review of existing regulations.
- (1) All departmental regulations are on a 10-year review cycle, as described in Appendix D of the Unified Agenda.
  - (2) The OA or OST component that issued the regulation will review an existing rule for the following:
    - (a) Regulatory flexibility: Whether the regulation has a significant economic impact on a substantial number of small business entities and, thus, requires review under section 610 of the Regulatory Flexibility Act, chapter 6 of title 5, United States Code;
    - (b) General updates: Whether the regulation may require technical corrections, updates (e.g., to reflect updated versions of voluntary consensus standards that may be tied to DOT regulations), revisions, rewriting to ensure its language is clear, or repeal; and
    - (c) Other considerations as required by relevant executive orders and laws.

- (3) The results of each OA's or OST component's review will be reported annually in Appendix D of the Unified Agenda.
- e. Supporting economic analysis.
- (1) Rulemakings shall include, at a minimum, an assessment of the potential benefits, costs, and other important impacts of the regulatory action (which may entail a regulatory impact analysis, or RIA).
  - (2) Economic analyses should quantify to the extent practicable the benefits, costs, and any significant distributional impacts in accordance with the requirements of section 6(a)(3)(B) and (C) of Executive Order 12866 and OMB Circular A-4. When equity or environmental metrics of interest have been identified, the economic analysis should characterize any equity or environmental impacts. If quantification is not possible, impacts should be described qualitatively.
- f. Regulatory flexibility analysis. All rulemakings subject to the requirements of sections 603-604 of title 5, United States Code (i.e., the analytical requirements of the Regulatory Flexibility Act), and any amendment thereto, shall include a detailed statement setting forth the required analysis regarding the potential impact of the rule on small business entities.
- g. Advance notices of proposed rulemaking. Before determining to issue an ANPRM, the responsible OA or OST component shall consult with OST concerning the need for the potential rule, as described in section 8 of this Order. Whenever the OA or OST component responsible for a proposed rulemaking develops an advance notice of proposed rulemaking (ANPRM) for publication in the *Federal Register*, the ANPRM should:
- (1) Include a written statement identifying, at a minimum—
    - (a) The nature and significance of the problem the OA or OST component may address with a rule;
    - (b) The legal authority under which a rule may be proposed; and
    - (c) Any preliminary information available to the OA or OST component that may support one or another potential approach to addressing the identified problem;
  - (2) Solicit written data, analysis, views, and recommendations from interested persons concerning the information and issues addressed in the ANPRM; and
  - (3) Provide for a reasonably sufficient period for public comment (see section 10(i)(2) below).

- h. Notices of proposed rulemaking.
- (1) When required. Before determining to propose a rule, the responsible OA or OST component shall consult with OST concerning the need for the potential rule, as described in section 8 of this Order. If it is appropriate to propose a rule, the proposing OA or OST component shall publish a notice of proposed rulemaking (NPRM) in the *Federal Register*, unless a controlling statute provides otherwise or unless OGC determines that an NPRM is not required or OGC determines there is legal justification to waive the requirement.
  - (2) Contents. The NPRM shall include, at a minimum—
    - (a) The need for the regulation, including a description of any statutory mandate necessitating the rulemaking.
    - (b) A statement of the time and place for submission of public comments and the time, place, and nature of related public rulemaking proceedings, if any;
    - (c) Reference to the legal authority under which the rule is proposed;
    - (d) The terms of the proposed rule;
    - (e) A description of information known to the proposing OA or OST component on the subject and issues of the proposed rule, including but not limited to—
      - (i) A summary of material information known to the OA or OST component concerning the proposed rule;
      - (ii) A summary of any preliminary risk assessment performed by the OA or OST component; and
      - (iii) Information specifically identifying all material data, studies, models, available voluntary consensus standards, and other evidence or information considered or used by the OA or OST component in connection with its determination to propose the rule;
    - (f) A reasoned preliminary economic analysis, as described in section 10(e) of this Order;
    - (g) If the rulemaking is significant, a summary discussion of (i) the alternatives to the proposed rule considered by the OA or OST component, (ii) the relative costs and benefits of those alternatives, (iii) whether the alternatives would meet relevant statutory objectives, and (iv) why the OA or OST component chose not to propose or pursue the alternatives; and
    - (h) All other statements and analyses required by law, including, without limitation, the Regulatory Flexibility Act or any amendment thereto.

