EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
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M-20-02

MEMORANDUM FOR REGULATORY POLICY OFFICERS AT EXECUTIVE DEPARTMENTS AND AGENCIES AND MANAGING AND EXECUTIVE DIRECTORS OF CERTAIN AGENCIES AND COMMISSIONS

FROM: Dominic J. Mancini, Acting Administrator
Office of Information and Regulatory Affairs

SUBJECT: Guidance Implementing Executive Order 13891, Titled "Promoting the Rule of Law Through Improved Agency Guidance Documents"

OMB issues this memorandum to implement Executive Order (EO) 13891, titled "Promoting the Rule of Law Through Improved Agency Guidance Documents," per Section 6 of that Order. A central principle of EO 13891 is that guidance documents should only clarify existing obligations; they should not be a vehicle for implementing new, binding requirements on the public. Even guidance documents that do not create binding requirements, however, can significantly affect the public, and EO 13891 recognizes that these documents warrant a thorough review prior to issuance. This memorandum provides agencies with instructions for complying with the requirements of EO 13891; agencies should refer to this memorandum when developing or reviewing new or existing guidance documents, as well as when proposing and finalizing regulations under Section 4 of the Order. OMB may revise or supplement this memorandum in light of agency experience with this new Order.

Deadlines

Q1: What are the key deadlines for agencies?

A: The EO builds upon the requirements in FOIA and requires each agency by February 28, 2020 to establish a single, searchable, indexed website that contains, or links to, all of the agencies' respective guidance documents currently in effect. By that same date, agencies should send to the Federal Register a notice announcing the existence of the new guidance portal and explaining that all guidance documents remaining in effect are contained on the new guidance portal. Agencies should also make the notice available on the new guidance portal. In addition, since some stakeholders may not see the Federal Register Notice, agencies are encouraged to send the notice to their stakeholders through the normal means of distributing important announcements.

If an agency determines that it failed to include on its new guidance portal a guidance document that existed on October 31, 2019 it may reinstate the guidance document provided it does so by June 27, 2020. Any rescinded guidance document that has not been reinstated by June 27, 2020, may be reinstated only by following all necessary steps associated with the issuance of a new guidance document.

The EO requires agencies to finalize new or amend existing regulations that set forth a process for issuing guidance documents no later than April 28, 2020. To meet this deadline, agencies should submit proposed regulations or amendments to OIRA for review by January 29, 2020.

Definition of a Guidance Document

Q2: What constitutes a "guidance document" under this EO?

A: Guidance documents come in a variety of formats, including interpretive memoranda, policy statements, manuals, bulletins, advisories, and more. Any document that satisfies the definition of "guidance" under Section 2(b) of the EO would qualify, regardless of name or format. If an agency is unsure if an item qualifies as guidance, it should consult with its OIRA desk officer prior to publication.

While broad, the term "guidance" as used in the EO is not boundless. The definition excludes the following:

- Agency statements of specific, rather than general, applicability. This would exclude from the definition of "guidance" advisory or legal opinions directed to particular parties about circumstance-specific questions; notices regarding particular locations or facilities; and correspondence with individual persons or entities, including congressional correspondence or notices of violation. If, however, an agency issues a document ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public, such a document would qualify as guidance.

- Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation. This would exclude from the definition of "guidance" documents that merely communicate news updates about the agency, such as most speeches and press releases (although a speech or press release could be a guidance document if it sets forth for the first time a new regulatory policy).

- Legislative rules promulgated under 5 U.S.C. 553 (or similar statutory provisions), or exempt from rulemaking requirements under 5 U.S.C. 553(a).

- Rules of agency organization, procedure, or practice. Whether a document is exempt as a rule of agency organization, procedure, or practice is a functional test; the exemption does not exclude from the definition of "guidance" statements of agency practice that are designed to shape the behavior of regulated parties. For instance, a memo addressed to regional agency officials directing them to issue permitting

decisions based on a particular construction of a statute, and to be released to the public with the predictable result of dissuading regulated parties from pursuing permits not consistent with the statute as thus construed, would be a guidance document within the terms of the EO.

- Decisions of agency adjudication.

- Documents that are directed solely to the issuing agency or other agencies (or personnel of such agencies) and that are not anticipated to have substantial future effect on the behavior of regulated parties or the public. This includes the typical documents issued for government-wide use by GSA, OPM, OMB, and similar departments and agencies. Such documents are often publicly released by the relevant agencies according to standard agency disclosure practices. This type of standard release would not trigger coverage under this EO, and we encourage agencies to continue their transparency practices in this area. Documents that are not publicly disseminated would also be excluded. Internal agency documents that are made public only because release is required under FOIA or agency disclosure policies would be presumptively excluded as well.

