



DEPARTMENT OF COMMERCE

15 CFR Part 29

[Docket No. 200819-0223]

RIN 0605-AA57

Promoting the Rule of Law Through Improved Agency Guidance Documents

AGENCY: Department of Commerce.

ACTION: Interim final rule; request for comments.

SUMMARY: The Department of Commerce (Department) issues regulations to implement the requirements of an Executive order entitled “Promoting the Rule of Law Through Improved Agency Guidance Documents” signed October 9, 2019. Consistent with the Executive order, these regulations require that the Department clearly state that guidance documents issued by the Department do not bind the public, except as authorized by law or as incorporated into a contract; establish procedures for the public to petition for withdrawal or modification of guidance documents; and provide, with certain exceptions, that for significant guidance documents, the Department will submit those documents for review by the Office of Management and Budget’s (OMB’s) Office of Information and Regulatory Affairs (OIRA) and provide for a period of public notice and comment of at least 30 days.

DATES: The interim final rule is effective [*insert date 30 days after date of publication in the FEDERAL REGISTER*]. Comments on the interim final rule must be received by [*insert date 30 days after date of publication in the FEDERAL REGISTER*].

ADDRESSES: You may submit comments by the following method:

Electronic submissions: Submit all electronic public comments via the Federal e-Rulemaking portal: <http://www.regulations.gov> at docket number DOC-2020-0004.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Xenia Kler, Office of the Assistant General Counsel for Legislation and Regulation, 202-482-5354, or via email xkler1@doc.gov.

SUPPLEMENTARY INFORMATION:

Background

On October 9, 2019 (84 FR 55235), the President issued Executive Order 13891, entitled “Promoting the Rule of Law Through Improved Agency Guidance Documents,” which seeks to ensure that when Federal agencies issue guidance documents, the agencies: do not treat those guidance documents alone as imposing binding obligations both in law and in practice, except as incorporated into a contract; take public input into account in formulating significant guidance documents; and make guidance documents readily available to the public.

The Executive order, consistent with previous OMB memoranda, defines “guidance document” as “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.” It further distinguishes guidance documents from, among other things, rules promulgated under the Administrative Procedure Act (APA) (5 U.S.C.

553), which, as authorized by statute, may bind the public, and agency adjudications conducted under the APA (5 U.S.C. 554), which may bind parties on a case-by-case basis. Guidance documents may help clarify existing obligations, but unlike statutes, regulations, and adjudications, cannot themselves impose obligations on the public.

The Department, through its component bureaus, issues a variety of guidance documents in an effort to assist businesses and the public in understanding their obligations, as well as agency procedures, under existing statutes and regulations. For example, when the National Oceanic and Atmospheric Administration modified its regulations pertaining to fishing quotas for widow rockfish in the Pacific Groundfish fishery, it issued a small entity compliance guide intended to provide to fishermen in the region a plain-language summary of the new regulations and how they would work. The guide includes information about why the new rules were issued, how fishermen could expect their existing allocations to be affected, relevant deadlines, and the opportunity to appeal.¹ The United States Patent and Trademark Office, for its part, publishes and periodically updates a trial practice guide for patent bar attorneys practicing before the Patent Trial and Appeal Board.² And the Enforcement and Compliance unit of the International Trade Administration, through its External User Guide, provides guidance to interested parties about how to navigate its ACCESS electronic filing system, which is used in trade proceedings involving unfair imports.³ These guidance documents, and others like them throughout the Department, are intended only to be helpful to the public, and none are intended to impose new or additional obligations. The Department's guidance documents are, furthermore, almost

¹ https://archive.fisheries.noaa.gov/wcr/publications/fishery_management/groundfish/catch_shares/rockfish-compliance-guide-2017.pdf

² <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/ptab-trial-practice-guide-august-2018>

³ https://access.trade.gov/help/ACCESS_User_Guide.pdf

always published on the Department's website, or those of its bureaus, in order to help ensure they are readily available to the public.

