



COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE
DISTRICT OF COLUMBIA

28 CFR Part 813

RIN 3225-AA18

Guidance Development Procedures

AGENCY: Court Services and Offender Supervision Agency.

ACTION: Final rule.

SUMMARY: This final rule responds to an Executive order titled “Promoting the Rule of Law Through Improved Agency Guidance Documents” (October 9, 2019). The central principle of the E.O. is that agency guidance documents should clarify existing obligations. Guidance documents are not permitted to impose new, binding requirements on the public. Pursuant to the E.O., Federal agencies are required to finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents. This final rule codifies internal procedural requirements governing the review and clearance of guidance documents for Court Services and Offender Supervision Agency (CSOSA) and Pretrial Services Agency (PSA).

DATES: Effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For CSOSA: Hyun-Ju E. Park, Supervisory Policy Analyst, Court Services and Offender Supervision Agency for the District of Columbia, 633 Indiana Avenue, NW, Room 1232B, Washington, D.C. 20004; Tel: 202-220-5635; Email: Hyun-Ju.Park@csosa.gov. For PSA: Victor Davis, Chief of

Staff, Pretrial Services Agency for the District of Columbia, 633 Indiana Avenue, NW, Washington, D.C. 20004; Tel: 202-220-5654; Email: Victor.Davis@psa.gov.

SUPPLEMENTARY INFORMATION: The Court Services and Offender Supervision Agency (CSOSA) was established within the Executive Branch of the Federal Government by the National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. 105–33, 111 Stat. 251, 712 (D.C. Code sections 24–1232, 24–1233). On August 4, 2000, CSOSA was certified by the Attorney General as an independent Federal agency.

CSOSA provides supervisory and treatment services to individuals on probation, parole, and supervised release for District of Columbia Code violations. CSOSA also provides supervisory and treatment services to offenders from other jurisdictions in accordance with the Interstate Parole and Probation Compact. The Pretrial Services Agency (PSA) is an independent agency within CSOSA. PSA provides a wide range of supervision programs to support the D.C. Superior Court and the U.S. District Court.

I. Background

This final rule responds to Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents (October 9, 2019). This final rule codifies the existing procedures regarding the review and clearance of guidance documents for CSOSA and PSA (collectively “the Agencies”). The procedures contained in this final rule apply to all guidance documents, which the Agencies define as: any statement of agency policy or interpretation concerning a statute, regulation, or technical matter within the jurisdiction of the agency that is intended to have general applicability and future effect, but which is not intended to have the force or effect of law in its own

right and is not otherwise required by statute to satisfy the rulemaking procedures of the Administrative Procedure Act.

These procedures ensure that all guidance documents receive review by the Agencies' counsel, when appropriate, and Directors. Before guidance documents are issued, they must be reviewed to ensure they are written in plain language and do not impose any substantive legal requirements beyond existing requirements of statute or regulation. If a guidance document purports to describe, approve, or recommend specific conduct that extends beyond requirements of existing law, then it must include a clear and prominent statement effectively stating that the content of the guidance document does not have the force and effect of law and is not meant to bind the public in any way. The final rule provides a process for interested parties to petition CSOSA and PSA for the withdrawal or modification of guidance documents. Finally, this rule describes when guidance documents are subject to notice and an opportunity for public comment, and how they will be made available to the public after issuance.

II. Procedural Issues and Regulatory Review

Administrative Procedure Act (APA): Under the APA, an agency may waive the normal notice and comment procedures if the action is a rule of agency organization, procedure, or practice. *See* 5 U.S.C. 553(b)(3)(A). Since this final rule merely incorporates existing internal procedures applicable to the Agency's administrative procedures into the Code of Federal Regulations (CFR), notice and comment are not necessary.

Executive Order 12866 and 13563 (Regulatory Planning and Review): The Agencies do not anticipate that this final rule will have significant economic impact, raise novel issues, and/or have any other significant impacts because it simply incorporates existing internal procedures into the CFR. Thus, this final rule is not a significant regulatory action under 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under 6(a)(3) of the order.

Regulatory Flexibility Act (RFA): The Regulatory Flexibility Act does not apply. This final rule will not directly regulate small entities. The Agencies, therefore, do not need to perform a regulatory flexibility analysis of small entity impacts.

Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA): The Agencies have determined that this final rule does not impose a significant impact on a substantial number of small entities under the RFA; therefore, The Agencies are not required to produce any Compliance Guides for Small Entities as mandated by the SBREFA.