- Legal briefs and other court filings, because these are intended to persuade a court rather than affect the conduct of regulated parties.

- Legal opinions by the Office of Legal Counsel at the Department of Justice.

Q3: How does this memorandum interact with the 2007 OMB Good Guidance Bulletin?

A: Where they apply, EO 13891 and this memorandum supersede the 2007 Bulletin. We note, however, that many of the practices specified by the EO and explained in this memorandum are identical to practices discussed in the Good Guidance Bulletin; therefore, in specific instances identified below, this Q and A document refers to the Good Guidance Bulletin which continues to describe best practices that agencies should follow.

Q4: What types of policies may appropriately be issued through guidance documents?

A: Guidance documents can provide a valuable means for an agency, *inter alia*, to interpret existing law through an interpretive rule or to clarify how it intends to enforce a legal requirement through a policy statement. However, a guidance document should never be used to establish new positions that the agency treats as binding; any such requirements must be issued pursuant to applicable notice-and-comment requirements of the Administrative Procedure Act or other applicable law. Nor should agencies use guidance documents—including those that describe themselves as non-binding—effectively to coerce private-party conduct, for instance by suggesting that a standard in a guidance document is the only acceptable means of complying with statutory requirements, or by threatening enforcement action against all parties that decline to follow the guidance.

Calculating the Economic Impact of a Guidance Document

Q5: How should agencies calculate the economic impact of a guidance document?

A: OMB Circular A-4 sets forth principles governing analysis of the costs and benefits of regulations.[1] For the most part, the same principles apply when assessing guidance; however, there may be some differences as compared with the regulatory context. Some of these potential analytic differences are discussed below:

- Estimating behavior change. Because guidance is non-binding, and regulated parties are thus legally free to decline to conform their behavior to it, estimating behavior change due to a new guidance document can present unique challenges. In estimating behavior change, agencies should focus on how the guidance affects the incentives of regulated parties, including, e.g., incentives to avoid investigation by or litigation with the government, as well as potential pressure from industry peers or consumers to conform to "best practices" or norms provided or recommended by the agency. Agencies should rely on empirical estimates of behavior change whenever reasonably available, but should discuss potential behavior changes qualitatively where such empirical estimates are unavailable. In some instances, analysis of the impact of a guidance document should reflect an assumption that, because the document is not legally binding, less than all affected entities or individuals will conform their behavior to the policy set forth in the document.[2]

- Baseline. With guidance as with regulations, the analytic baseline is the state of the world in the absence of the document at issue. Where a guidance document materially alters the interpretation or implementation of a statute or regulation, the baseline is ordinarily the prior interpretation or implementation, adjusted for any non-conformity as discussed above. Where a guidance document instead simply provides specificity that falls within the range of the possible interpretive or implementation choices, agencies should attempt to acquire information about the interpretive or

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[1] Other helpful references include OIRA's Regulatory Impact Analysis FAQ, available at www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/circulars/a004/a-4_FAQ.pdf, which among other things, provides a list of examples of transfer impacts and offers guidance on valuing time costs; the 'Recommendations for Reform' chapter of OMB's 2015 Report to Congress on the Benefits and Costs of Federal Regulations, available at www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/2015_cb/2015-cost-benefit-report.pdf, which elaborates on often-misunderstood analytic concepts; and OIRA's Regulatory Impact Analysis Primer, available at www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf, which provides a more condensed introduction to RIA concepts than the full Circular A-4.

[2] Although the estimation of non-compliance may be more widely necessary in the guidance context than with regulations, non-compliance merits serious analytic attention as a general matter.

implementation choices that regulated parties made in the absence of the guidance.

- Rigor of Analysis. When an agency is assessing or explaining whether it believes a guidance document is significant, it should, at a minimum, provide the same level of analysis that would be required for a major determination under the Congressional Review Act.[3] When an agency determines that a guidance document will be economically significant, the agency should conduct a Regulatory Impact Analysis of the sort that would accompany an economically significant rulemaking, to the extent reasonably possible.

Agencies with further questions about how to apply or adapt the concepts of Circular A-4 to the assessment of guidance should consult with their OIRA desk officers.

Q6: Which guidance documents require a separate Regulatory Impact Analysis?

A: An analysis is required for any guidance document that may bring about $100 million in benefits, costs, or transfer impacts in at least one year (i.e., in one consecutive twelve-month period), or that otherwise qualifies as economically significant under Executive Order 12866.

Q7: Is a separate document needed for the analysis?