- (i) A specific request for public comments on any potential equity or climate change impacts of the proposed rule.
  - (3) Information access and quality. To inform public comment when the NPRM is published, the proposing OA or OST component shall place in the docket for the proposed rule and make accessible to the public, including by electronic means, all material information relied upon by the OA or OST component in considering the proposed rule, unless the information is exempt from disclosure under section 552(b) of title 5, United States Code. Material provided electronically should be made available in accordance with the requirements of section 794d of title 29, United States Code (section 508 of the Rehabilitation Act of 1973, as amended).
- i. Public comment.
  - (1) Following publication of an NPRM, the Department will provide interested persons a fair and sufficient opportunity to participate in the rulemaking through submission of written data, analysis, views, and recommendations.
  - (2) Generally, absent special considerations, the comment period for nonsignificant DOT rules should be at least 30 days, and the comment period for significant DOT rules should be at least 60 days.
  - (3) If the OA or OST component intends to support a final rule with specialized factual information identified after the close of the comment period, the OA or OST component should consult with the Office of Regulation on whether to allow an additional opportunity for public comment on such information.
- j. Exemptions from notice and comment.
  - (1) Except when prior notice and an opportunity for public comment are required by statute or determined by the Secretary to be advisable for policy or programmatic reasons, the responsible OA or OST component may, in consultation with OST pursuant to (b)(2) of this section, publish certain final rules in the *Federal Register* without prior notice and opportunity for comment. The rule should explicitly state why the rule is exempt from prior notice and an opportunity for comment. Final rules that may be issued without notice and an opportunity for comment include:
    - (a) Rules of interpretation and rules addressing only DOT organization, procedure, or practice, provided such rules do not alter substantive obligations for parties outside the Department;
    - (b) Rules for which notice and comment is unnecessary to inform the rulemaking, such as rules correcting *de minimis* technical or clerical errors or rules addressing other minor and insubstantial matters, provided the reasons to forgo public comment are explained in the preamble to the final rule; and

- (c) Rules that require finalization without delay, such as rules to address an urgent safety or national security need, and other rules for which it would be impracticable or contrary to public policy to accommodate a period of public comment, provided the responsible OA or OST component makes findings that good cause exists to forgo public comment and explains those findings in the preamble to the final rule.
  - (2) Interim final rules. When an OA or OST component issues an interim final rule, it should proceed at the earliest opportunity to replace the IFR with a final rule that responds to any comments received on the IFR.
- k. Final rules. A final rule, which shall include the text of the rule as adopted along with a supporting preamble, shall be published in the *Federal Register* and shall satisfy the following requirements:
  - (1) The preamble to the final rule shall include—
    - (a) A concise, general statement of the rule’s basis and purpose, including clear reference to the legal authority supporting the rule;
    - (b) A reasoned, concluding determination by the adopting OA or OST component regarding each of the considerations required to be addressed in an NPRM under subsection h(2)(e)-(g) of this section;
    - (c) A reasoned response to significant issues raised in the comments to the proposed rule;
    - (d) If the final rule has changed in significant respects from the rule as proposed in the NPRM, an explanation of the changes and the reasons why the changes are needed or are more appropriate to advance the objectives identified in the rulemaking and how such changes were the “logical outgrowth” of the NPRM and information received thereon; and
    - (e) A reasoned, final determination that the information upon which the OA or OST component bases the rule complies with the Information Quality Act, section 515 of Pub. L. No. 106-554—Appendix C, 114 Stat. 2763A–153-54 (2001), or any subsequent amendment thereto.
  - (2) If the rule rests on scientific, technical, economic, or other specialized factual information, the OA or OST component should base the final rule on the best and most relevant reasonably obtainable evidence and data known to the Department and should ensure that such information is clearly identified in the preamble to the final rule and is available to the public in the rulemaking record, subject to reasonable protections for information exempt from disclosure under section 552(b) of title 5, United States Code.
  - (3) All final rules issued by the Department (a) shall be written in clear and under-

standable English; (b) shall be based on a reasonable and well-founded interpretation of relevant statutory text; and (c) shall not be inconsistent or incompatible with, or unnecessarily duplicative of, other Federal regulations.