Congressional Review Act: The Agencies have determined that this final rule is not a major rule under the Congressional Review Act, as it is unlikely to result in an annual effect on the economy of \$100 million or more; is unlikely to result in a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies or geographic regions; and is unlikely to have a significant adverse effect on competition, employment, investment, productivity, or innovation, or on the ability of U.S.-based enterprises to compete in domestic and export markets.

Unfunded Mandates Reform Act (UMRA): This revision does not impose any Federal mandates on state, local, or tribal governments, or on the private sector within the meaning of the UMRA.

National Environmental Policy Act (NEPA): This final rule will have no physical impact upon the environment and, therefore, will not require any further review under NEPA.

Paperwork Reduction Act (PRA): The Paperwork Reduction Act does not apply because the rule does not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

Executive Order 13132 (Federalism): This final rule does not have new federalism implications under Executive Order 13132.

Executive Order 12988 (Civil Justice Reform): This final rule meets applicable standards of 3(a) and 3(b)(2) of Executive Order 12988 and the Agencies have determined that the final rule will not unduly burden the Federal court system.

Plain Language: E.O. 12866 and E.O. 13563 require regulations to be written in a manner that is easy to understand. The Agencies have concluded that it has drafted this final rule in plain language.

Assessment of Federal Regulations and Policies on Families: Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681) requires the assessment of the impact of this rule on family well-being. The Agencies have assessed this final rule and determined that the rule will not have a negative effect on families.

Executive Order 13175 (Indian Tribal Governments): The Agencies reviewed this final rule under the terms of E.O. 13175 and has determined that the rule will not have tribal implications.

Executive Order 12630 (Government Actions and Interference With Constitutionally Protected Property Rights): The Agencies have determined that this final rule is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

Executive Order 13211 (Energy Supply): This final rule was drafted and reviewed in accordance with E.O. 13211, Energy Supply. The Agencies have determined that this final rule will not have a significant adverse effect on the supply, distribution, or use of energy and is not subject to E.O. 13211.

List of Subjects in 28 CFR Part 813

Administrative practice and procedure, Guidance documents.

Authority and Issuance

In consideration of the foregoing, CSOSA adds 28 CFR part 813 to read as follows:

PART 813 -- GUIDANCE DEVELOPMENT PROCEDURES

Sec.

- 813.1 Overview of guidance development process.**
- 813.2 Guidance management process for CSOSA.**
- 813.3 Requirements for clearance of CSOSA guidance documents.**
- 813.4 Guidance development process for Pretrial Services Agency (PSA).**
- 813.5 Required elements of guidance documents.**

- 813.6 Public access to and notification of effective guidance documents.**
- 813.7 Definition of “significant guidance documents”.**
- 813.8 Significant guidance documents.**
- 813.9 Petitions for withdrawal or modification of guidance.**

Authority: 5 U.S.C. 301; E.O. 13891, 84 FR 55235.

§813.1 Overview of guidance development process.

- (a) This part governs all Court Services and Offender Supervision Agency for the District of Columbia (CSOSA) and Pretrial Services Agency (PSA) employees and contractors involved with all phases of implementing CSOSA guidance documents.
- (b) The procedures set forth in this part apply to all guidance documents, issued by all components of CSOSA and PSA.
- (c) For purposes of this part, “guidance document” means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of statute or regulation. Guidance documents do not have the force and effect of law and are not meant to bind the public in any way. A guidance document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.
- (d) CSOSA may not cite, use, or rely on guidance documents that are rescinded, except to establish historical facts.
- (e) Guidance documents not posted on the Agencies’ web portal are considered rescinded, and not in effect.

(f) This part does not apply to:

- (1) Rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code, or similar statutory provisions;
- (2) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);
- (3) Rules of agency organization, procedure, or practice;
- (4) Decisions of agency adjudications under 5 U.S.C. 554 or similar statutory provisions;
- (5) Internal executive branch legal advice or legal advisory opinions addressed to executive branch officials;
- (6) Agency statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions (e.g., case or investigatory letters responding to complaints, warning letters), notices regarding particular locations or facilities (e.g., guidance pertaining to the use, operation, or control of a government facility or property), and correspondence with individual persons or entities (e.g., congressional correspondence), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public;
- (7) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;
- (8) 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 that do not set forth for the first time a new regulatory policy;

- (9) Guidance pertaining to military or foreign affairs functions;
- (10) Grant solicitations and awards;
- (11) Contract solicitations and awards; or
- (12) Purely internal agency policies or guidance directed solely to the Agencies' employees or contractors or to other Federal agencies that are not intended to have substantial future effect on the behavior of regulated parties.

