



BILLING CODE: 4410-BB

DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 50

Docket No. OAG 169; AG Order No. 4803-2020

RIN 1105-AB61

Processes and Procedures for Issuance and Use of Guidance Documents

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Interim final rule; request for comments.

SUMMARY: This rule sets forth the Department's processes and procedures governing the review, clearance, and issuance of guidance documents and codifies existing Department limitations on the use of Department guidance documents in criminal and civil enforcement actions brought by the Department.

DATES: Effective date: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments: Comments are due on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: To ensure proper handling of comments, please reference Docket No. OAG 169 on all electronic and written correspondence. The Department encourages the electronic submission of all comments through <https://www.regulations.gov> using the electronic comment form provided on that site. For ease of reference, an electronic copy of this document is also available at that website. It is not necessary to submit paper comments that duplicate the electronic submission, as all comments submitted to <https://www.regulations.gov> will be posted

for public review and are part of the official docket record. However, should you wish to submit written comments through regular or express mail, they should be sent to Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, Room 4252 RFK Building, 950 Pennsylvania Avenue NW, Washington, DC 20530. Comments received by mail will be considered timely if they are postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The electronic Federal eRulemaking portal will accept comments until Midnight Eastern Time at the end of that day.

FOR FURTHER INFORMATION CONTACT: Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, Room 4252 RFK Building, 950 Pennsylvania Avenue NW, Washington, DC 20530, telephone (202) 514–8059 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at <https://www.regulations.gov>. Information made available for public inspection includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

You are not required to submit personal identifying information in order to comment on this rule. Nevertheless, if you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You must also locate all the personal identifying information that you do not want posted online in the first paragraph of your comment and identify what information you

want the agency to redact. Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify the confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the agency may choose not to post that comment (or to post that comment only partially) on <https://www.regulations.gov>. Confidential business information identified and located as set forth above will not be placed in the public docket file, nor will it be posted online.

If you want to inspect the agency's public docket file in person by appointment, please see the "**FOR FURTHER INFORMATION CONTACT**" paragraph.

II. Discussion

The Department is committed to ensuring the fair and impartial administration of justice. This principle extends to the Department's issuance and use of guidance documents. Pursuant to 5 U.S.C. 301 and Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents," 84 FR 55235, the Department issues this rule to codify processes and procedures for the issuance and use of guidance documents that will enhance the fair and impartial administration of justice.

The Department recently codified in its regulations the Memorandum for All Components, "Prohibition on Improper Guidance Documents," issued by then-Attorney General Jefferson B. Sessions III, which set certain limitations on the issuance of guidance documents. Att'y Gen. Order No. 4769-2020 (July 24, 2020). This rule builds on that regulation, providing

specific processes and procedures governing the review, clearance, and issuance of guidance documents, along with procedures to petition for the withdrawal or modification of a guidance document consistent with Executive Order 13891. This rule also incorporates into the Code of Federal Regulations existing Department policy limitations on the use of guidance documents in criminal and civil enforcement actions brought by the Department.

A. Attorney General Sessions’s Memorandum of November 16, 2017

As mentioned earlier in this preamble, the Department recently codified the Memorandum for All Components, “Prohibition on Improper Guidance Documents,” issued by then-Attorney General Jefferson B. Sessions III on November 16, 2017. That regulation set forth general definitions, principles, and compliance procedures required when the Department, including any of its components, issues a guidance document. This rule elaborates on those definitions, principles, and compliance procedures in light of Executive Order 13891.

B. Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents”

On October 9, 2019, President Donald J. Trump issued Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents.” Pursuant to that Executive Order, Executive departments and agencies are required to “finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents.” 84 FR at 55237. This rule incorporates requirements outlined in the Executive Order that were not otherwise provided for in the Department’s existing processes and procedures for issuing guidance documents.

C. Limitations on the Use of Guidance Documents in Litigation

In addition to the enhancements described above, this rule codifies existing Department policies limiting the use of guidance documents in criminal and civil enforcement actions initiated by the Department. These existing policies are designed to ensure that enforcement actions satisfy principles of accountability and fair notice. Codification of these policies in the Code of Federal Regulations will further enhance transparency.

III. Regulatory Certifications

A. Administrative Procedure Act

This rule relates to a matter of agency management or personnel and is a rule of agency organization, procedure, or practice. As such, this rule is exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date. *See* 5 U.S.C. 553(a)(2), (b)(A), (d). However, the Department is, in its discretion, seeking public comment on this rulemaking.

B. Regulatory Flexibility Act

A Regulatory Flexibility Analysis was not required for this final rule because the Department was not required to publish a general notice of proposed rulemaking for this matter. *See* 5 U.S.C. 601(2), 604(a).

C. Executive Orders 12866, 13563, and 13771 - Regulatory Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), The Principles of Regulation, and Executive Order 13563, “Improving Regulation and Regulatory Review,” section 1(b), General Principles of Regulation.

This final rule is “limited to agency organization, management, or personnel matters” and thus is not a “rule” for purposes of review by the Office of Management and Budget (OMB), a

determination in which OMB has concurred. *See* Executive Order 12866, sec. 3(d)(3).

Accordingly this rule has not been formally reviewed by OMB.

This rule is not subject to the requirements of Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” because it is a regulation “related to agency organization, management, or personnel.” Sec. 4(b).

D. Executive Order 12988 - Civil Justice Reform

This regulation meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, “Civil Justice Reform.”