1. Reports to Congress. For each final rule adopted by DOT, the responsible OA or OST component shall submit the reports separately to the U.S. Senate, House of Representatives, and Government Accountability Office, and comply with the procedures specified by section 801 of title 5, United States Code (the Congressional Review Act), or any subsequent amendment thereto.
- m. Negotiated rulemakings.
  - (1) In appropriate cases, DOT encourages OAs and OST components to consider using a negotiated rulemaking process to supplement APA procedures for rulemaking. By bringing representatives of affected constituencies together in a committee process to participate in the collaborative development of a proposed rule, negotiated rulemaking can promote consensus, enable DOT to receive relevant data more efficiently, simplify implementation of the final rule and reduce the likelihood or scope of a litigation challenge, and result in a more effective and durable final rule. DOT negotiated rulemakings are to be conducted in accordance with the Negotiated Rulemaking Act, sections 561-571 of title 5, United States Code, and the Federal Advisory Committee Act, Appendix 2 of title 5, United States Code, as applicable.
  - (2) Before initiating a negotiated rulemaking process, the OA or OST component should: (a) assess whether using negotiated rulemaking procedures for the proposed rule in question is in the public interest, in accordance with section 563(a) of title 5, United States Code, and present these findings for OST review; and (b) consult with the Office of Regulation on the appropriateness of negotiated rulemaking and the procedures therefor.
  - (3) Unless otherwise approved by the General Counsel, all DOT negotiated rulemakings should involve the assistance of a convener and a facilitator, as provided in the Negotiated Rulemaking Act. A convener is a person who impartially assists the agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking. A facilitator is a person who impartially aids in the discussions and negotiations among members of a negotiated rulemaking committee to develop a proposed rule. The same person may serve as both convener and facilitator.
  - (4) All charters, membership, *Federal Register* notices, and operating procedures (or bylaws) for negotiated rulemaking committees must be approved by OGC.



## 11. PUBLIC CONTACTS IN INFORMAL RULEMAKING

OAs and OST components are encouraged to conduct outreach and provide access equitably to stakeholder groups and provide robust opportunities for discussion early in, and throughout, the rulemaking process. OAs and OST components should ensure that outreach includes providing adequate opportunities for stakeholders who may not have access to extensive legal and lobbying support. Agency contacts with the public during informal rulemakings shall be conducted in accordance with section 553 of title 5, United States Code, and 49 CFR 5.5.

## PART II: GUIDANCE PROCEDURES

### 12. APPLICABILITY.

- a. This Part governs all DOT employees and contractors involved with all phases of issuing DOT guidance documents.
- b. Subject to the qualifications and exemptions contained in this Part and as otherwise provided in writing by the General Counsel, these procedures apply to all guidance documents issued by all components of the Department.
- c. For purposes of this Part, the term *guidance document* means a new, or amendment to an existing, statement of agency policy or interpretation concerning a statute, regulation, or technical matter within the jurisdiction of the agency that does not have the force or effect of law. The term is not confined to formal written documents; guidance may come in a variety of forms, including (but not limited to) letters, memoranda, circulars, bulletins, and advisories, and may also include video, audio, and Web-based formats. See OMB Bulletin 07-02, “Agency Good Guidance Practices,” (January 25, 2007) (“OMB Good Guidance Bulletin”).
- d. This Part does not apply to:
  - (1) Rulemakings, which are covered by procedures contained in Part I of this Order, as well as rules exempt from rulemaking requirements because they pertain to national security, military functions, or foreign policy;
  - (2) Rules of agency organization, procedure, or practice;
  - (3) Decisions of agency adjudications under section 554 of title 5, United States Code or similar statutory provisions, and other agency statements of specific applicability, such as orders and exemptions;
  - (4) Internal executive branch legal advice or legal advisory opinions addressed to executive branch officials;
  - (5) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;

- (6) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and individual presentations, editorials, media interviews, press materials, or congressional testimony;
- (7) Grant or cooperative agreement solicitations and awards;
- (8) Contract solicitations and awards; or
- (9) Purely internal agency policies or guidance directed solely to DOT employees or contractors or to other Federal agencies.

13. REVIEW AND CLEARANCE BY CHIEF COUNSELS AND THE OFFICE OF THE GENERAL COUNSEL.

All DOT guidance documents, as defined in section 12(c) of this Order, require review and clearance in accordance with this Part.

- a. Guidance proposed to be issued by an OA of the Department must be reviewed and cleared by the OA's Office of Chief Counsel. The OA's Office of Chief Counsel may, in its discretion, waive review of certain categories of guidance documents that are not "of special note to the Department," as defined in section 16 of this Order. In addition, as provided in section 16 of this Order, some OA guidance documents will require review and clearance by OGC.
- b. Guidance proposed to be issued by an OST component must be reviewed and cleared by OGC.
- c. Certain guidance documents may include policy questions that require consideration by the RLG (see section 7 of this Order).