A: No, a separate document is not needed for the analysis, although it is permitted. In choosing between placing a guidance and its accompanying analysis in the same or separate documents, agencies should prioritize clarity and transparency for the public.

Q8: Will the analysis be published?

A: Yes, absent highly unusual and compelling circumstances.

Process for Complying with Section 3(a)

Q9: How should agencies set up their guidance portal for public access to all guidance documents?

A: Agency guidance portals should comply with all existing Federal web policies such as OMB Memorandum M-17-06, with particular emphasis on ensuring that all guidance documents are machine readable and can be indexed and searched by commonly used commercial search engines.[4]

Additionally, agencies must ensure that their guidance portal is either located at, or can be accessed from (through a URL redirect) the domain on their site **www.[agencyname].gov/guidance.** Some agencies may already group guidance

[3] See OMB Memorandum M-19-14, Guidance on Compliance with the Congressional Review Act (April 11, 2019).

[4] https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/m-17-06.pdf

documents by program or subject matter throughout various webpages on their main agency website. In such cases, the specific websites housing those guidance documents should be linked from the main guidance portal.

Agencies should also review their web traffic analytics and ensure the guidance portal is accessible from the main points of entry through which most users come to their main agency website.

Q10: What information should agencies provide on their guidance portal for each guidance document?

A: For each guidance document agencies publish on their guidance portal established under the EO, they should include the following information:

- A concise name for the guidance document.
- The date on which the guidance document was issued.
- The date on which the guidance document was posted to the website.
- An agency unique identifier.
- A hyperlink to the guidance document.
- The general topic addressed by the guidance document (e.g., pensions, healthcare, vehicle safety standards).
- One or two sentences summarizing the guidance document's content.

Q11: What is the "unique identifier" that an agency should include on a guidance document?

A: The agency should develop a system that will allow a member of the public easily to search for and locate a specific guidance document by its unique identifier. This identifier can be a series of letters and numbers and should be preceded by a well-known acronym for the agency (example: OMB 1X34). In addition, if a guidance is deemed "significant" by OIRA, the document should be assigned a Z-RIN in the ROCIS system, and the agency should include that as an identifier, or at least part of the guidance name, on its website.

Q12: What other information should agencies provide on their guidance portal?

A: In addition to the information associated with each guidance document, agencies should also include a clearly visible note expressing that (a) guidance documents lack the force and effect of law, unless expressly authorized by statute or incorporated into a contract; and (b) the agency may not cite, use, or rely on any guidance that is not posted on the website existing under the EO, except to establish historical facts. The agency should also include a link to the proposed or final regulations required by Section 4 of the EO.

Process for Complying with Section 3(b)

Q13: How should agencies notify the public that all guidance documents remaining in effect may be found on the new guidance portal?

A: Agencies should publish in the Federal Register a notice announcing the existence of the guidance portal required by the EO and explaining that, by February 28, 2020, all guidance documents remaining in effect may be found on the guidance portal. At the same time as publication in the Federal Register, agencies should also make the notice available on the new guidance portal and send the notice to its stakeholders through its normal means of distributing important announcements.

Q14: How should an agency reinstate a guidance document under Section 3(b)?

A: If an agency wishes to reinstate a guidance document that it rescinded under Section 3(b) of the EO by June 27, 2020 it may do so by uploading the guidance document to its guidance portal, ensuring that it includes the date on which it posted the guidance document to the guidance portal. The agency should, at the time it uploads the document, notify OIRA for purposes of implementing Section 3(d) of the Order.

Q15: How should an agency determine which documents or statements are appropriate for inclusion on the website existing under the EO?

A: Agencies should post on their guidance portal all guidance documents as defined in the EO which the agency expects to cite, use, or rely upon. If any agency is uncertain whether a particular document should be posted to its guidance portal, it should consult with its OIRA desk officer.

Process for Requesting a Waiver under Section 3(c)

Q16: How should agencies request a waiver from the OMB Director?

A: Requests for waivers from the OMB Director should be submitted through OIRA. The request should come in the form of a letter signed by a senior policy official at the agency.

Q17: What information should agencies provide to the OMB Director when requesting a waiver?

A: If the agency requests that the Director waive the requirement to upload a particular guidance document or category of guidance documents, the agency should clearly explain the purpose of the document(s) and why making the document(s) publicly available on an agency website would cause specific harm or otherwise interfere with the agency's mission. If the agency requests an extension of the timing requirements in sections 3(a) or 3(b), the agency should clearly explain the circumstances that prevent the agency from complying with the timing requirements and why an extension would alleviate those circumstances.