In order to further assist the public, going forward, the Department, as explained in an earlier notice (85 FR 12771), will provide access to its guidance documents through a centralized web portal, www.commerce.gov/guidance ("Web Portal"), dedicated to guidance documents, with links to additional, corresponding webpages maintained by individual bureaus of the Department. In compliance with Executive Order 13891, the Web Portal will note that the guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract. In further compliance with Executive Order 13891, the Department will make accessible all documents determined by the Department to qualify as guidance documents currently in effect in the Web Portal. The Department will not retain in effect any guidance document without providing access to it in the Department's Web Portal. The Department's guidance documents issued in the future will also be accessible through the Web Portal. As appropriate, for each guidance document accessible through the Department's Web Portal, including the websites of the individual bureaus, the relevant website will provide: a concise name for the guidance document; an issuance date; a posting date; a unique identifier, the general topic addressed; and a brief summary.

In addition, the Department has reviewed, and will continue to review, documents determined to qualify as guidance documents and, consistent with applicable law, will rescind those guidance documents that it determines should no longer be in effect. The Department will not cite, use, or rely on any rescinded guidance document except to establish historical facts.

In issuing this interim final rule, the Department seeks both to codify its existing practices with respect to guidance documents and to implement the further requirements set forth

in section 4 of Executive Order 13891. The interim final rule sets out procedures the Department will follow with respect to its guidance documents. These include: for all guidance documents, clearly stating that such documents do not bind the public, except as authorized by law or as incorporated into a contract; for significant guidance documents, providing, with certain exceptions, that the Department will submit such documents for OIRA review and provide a 30-day period for public notice and comment; and establishing procedures for the public to petition for withdrawal or modification of guidance documents.

First, this rule provides that the Department will clearly indicate that guidance documents do not bind the public, except as authorized by law or as incorporated into a contract. Guidance documents are intended only to provide clarity to the public regarding existing requirements under the law or with respect to agency policies or practices.

Second, this rule provides that the Department will submit for review by OIRA all significant guidance documents. When appropriate, the Department plans to seek from OIRA significance determinations for guidance documents in a similar manner as it does for rulemakings. In the event that OIRA determines that a guidance document is significant or economically significant as defined in section 2 of Executive Order 13891, the Department will provide OIRA sufficient time to review the document prior to publishing the guidance document, unless the Department and the OIRA Administrator agree that exigency, safety, health, or other compelling cause warrant otherwise. Once OIRA's review is complete, the Department will, absent good cause, provide the public with a notice and comment period of at least 30 days before issuing a final guidance document, and provide a public response addressing major concerns that were raised. In the future, if the Department determines that a category of guidance documents is generally of limited importance to the public or routine, it may, consistent

with section 4(b) of Executive Order 13891, request a categorical exemption from OIRA review or a presumptive determination that such guidance documents are not significant.

Finally, this rule provides procedures for the public to petition the Department for withdrawal or modification of guidance documents, and each of the Department's bureaus will designate one or more individuals whom members of the public can contact concerning such petitions.

Classification

This interim final rule is a rule of agency organization, procedure, or practice, codifying in the CFR the Department's existing procedures and Executive Order 13891's requirements regarding the development, review, and clearance of guidance documents. Therefore, pursuant to 5 U.S.C. 553(b)(3)(A), notice and public comment are not required. Nonetheless, while no proposed rule is being issued, comments are solicited from the public on all aspects of this interim final rule, and the Department will consider all public comments received in the development of a subsequent final rule.

This rule has been determined to be not significant for purposes of Executive Order 12866.

This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department has certified to the Chief Counsel for Advocacy of the Small

Business Administration that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. This rule is purely an agency procedural rule for the use and management of guidance documents by the Department and does not burden the public. Therefore, this rule will not have a significant economic impact on a substantial number of small entities.

This rule does not have any collection of information requirements under the Paperwork Reduction Act.

List of Subjects in 15 CFR Part 29

Administrative practice and procedure, Categorical exemptions, Guidance documents, Procedures, Significance determinations.

For reasons set forth in the preamble, 15 CFR part 29 is added to read as follows:

PART 29 – PROCEDURES FOR GUIDANCE DOCUMENTS

Sec.

29.1 Definitions.

29.2 Procedures for issuing guidance documents.

29.3 Public petition for withdrawal or modification.

29.4 General provisions.

Authority: 15 U.S.C. 1512.

