



## **NATIONAL FOUNDATION FOR THE ARTS AND HUMANITIES**

### **National Endowment for the Arts**

#### **45 CFR Part 1147**

#### **RIN 3135-AA35**

#### **Procedures for Arts Endowment Guidance Documents**

**AGENCY:** National Endowment for the Arts, National Foundation for the Arts and Humanities.

**ACTION:** Interim final rule.

**SUMMARY:** This interim final rule sets procedures for the Arts Endowment relating to the issuance of guidance documents.

**DATES:** This rule is effective on August 28, 2020. Written comments must be received on or before September 27, 2020.

**ADDRESSES:** You may submit comments, identified by RIN 3135-AA35, by any of the following methods:

- (a) Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.
- (b) E-mail: [generalcounsel@arts.gov](mailto:generalcounsel@arts.gov). Include RIN 3135-AA35 in the subject line of the message.
- (c) Mail: National Endowment for the Arts, Office of the General Counsel, 400 7th Street SW, Second Floor, Washington, DC 20506.

(d) Hand Delivery / Courier: National Endowment for the Arts, Office of the General Counsel, 400 7th Street SW, Second Floor, Washington, DC 20506.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (3135-AA35) for this rulemaking. Arrangements to deliver by courier may be affected by health and safety procedures related to the coronavirus pandemic; please reach out to [generalcounsel@arts.gov](mailto:generalcounsel@arts.gov) or 202-682-5418 before attempting delivery in this manner to ensure that you delivery will be able to be accepted.

Docket: For access to the docket to read background documents or comments received, go to 400 7th Street, SW, Washington, DC. Arrangements to view the docket in person may be affected by health and safety procedures related to the coronavirus pandemic; please reach out to [generalcounsel@arts.gov](mailto:generalcounsel@arts.gov) or 202-682-5418 before attempting delivery in this manner to ensure that you delivery will be able to be accepted.

**FOR FURTHER INFORMATION CONTACT:** Daniel Fishman, Assistant General Counsel, National Endowment for the Arts, 400 7<sup>th</sup> St SW, Washington, DC 20506; [fishmand@arts.gov](mailto:fishmand@arts.gov); 202-682-5418.

**SUPPLEMENTARY INFORMATION:**

**1. Background**

This final rule implements section 4 of Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents” (October 9, 2019). Under the Executive order, the National Endowment for the Arts must set forth a process in regulation that includes:

- (1) a requirement that each guidance document clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract;
- (2) procedures for the public to petition for withdrawal or modification of a particular guidance document, including a designation of the officials to which petitions should be directed; and
- (3) for a significant guidance document, as determined by the Administrator of Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (Administrator), unless the agency and the Administrator agree that exigency, safety, health, or other compelling cause warrants an exemption from some or all provisions requiring:
  - (A) a period of public notice and comment of at least 30 days before issuance of a final guidance document, and a public response from the agency to major concerns raised in comments, except when the agency for good cause finds (and incorporates such finding and a brief statement of reasons therefor into the guidance document) that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest;
  - (B) approval on a non-delegable basis by the agency head or by an agency component head appointed by the President, before issuance;
  - (C) review by the Office of Information and Regulatory Affairs (OIRA) under Executive Order 12866, before issuance; and
  - (D) compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in Executive Orders 12866, 13563 (Improving Regulation and Regulatory Review), 13609 (Promoting International Regulatory Cooperation), 13771 (Reducing Regulation and Controlling Regulatory Costs), and 13777 (Enforcing the Regulatory Reform Agenda).

All agency guidance documents will be made available on the agency's website, at <https://www.arts.gov/guidance>.

## **2. Compliance**

### **Administrative Procedure Act**

This final rule incorporates requirements of the Executive order and the Arts Endowment's existing internal policy and procedures into the CFR. Therefore, in accordance with 5 U.S.C. 553, there is good cause for this rule of Agency organization, procedure, or practice, to be enacted without notice and comment. See 5 U.S.C. 553(b)(A).

### **Executive Order 12866**

This rule is an internal rule of agency procedure and is not a significant regulatory action under Executive Order 12866.

### **Executive Order 13771**

This rule is not an EO 13771 regulatory action because this rule is related to agency organization, management, or personnel.

### **Regulatory Flexibility Act**

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605 (b)), the Arts Endowment certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities.

### **Unfunded Mandates**

For purposes of Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531-1538, as well as Executive Order 12875, this regulatory action does not contain any Federal mandate that may result in increased expenditures in either Federal, state, local, or tribal governments in the aggregate, or impose an annual burden exceeding \$100 million on the private sector.

### **Paperwork Reduction Act**

The rule does not contain any information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

### **Executive Order 13132, Federalism**

Executive Order 13132, Federalism, prohibits an agency from publishing any rule that has federalism implications if the rule imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This rule does not have any federalism implications, as described above.