Process for Submitting a Report under Section 3(d)

Q18: For any guidance document for which the OMB Director has asked for a report under Section 3(d), what information should agencies provide to the Director to explain the need for retaining in effect the guidance document in question?

A: The head of the agency should draft a response to the OMB Director, which the OMB Director will make available to the President, explaining how the guidance document in question aligns with the President's priorities and is net beneficial. The letter should clearly explain why rescinding the guidance document would cause public harm, as well as any alternatives the agency considered regarding possibly amending the guidance document in question and why the agency rejected those alternatives.

Q19: How will the report be evaluated?

A: The report will be evaluated in a review by the Executive Office of the President as coordinated by OIRA. The review will evaluate whether the guidance document is net beneficial and whether the policy outlined in the document aligns with the President's priorities. The OIRA Administrator may issue a letter summarizing the conclusions reached in the review.

Compliance with Section 4(a)(i) and (ii) (all guidance documents)

Q20: What language should agency regulations require to be included in their guidance documents to make clear that the documents do not bind the public?

A: Agencies should include the following disclaimer prominently in each guidance document:

> "The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies."

When an agency's guidance document is binding because binding guidance is authorized by law or because the guidance is incorporated into a contract, the agency should modify the disclaimer above to reflect either of those facts.

Q21: What information should agency regulations require that agencies provide to the public regarding a request to withdraw or modify an existing guidance document?

A: Agencies should provide clear instructions on the agency's website to members of the public regarding how to request the withdrawal or modification of an existing guidance document, including, but not limited to, an email address or web portal where requests can be submitted, a mailing address where hard copy requests can be submitted, and an office at the agency responsible for coordinating such requests. The agency should respond to all requests in a timely manner, but no later than 90 days after receipt of the request.

Q22: What information should agency regulations require to be included in a published guidance document?

A: In general, each guidance document should, at a minimum:

- Include the term "guidance."
- Identify the agency or office issuing the document.
- Identify the activities to which and the persons to whom the document applies.
- Include the date of issuance.
- Note if it is a revision to a previously issued guidance document and, if so, identify the guidance document that it replaces.
- Provide the title of the guidance and the document identification number.
- Include the citation to the statutory provision or regulation (in Code of Federal Regulations format) to which it applies or which it interprets.
- Include the disclaimer from Q20 above.
- Include a short summary of the subject matter covered in the guidance document at the top of the document.

Compliance with Section 4(a)(iii) (significant guidance documents)

Q23: When should agency regulations require publication of a significant guidance document for notice and comment?

A: Section 4(a)(iii)(A) of the EO requires that, at a minimum, significant guidance documents must receive 30 days of public notice and comment before issuance, as well as a public response from the agency to major concerns raised in comments.

Agencies should follow best practices for collecting and responding to public comments associated with their significant guidance documents. An agency should publish a notice in the Federal Register announcing the availability of a significant guidance document and should also make the draft guidance document available on the agency's website; additional methods of notice may be appropriate as well. Persons with disabilities should be able reasonably to access and comment during the guidance development process. Agencies should also make the public comments available to the public for review online, on or linked to the website existing under this Order.

For more specific details and best practice recommendations regarding notice and comment processes for guidance documents, see OMB's *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3438–39 (Jan. 18, 2007).

Q24: How should an agency present its responses to public comments?

A: After reviewing the public comments on a draft guidance document, agencies should incorporate any suggested changes as appropriate into a final version and then make the final guidance document available to the public. Agencies should also provide a public response-to-comments document that is similar to the response-to-comments that typically appears in the preamble to a final rule. The response to comments may appear in the final guidance document itself or in a companion document. Agencies need not respond to every comment or every issue raised; the goal, rather, is to provide a robust explanation of the agency's choices in the final guidance document, including why the agency did not agree with relevant suggestions from commenters.

Q25: Which official should agency regulations require to sign a significant guidance document?

A: On a non-delegable basis, a significant guidance document should be signed by an agency head, or by a component head who is appointed by the President (with or without confirmation by the Senate), or by an official who is serving in an acting capacity as either of the foregoing.

Q26: When should agencies explain how the guidance document complies with the relevant EOs?

A: When an agency submits a guidance document to OIRA for review, it should demonstrate how the guidance document complies with EOs 12866, 13563, 13609, 13771, and 13777, under EO 13891 section 4(a)(iii)(D). Such demonstration may be similar to the corresponding demonstration in a regulation's preamble.

- EO 12866 and EO 13563: The agency should explain the analysis it has conducted that shows that the regulation at issue maximizes net benefits, as well as the alternatives the agency has considered. The agency should also explain if it is issuing the guidance as a result of any retrospective review.