§ 813.2 Guidance management process for CSOSA.

All CSOSA guidance documents, as defined in § 813.1, require review and clearance in accordance with this section. CSOSA's guidance documents are created through the Office of Policy Analysis (OPA), and come in two primary forms, policy statements and procedures (also known as operating instructions). This section sets forth the process for review and clearance for each.

(a) Policy statements are:

- (1) Prepared by CSOSA components and issued under the Director's signature;
- (2) Remain in effect and active until rescinded, amended, or superseded;
- (3) Are reviewed by all CSOSA Associate Directors or their designees;
- (4) Are prepared using a standard format provided by the Office of Policy Analysis (OPA);

- (5) Are developed and maintained using a four-stage process that includes planning, development, review, and maintenance, each stage taking place within specified timeframes; and
- (6) Are reviewed and re-certified biennially.

(b) Procedures are:

- (1) Coordinated through OPA;
- (2) Evaluated to prevent the issuance of duplicative or conflicting procedures;
- (3) Tied to a policy statement;
- (4) Developed in a collaborative process that addresses all relevant stakeholders' input;
- (5) Organized so that critical information is readily accessible and staff know how and where to find any related information; and
- (6) Maintained in an archive system to ensure future decision-makers have adequate information regarding the basis for previous procedure determinations.

(c) The CSOSA Director, or his/her designee, may waive or truncate the internal policy development process where good cause exists, for example where Congress or the executive branch mandates changes.

(d) CSOSA will notify OMB's Office of Information and Regulatory Affairs (OIRA) regularly of upcoming guidance documents. Notification will include a list of planned guidance documents, including summaries of each guidance document and the agency's recommended designation of "not significant" or "significant" as defined in § 813.7.

- (e) CSOSA will seek significance determinations for guidance documents from OIRA. Where CSOSA preliminarily finds the guidance document to be significant, prior to publishing, CSOSA will provide the document to OIRA for review to determine if it meets the definition of "significant" under E.O. 13891.

§ 813.3 Requirements for clearance of CSOSA guidance documents.

CSOSA's review and clearance of guidance documents, including policy and procedures, occurs according to the stages set forth in paragraphs (a) and (b) of this section.

(a) *Policy management--(1) Stage 1 - planning.* The CSOSA component coordinates with OPA to initiate the process.

(2) *Stage 2 - development.* The CSOSA component provides the operational details and OPA will conduct the analysis and coordination and then prepare the initial document.

(3) *Stage 3 - review.* The multi-layered review involves the Associate Directors, other CSOSA components and Employee Labor Relations (ELR), if appropriate. Upon completion, the Director reviews and signs the document for implementation.

(4) *Stage 4 - maintenance.* The Office of Information Technology (OIT) posts the signed policies to CSOSA's intranet and/or public-facing web portal, and OPA maintains the central repository of all signed policies and associated working files and initiates the biennial review.

(b) *Procedure (also known as operating instruction - OI) management--*(1) *Stage 1 – planning.* The CSOSA component submits a request to OPA for a new OI or an update to an existing OI;

(2) *Stage 2 – development.* The CSOSA component prepares the content for the initial draft, which OPA reviews and affects any necessary coordination across CSOSA.

(3) *Stage 3 – review.* The initial draft OI is submitted simultaneously to CSOSA Associate Directors, the Supervisory Policy Analyst, and Office of the Director for review. If applicable, notice is provided to union representatives; and upon clearance and approvals it is submitted to the Director for review, signature, and implementation.

(4) *Stage 4 - maintenance.* The Office of Information Technology (OIT) posts the signed OI to CSOSA’s intranet and/or public-facing web portal; OPA maintains the central repository of all signed OI and associated working files and initiates the biennial review.

§ 813.4 Guidance development process for Pretrial Services Agency (PSA).

Pretrial Services Agency (PSA), an independent agency within CSOSA, has its own guidance or policy development process, coordinated through PSA’s Office of Planning, Policy, and Analysis (OPPA). PSA’s guidance development process occurs as detailed in paragraphs (a) through (d) of this section:

(a) PSA’s guidance documents are:

- (1) Prepared by the responsible PSA Office and issued with the PSA Director's signature;
- (2) Remain in effect and active until rescinded, amended, or superseded;
- (3) Reviewed by all PSA Deputy Assistant Directors and/or designees;
- (4) Prepared using a standard format provided by OPPA; and
- (5) Developed using a process that includes planning, development, review, and maintenance in accordance with specified timeframes.