### **Congressional Review Act**

This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of nonagency parties and, accordingly, is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply. However, for each final guidance document issued pursuant to these regulations and adopted by the Arts Endowment, it will submit appropriate reports to Congress and Government Accountability Office (GAO) and comply with the procedures specified by 5 U.S.C. 801.

## **List of Subjects in 45 CFR Part 1157**

Administrative practice and procedure.

For reasons set forth in the preamble, the Arts Endowment amends 45 CFR chapter XI, subchapter B, by adding part 1157 to read as follows:

### **PART 1157—ARTS ENDOWMENT GUIDANCE DOCUMENTS**

Sec.

1157.1 General.

1157.2 Review and clearance.

1157.3 Requirements for clearance.

1157.4 Public access to effective guidance documents.

1157.5 Definitions of “significant guidance document” and guidance documents that are “otherwise of importance to the Arts Endowment’s interests.”

1157.6 Notice-and-comment procedures.

1157.7 Petitions for guidance.

1157.8 Rescinded guidance.

1157.9 Exigent circumstances.

1157.10 No judicial review or enforceable rights.

1157.11 Reports to Congress and Government Accountability Office (GAO).

Authority: 20 U.S.C. 959.

#### **§1157.1 General.**

(a) This part governs all National Endowment for the Arts (“Arts Endowment” or “NEA”) employees and contractors involved with all phases of issuing Arts Endowment guidance documents.

(b) Subject to the qualifications and exemptions contained in this part, the procedures in this part apply to all guidance documents issued by the Arts Endowment after August 28, 2020.

(c) For purposes of this part, the term “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 a statute or regulation. 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 include video, audio, and web-based formats. See Office of Management and Budget (OMB) Bulletin 07-02, “Agency Good Guidance Practices,” (January 25, 2007) (“OMB Good Guidance Bulletin”).

(d) 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 guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties;

(6) Internal executive branch legal advice or legal advisory opinions addressed to executive branch officials;

(7) 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, determinations related to historic preservation), 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;

(8) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;

(9) 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;

(10) Guidance pertaining to military or foreign affairs functions;

(11) Grant solicitations, guidelines and awards;

(12) Contract solicitations and awards; and

(13) Purely internal Agency policies or guidance directed solely to Arts Endowment employees or contractors or to other Federal agencies that are not intended to have substantial future effect on the behavior of regulated parties.

**§1157.2 Review and clearance.**



All Arts Endowment guidance documents, as defined in § 1157.1(c), require review and clearance in accordance with this part.

**§1157.3 Requirements for clearance.**

The Arts Endowment's review and clearance of guidance shall ensure that each guidance document proposed by the Arts Endowment satisfies the following requirements:

(a) The guidance document complies with all relevant statutes and regulation (including any statutory deadlines for Agency action);

(b) The guidance document identifies or includes:

(1) The term "guidance" or its functional equivalent;

(2) If applicable, the issuing Arts Endowment responsible office name;

(3) A unique identifier, including, at a minimum, the date of issuance and title of the document and its regulatory identification number (RIN), if applicable;

(4) The activity or entities to which the guidance applies;

(5) Citations to applicable statutes and regulations;

(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; and

(7) A short summary of the subject matter covered in the guidance document at the top of the document;

(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 Arts Endowment employees and will not foreclose the Arts Endowment’s consideration of positions advanced by affected private parties;

(d) The guidance document is written in plain and understandable English; and

(e) All guidance documents 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 Arts Endowment guidance document is binding because binding guidance is authorized by law or because the guidance is incorporated into a contract, the Arts Endowment will modify the disclaimer in the preceding sentence to reflect either of those facts.

#### **§1157.4 Public access to effective guidance documents.**

The Arts Endowment shall:

(a) Ensure all effective guidance documents, identified by a unique identifier which includes, at a minimum, the document's title and date of issuance or revision and its RIN, if applicable, are on its website in a single, searchable, indexed database, and available to the public in accordance with § 1157.7;

(b) Note on its website that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract;

(c) Advertise on its website where the public can comment electronically on any guidance documents that are subject to the notice-and-comment procedures described in §1157.6 and to submit requests electronically for issuance, reconsideration, modification, or rescission of guidance documents. Guidance documents that do not appear on the Agency's single, searchable, indexed database are rescinded; and

(d) Designate an office to receive and address complaints from the public that the Arts Endowment is not following the requirements of OMB's Good Guidance Bulletin or is improperly treating a guidance document as a binding requirement.

**§1157.5 Definitions of “significant guidance document” and guidance documents that are “otherwise of importance to the Arts Endowment’s interests.”**

(a) The term “significant guidance document” means a guidance document that will be disseminated to regulated entities or the general public and that may reasonably be anticipated:

(1) 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. Historically, the Arts Endowment has not issued any significant guidance documents with these implications;

(2) To create serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency;

(3) To alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) 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.