- EO 13609: The agency should explain how the guidance, if applicable, promotes international regulatory cooperation and how the agency considered the effect the guidance may have on interactions with other countries.

- EO 13771: The agency should explain whether the guidance is a "regulatory" or "deregulatory" action per the definitions in OMB's EO 13771 Implementing Memorandum, or whether the guidance falls into one of the other categories under EO 13771.[5]

[5] See M-17-21 Guidance Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs" April 5, 2017.

- EO 13777: The agency should explain whether the guidance is being issued as a result of the agency's regulatory reform agenda or through a recommendation from the agency's Regulatory Reform Task Force, noting that EO 13777 charges agency Task Forces with identifying regulatory reforms consistent with the previous EOs mentioned here.

Process for Determining If a Guidance Document Meets the Definition of "Significant Guidance Document"

Q27: What is the process for seeking significance determinations from OIRA?

A: Agencies should seek significance determinations for guidance documents from OIRA in the same manner as for rulemakings. Prior to publishing the guidance document, and with sufficient time to allow OIRA to review the document in the event that a significance determination is made, agencies should provide their OIRA desk officer with an opportunity to review the document to determine if it meets the definition of "significant" or "economically significant" under EO 13891.

Q28: What information do agencies need to submit to OMB regarding upcoming guidance documents?

A: Each agency should notify OIRA regularly of upcoming guidance documents. An agency may provide such a notification by submitting a list of planned guidance documents, including summaries of each guidance document and the agency's recommended designation of "not significant," "significant," or "economically significant," as well as a justification for that designation. For example, an agency may recommend that a guidance document should not be deemed significant by explaining in the summary that it is routine, ministerial, or otherwise does not meet the EO criteria for a significant guidance document. To make the significance determination, OIRA may request additional information from the agency.

Q29: How may agencies request categorical determinations that classes of guidance documents presumptively do not qualify as significant under the EO?

A: To request categorical exemptions, agencies should submit to OIRA a written request signed by a senior policy official that explains why the proposed category of guidance document generally is only routine or ministerial, or is otherwise of limited importance to the public. The agency should provide examples of such guidance documents to support the request. Should OIRA grant a categorical exemption, agencies remain responsible for determining if a future planned document in the category may trigger one of the four criteria for significant guidance and should submit such a document to OIRA for review pursuant to the requirements of EO 13891. OIRA reserves the right to revoke categorical exemptions or to deem significant, and hence to review, a particular guidance document notwithstanding a presumption that documents of that category are not significant.

Q30: How should agencies submit significant guidance documents for OIRA review?

A: The agency should submit the significant guidance document for review electronically in the ROCIS system. At the time of submission, the agency should also upload any supporting documents as part of the same package.

Q31: Does OIRA need to review all significant guidance documents?

A: Agencies should work with their OIRA desk officer to determine the appropriate process for reviewing guidance documents that have been deemed significant. An agency should assume that any guidance document that has been deemed significant will be reviewed unless told otherwise by its OIRA desk officer.

Q32: When can an agency publish a significant guidance document?

A: Agencies may publish significant (including economically significant) guidance documents only when OIRA has concluded review under EO 13891. If an agency is not sure if review has concluded, it should consult its OIRA desk officer.

Q33: Is it possible to waive the need for a significance determination or EO 12866 review in the event of an emergency?

A: Agencies may request that a significance determination or review be waived due to exigency, safety, or other compelling cause. A senior policy official must explain the nature of the emergency and why following the normal clearance procedures would result in specific harm. The OIRA Administrator will review and make a determination as to whether granting such a request is appropriate.

Exemptions

Q34: What categories of documents that might otherwise constitute guidance are excepted from the requirements of this EO? What is the process for requesting additional exceptions?

A: Section 4(b) of the EO authorizes the Administrator of OIRA to articulate exceptions from the requirements of the EO for certain categories of documents as may be appropriate. Please contact your OIRA desk officer if you would like to suggest an exception under section 4(b). OIRA will release a list of government-wide exceptions, as well as of categorical presumptions of non-significance, at a future date.

OMB has found that standard issue documents associated with grants and procurements such as Notices of Funding Opportunities (NOFOs) and Requests for Proposals (RFPs) are, as a general matter, not significant guidance documents. OMB also clarifies this EO is not meant to alter any existing OMB process for reviewing documents of this nature. OMB further notes, however, that OIRA has on a few occasions found documents of this type to be significant regulatory actions under EO 12866 and has reviewed accordingly. accordingly.