§ 29.1 Definitions.

As used in this part:

Administrator means the Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA).

Department means the Department of Commerce including any of its component bureaus and agencies.

Guidance document means a Department 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, but does not include the following:

- (1) Rules promulgated pursuant to notice and comment under 5 U.S.C. 553, or similar statutory provisions;
- (2) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);
- (3) Rules of Department organization, procedure, or practice;
- (4) Decisions of Department adjudications under 5 U.S.C. 554, or similar statutory provisions;
- (5) Internal guidance directed to the Department that is not intended to have substantial future effect on the behavior of regulated parties; or

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

Pre-enforcement ruling means a formal written communication by the Department in response to an inquiry from a person concerning compliance with legal requirements that interprets the law or applies the law to a specific set of facts supplied by the person. The term includes informal guidance under section 213 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (Title II), as amended, letter rulings, advisory opinions, and no-action letters.

Secretary means the Secretary of Commerce.

Significant guidance document means a guidance document deemed to be significant by OIRA because it may reasonably be anticipated to:

- (1) Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, loan programs, or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.

§ 29.2 Procedures for issuing guidance documents.

(a) The Department will indicate prominently that each guidance document does not bind the public, except as authorized by law or as incorporated into a contract.

(b) The Department will comply with Executive Orders 12866, 13563, 13609, 13771 and 13777 in issuing guidance documents.

(c)(1) For a significant guidance document, as determined by the Administrator unless the Department and the Administrator agree that exigency, safety, health, or other compelling cause warrants an exception from some or all requirements, the Department will:

(i) Provide 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 Department to major concerns raised in comments, except when the Department 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;

(ii) Seek approval on a non-delegable basis by the Secretary or by a Department component head appointed by the President, before issuance; and

(iii) Submit the significant guidance document for review by OIRA under Executive Order 12866 before issuance.

(2) This section does not apply to pre-enforcement rulings.

- (3) This section does not apply to any document that falls within a class which the Administrator or the Administrator's designee has determined is exempt from consideration as significant guidance documents.

§ 29.3 Public petition for withdrawal or modification.

- (a) The public may petition for withdrawal or modification of a particular guidance document by submitting such petition through the designated website: Department of Commerce: www.commerce.gov/guidance; Bureau of Economic Analysis (BEA): www.bea.gov/guidance; Bureau of Industry and Security (BIS): www.bis.doc.gov/guidance; U.S. Census Bureau: www.census.gov/guidance; Economic Development Administration: www.eda.gov/guidance; International Trade Administration (ITA): www.trade.gov/guidance; Minority Business Development Agency (MBDA): www.mbda.gov/guidance; National Institute of Standards and Technology (NIST): www.nist.gov/guidance; National Oceanic and Atmospheric Administration (NOAA): www.noaa.gov/guidance; National Technical Information Service (NTIS): www.ntis.gov/guidance; National Telecommunications and Information Administration (NTIA): www.ntia.doc.gov/guidance; and U.S. Patent and Trademark Office (USPTO): www.uspto.gov/guidance.
- (b) The Department or the relevant individual bureau will provide a response to such petition within 90 days of receipt of the petition.

§ 29.4 General provisions.

Notwithstanding any other provision in this part, nothing in this part shall apply:

- (a) To any action that pertains to foreign or military affairs, or to a national security or homeland security function of the United States (other than guidance documents involving procurement or the import or export of articles and services subject to the Department's jurisdiction);
- (b) To any action related to a criminal investigation or prosecution, including undercover operations, or any civil enforcement action or related to a criminal investigation or prosecution, including undercover operations, or any civil enforcement action or related investigation by the Department of Justice, including any action related to a civil investigative demand under 18 U.S.C. 1968;
- (c) To any investigation of misconduct by a Department employee or any disciplinary, corrective, or employment action taken against a Department employee;
- (d) To any document or information that is exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. 552(b); or
- (e) In any other circumstance or proceeding to which application of this section, or any part of this part, would, in the judgment of the Secretary, undermine the national security.

Dated: August 19, 2020.

Robert Blair,

Director of Policy and Strategic Planning.

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