(b) The term “significant guidance document” does not include the categories of documents excluded by this part or any other category of guidance documents exempted in writing by the Arts Endowment in consultation with the Office of Information and Regulatory Affairs (OIRA).

(c) Significant and economically significant guidance documents must be reviewed by OIRA under E.O. 12866 before issuance and must demonstrate compliance with the applicable requirements for regulations, including significant regulatory actions, set forth in applicable Executive orders. NEA will seek significance determinations from OIRA for guidance documents, as appropriate, in the same manner as for rulemakings. Prior to publishing these guidance documents, and with sufficient time to allow OIRA to review the document in the event that a significance determination is made. NEA will provide OIRA with an opportunity to review the designation request or the guidance document, if requested, to determine if it meets the definition of “significant” or “economically significant” under Executive Order 13891.

(d) Even if not “significant,” a guidance document will be considered “otherwise of importance to the Arts Endowment’s interests” within the meaning of this paragraph (d) if it may reasonably be anticipated:

(1) To relate to a major program, policy, or activity of the Arts Endowment or a high-profile issue pending decision before the Arts Endowment;

(2) To involve one of the Chairman’s top policy priorities;

(3) To garner significant press or congressional attention; or

(4) To raise significant questions or concerns from constituencies of importance to the Arts Endowment, such as Committees of Congress, states, Indian tribes, the White House or other departments of the executive branch, courts, consumer or public interest groups, or leading representatives of industry.

#### **§1157.6 Notice-and-comment procedures.**

(a) Except as provided in paragraph (b) of this section, all proposed Arts Endowment guidance documents determined to be a “significant guidance document” within the meaning of §1157.5 are subject to notice-and-comment procedures. The Arts Endowment shall publish an advance notice in the **Federal Register** of the proposed guidance document and invite public comments for a minimum of 30 days, then publish a response to major concerns raised in the comments when the final guidance document is published.

(b) All significant guidance documents must have approval and signature on a non-delegable basis by the Chairman or Senior Deputy Chairman, before issuance.

(c) The requirements of paragraph (a) of this section will not apply to any significant guidance document unless the Arts Endowment finds, in consultation with OIRA, good cause that notice-and-comment procedures thereon are impracticable, unnecessary, or contrary to the public interest (and incorporates the finding of good cause and a brief statement of reasons in the guidance issued). The Arts Endowment and OIRA may establish an agreement on presumptively exempted categories of guidance; such documents will be presumptively exempt from the requirements of paragraph (a) of this section.

(d) Where appropriate, the Arts Endowment may determine a particular guidance document that is otherwise of importance to the Arts Endowment's interests shall also be subject to the notice-and-comment procedures described in paragraph (a) of this section.

**§1157.7 Petitions for guidance.**

(a) Interested parties may submit petitions to the Arts Endowment requesting withdrawal or modification of any effective guidance document by e-mailing [generalcounsel@arts.gov](mailto:generalcounsel@arts.gov), or sending the petition by mail to National Endowment for the Arts, Attn: Office of General Counsel, 400 7<sup>th</sup> St SW, Washington DC 20506. Please include "Guidance Petition" in the subject line of any correspondence to ensure the letter is routed properly.

(b) Interested parties should include the guidance document's title and a summarized justification describing why the document should be withdrawn, how it should be modified, or the nature of the complaint in the petition in order to receive an expedited response.

(c) The appropriate Arts Endowment official will review the petition and determine if withdrawal or modification is necessary or the best way to resolve the complaint, and respond to the petitioner with a decision no later than 90 days after receipt of the request.

**§1157.8 Rescinded guidance.**

The Arts Endowment may not cite, use, or rely on guidance documents that are rescinded, except to establish historical facts.

**§1157.9 Exigent circumstances.**

In emergency situations or when the Arts Endowment is required by statutory deadline or court order to act more quickly than normal review procedures allow, the Arts Endowment shall

notify OIRA as soon as possible and, to the extent practicable, comply with the requirements of this part at the earliest opportunity. Wherever practicable, the Arts Endowment will alter its proceedings to permit sufficient time to comply with the procedures set forth in this part.

**§1157.10 No judicial review or enforceable rights.**

This part is intended to improve the internal management of the Arts Endowment. As such, it is for the use of Arts Endowment personnel only and is not intended to, and does not create any right or benefit, substantive or procedural, enforceable by law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

**§1157.11 Reports to Congress and Government Accountability Office (GAO).**

Unless otherwise determined in writing by the Arts Endowment, it is the policy of the Agency that upon issuing a guidance document the Arts Endowment will submit a report to Congress and GAO in accordance with the procedures described in 5 U.S.C. 801 (the “Congressional Review Act”).

Dated: August 18, 2020.

Jillian Miller,

Director of Guidelines and Panel Operations, Administrative Services, National Endowment for the Arts.

[FR Doc. 2020-18459 Filed: 8/27/2020 8:45 am; Publication Date: 8/28/2020]