(b) PSA process and procedure documents are:

- (1) Coordinated with assistance from OPPA, as appropriate, to avoid duplicative or conflicting procedures;
- (2) Tied to a policy, when appropriate;
- (3) Developed in collaboration with all stakeholders including the bargaining unit;
- (4) Organized in a manner that is readily accessible by those who need it; and
- (5) Maintained according to records management standards.

(c) The PSA Director, or his/her designee, may waive or truncate the internal development process where good cause exists, for example where Congress or the executive branch mandates changes within a specified period or allow changes that need to be implemented immediately.

(d) The process set forth in § 813.2(d) and (e) also applies to PSA guidance documents.

§ 813.5 Required elements of guidance documents.

CSOSA and PSA will ensure each guidance document:

- (a) Complies with all relevant statutes and regulations;
- (b) Identifies or includes:
 - (1) The term “guidance” or its functional equivalent;
 - (2) The component or division issuing the document;
 - (3) The activities to which or the person to whom the document applies;
 - (4) The date of issuance;
 - (5) If it is a revision, the name/number of the guidance document it replaces;
 - (6) The title of the guidance and the document identification number;
 - (7) Citation(s) to the statutory provision or regulation to which it applies or interprets;
 - (8) A disclaimer stating: “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.”; and
 - (9) A short summary of the subject matter covered in the guidance document, at the top of the document.

§ 813.6 Public access to and notification of effective guidance documents.

CSOSA and PSA will:

- (a) Ensure that all effective guidance documents are:
 - (1) Identified by a unique identifier which includes, at a minimum, the document’s title and date of issuance or revision;

- (2) Located on its web portal in a single, searchable, indexed database; and
- (3) Available to the public.

- (b) Note on the agency web portal that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract.
- (c) Maintain and advertise on its web portal a means for the public to comment electronically on any guidance documents that are subject to the notice and comment procedures and to submit requests electronically for issuance, reconsideration, modification, or rescission of guidance documents in accordance with § 813.9.

§ 813.7 Definition of “significant guidance document”.

For purposes of this part, “significant guidance document” means a guidance document that will be disseminated to regulated entities or the general public and that may reasonably be anticipated:

- (a) To lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the U.S. economy, a sector of the U.S. economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (b) To create serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency;
- (c) To alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(d) To raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866, as further amended.

§ 813.8 Significant guidance documents.

- (a) Though not legally binding, some agency guidance may result in a substantial economic impact. For example, the issuance of agency guidance may induce private parties to alter their conduct or conform to recommended standards of practices, thereby incurring costs beyond the costs of complying with existing statutes and regulations.
- (b) If there is a reasonable possibility the guidance may be considered "significant" within the meaning of § 813.7 or if the Agencies are uncertain whether the guidance may qualify as such, the Agencies must receive OMB's Office of Information and Regulatory Affairs (OIRA) approval before issuance, unless the Agencies and OIRA agree that exigency, safety, health, or other compelling cause warrants an exemption from some or all requirements.
- (c) 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.¹
- (d) The following will apply to significant guidance documents:

¹ See OMB Memorandum M-19-14, Guidance on Compliance with the Congressional Review Act (April 11, 2019).

- (1) A period of public notice and comment of at least 30 days before the issuance of a final guidance document, and a public response from the Agencies to major concerns raised in comments. If the Agencies, for good cause, find that the notice and public comment are impracticable, unnecessary, or contrary to the public interest, then no period of public comment will be provided, with notification and consultation with OIRA;
- (2) Approval by the respective Agency Director;
- (3) Review by OIRA under Executive Order 12866 before issuance;
- (4) Compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in E.O. 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), E.O. 13609 (Promoting International Regulatory Cooperation), E.O. 13771 (Reducing Regulation and Controlling Regulatory Costs), and E.O. 13777 (Enforcing the Regulatory Reform Agenda).

§ 813.9 Petitions for withdrawal or modification of guidance.

Any person may petition CSOSA or PSA to withdraw or modify a particular guidance document. A person may make a request by accessing the respective agency guidance web portal or by writing a letter to the respective Agencies. The Agencies' portals allow an individual to provide his or her contact information and guidance-related requests. The Agencies will respond in a timely manner, but no later than 90 days after receipt of the request.

Dated: April 24, 2020.

Richard S. Tischner,

Director,
Court Services and Offender Supervision Agency
for the District of Columbia.

[FR Doc. 2020-09152 Filed: 5/18/2020 8:45 am; Publication Date: 5/19/2020]