14. REQUIREMENTS FOR CLEARANCE.

DOT's review and clearance of guidance shall ensure that each guidance document proposed to be issued by an OA or OST component satisfies the following requirements:

- a. The guidance document complies with all relevant statutes and regulations (including any statutory deadlines for agency action);
- b. The guidance document identifies or includes:
  - (1) The term "guidance" or its functional equivalent;
  - (2) The issuing OA or OST component;
  - (3) A unique identifier, including, at a minimum, the date of issuance and title of the document;

- (4) The activity or entities to which the guidance pertains;
  - (5) Citations to applicable statutes and regulations; and
  - (6) A statement noting whether the guidance is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance.
- c. The guidance document avoids using mandatory language, such as “shall,” “must,” “required,” or “requirement,” unless the language is describing an established statutory or regulatory requirement or is addressed to DOT staff and will not foreclose the Department’s consideration of positions advanced by affected parties;
  - d. The guidance document is written in clear and understandable language;
  - e. All guidance documents include a clear statement declaring that the contents of the document do not have the force and effect of law and are not meant to bind the public in any way, and the document is intended only to provide information to the public regarding existing requirements under the law or agency policies; and
  - f. The OA or OST component has evaluated whether a guidance document would benefit from stakeholder engagement (e.g., public comment). It is DOT policy to encourage providing an opportunity for public comment on guidance documents, as public input can be very helpful in formulating and improving the guidance that the Department offers.

#### 15. PUBLIC ACCESS TO EFFECTIVE GUIDANCE DOCUMENTS.

Each OA and OST component responsible for issuing guidance documents shall:

- a. Ensure guidance documents are on its website and available to the public; and
- b. Note on its website that guidance documents lack the force and effect of law, except as authorized by law.
- c. Ensure that effective guidance documents are periodically reviewed for accuracy, consistency with regulatory and statutory changes, and Administration policies and objectives.

#### 16. DEFINITION OF GUIDANCE DOCUMENTS THAT ARE “OF SPECIAL NOTE TO THE DEPARTMENT.”

A guidance document will be considered “of special note to the Department” if it may reasonably be anticipated:

- a. To relate to a major program, policy, or activity of the Department or a high-profile issue pending for decision before the Department;

- b. To involve one of the Secretary's top policy priorities;
- c. To garner significant press or congressional attention; or
- d. To raise significant questions or concerns from constituencies of importance to the Department, such as Committees of Congress, States or Indian tribes, the White House or other departments of the Executive Branch, courts, consumer or public interest groups, labor organizations, cities and counties, or leading representatives of industry.

17. APPROVAL PROCEDURES FOR GUIDANCE DOCUMENTS IDENTIFIED AS "OF SPECIAL NOTE TO THE DEPARTMENT"

- a. For guidance proposed to be issued by an OA or OST component, if there is a reasonable likelihood the guidance document may be considered "of special note to the Department" or if the OA or OST component is uncertain whether the guidance document may qualify as such, the OA or OST component should email a copy of the proposed guidance document (or a summary of it) to the Office of Regulation for review and further direction before issuance. Each proposed DOT guidance document determined to be of special note to the Department must be approved by the Secretary before issuance. In such instances, the Office of Regulation will request that the proposing OA or OST component submit the guidance document for departmental review and clearance through the Regulatory Management System, or a successor data management system, and OGC will coordinate submission of the proposed guidance document to the Secretary for approval.
- b. OGC may determine, in consultation with the OA or OST component, that it is appropriate to coordinate with OMB in the review of guidance documents that are of special note to the Department.
- c. If the guidance document is determined not to meet the threshold for Departmental review, the Office of Regulation will advise the proposing OA or OST component to proceed with issuance of the guidance through the standard clearance process otherwise utilized for such documents.

18. EXIGENT CIRCUMSTANCES.

In exigent circumstances, the Office of Regulation may waive some or all of the procedures in this Part with respect to guidance documents that are "of special note to the Department."

**PART III: GENERAL**

19. POLICY UPDATES AND REVISIONS

This Order shall be reviewed from time to time to reflect improvements in the rulemaking process or changes in Administration policy. If Congress revises applicable laws or if the

Executive Branch issues new executive orders, Presidential memoranda, guidance, or implementing instructions governing Federal agency rulemaking, such changes shall be considered incorporated by reference in this Order.

## 20. DISCLAIMER

This Order is intended to improve the internal management of the Department. It is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, officers or employees, or any other person. In addition, this Order shall not be construed to create any right to judicial review involving the compliance or noncompliance with this Order by the Department, its OAs or OST components, its officers or employees, or any other person.

## 21. DISTRIBUTION

This Order is distributed to all Secretarial office heads and OA Administrators.

## 22. CONTACT

If you have specific questions related to this Order, please contact the Office of Regulation in OGC.

FOR THE SECRETARY OF TRANSPORTATION:

A handwritten signature in blue ink, appearing to be "D. L. ...", is positioned below the text "FOR THE SECRETARY OF TRANSPORTATION:". The signature is stylized and somewhat illegible.