E. Executive Order 13132 - Federalism

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, “Federalism,” the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted for inflation) in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 et seq.

G. Congressional Review Act

This rule is not a major rule as defined by section 804 of the Congressional Review Act, 5 U.S.C. 804. This action pertains to agency management or personnel, and agency

organization, procedure, or practice, and does not substantially affect the rights or obligations of non-agency parties. Accordingly, it is not a “rule” as that term is used in the Congressional Review Act, 5 U.S.C. 804(3)(B), (C), and the reporting requirement of 5 U.S.C. 801 does not apply.

H. Paperwork Reduction Act of 1995

This final rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521.

List of Subjects in 28 CFR part 50

Administrative practice and procedure.

Accordingly, for the reasons set forth in the preamble, part 50 of chapter I of title 28 of the Code of Federal Regulations is amended as follows:

PART 50 — STATEMENTS OF POLICY

1. The authority citation for part 50 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 1162; 28 U.S.C. 509, 510, 516, and 519; 42 U.S.C. 1921 et seq., 1973c; and Pub. L. 107–273, 116 Stat. 1758, 1824.

2. Add § 50.27 to read as follows:

§ 50.27 Processes and procedures for issuance and use of guidance documents.

(a) *Definitions*—(1) *Guidance document* has the same meaning described in § 50.26 of this part. A guidance document does not impose new standards of conduct on persons outside the Executive Branch, except as expressly authorized by statute or as expressly incorporated into a contract.

(2) *Significant guidance document* means a guidance document that may reasonably be anticipated to:

(i) 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;

(ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

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

(iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.

(3) *Pre-enforcement ruling* means a formal written communication by an agency 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. *Pre-enforcement ruling* includes, but is not limited to:

(i) Informal guidance under section 213 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Title II), as amended;

(ii) Letter rulings;

(iii) Advisory opinions; and

(iv) No-action letters.

(4) *Guidance Portal* means the single, searchable, indexed database located at www.justice.gov/guidance that the Department has established pursuant to section 3(a) of Executive Order 13891.

(5) *Contract* includes, but is not limited to, a grant or cooperative agreement.

(b) *Limitation on use of guidance documents in litigation.* (1) Criminal and civil enforcement actions brought by the Department must be based on violations of applicable legal requirements, not mere noncompliance with guidance documents issued by federal agencies, because guidance documents cannot by themselves create binding requirements that do not already exist by statute or regulation. Thus, the Department should not treat a party's noncompliance with a guidance document as itself a violation of applicable statutes or regulations. The Department must establish a violation by reference to statutes and regulations. The Department may not bring actions based solely on allegations of noncompliance with guidance documents. Consistent with Part 1-20.000 of the Department's *Justice Manual*, the Department may continue to rely on agency guidance documents for purposes, including evidentiary purposes that are otherwise lawful and consistent with the Federal Rules of Evidence, that do not treat such documents as independently creating binding requirements that do not already exist by statute or regulation.

(2) The Department shall not seek deference to any guidance document issued by the Department or any component after the effective date of this rule that does not substantially comply with the requirements of paragraphs (c) and (d) of this section.

(c) *Requirements for Department of Justice issuance of guidance documents—(1)*
Requirements for issuance of all guidance documents. (i) Guidance documents may not be used as a substitute for regulation and may not be used to impose new standards of conduct on persons outside the Executive Branch, except as expressly authorized by statute or as expressly incorporated into a contract.

(ii) Each guidance document shall clearly state that it does not bind the public, except as expressly authorized by statute or as expressly incorporated into a contract. This clear statement shall be prominent in each guidance document.

(A) The clear statement shall consist of the following: “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 Department policies.”

(B) Where a guidance document is binding because binding guidance is expressly authorized by statute or the guidance document is expressly incorporated into a contract with a specific party or parties, the clear statement described in paragraph (c)(1)(ii)(A) of this section shall be modified to reflect either of those facts.

(C) Nothing in this section shall be construed to prevent a guidance document from stating that the underlying law it discusses, as opposed to the guidance document itself, is binding.

(iii) Each guidance document shall:

(A) Include the term “guidance”;

(B) Identify the component issuing or maintaining the document;

(C) Identify the activities to which and the persons to whom the document applies;

(D) Include the date of issuance;

(E) Note if it is a revision to a previously issued guidance document and, if so, identify the guidance document that it replaces;

(F) Provide a title and unique document identification number;

(G) Include citations of the statutory provisions or regulations to which it applies or which it interprets;

(H) Include the clear statement specified in paragraph (c)(1)(ii) of this section; and

(I) Include, at the top of the document, a short summary of the subject matter covered in the document.

(2) *Requirements for significant guidance documents.* Unless the Department, or a component, has sought and obtained an exemption pursuant to section 4(a)(iii) of Executive Order 13891, the following requirements shall apply to a significant guidance document, except that the following requirements shall not apply to a pre-enforcement ruling:

(i) *Approval and signature.* Before issuance, a significant guidance document shall be approved and signed, on a non-delegable basis, by the Attorney General, by the Deputy Attorney General, or by the head of a component whose appointment to office is required to be made by the President.

(ii) *Submission to the Office of Information and Regulatory Affairs (“OIRA”) of the Office of Management and Budget (“OMB”).* Before issuance, a significant guidance document shall be submitted to OIRA, through the Department’s Office of Legal Policy, for review under Executive Order 12866, unless the Administrator of OIRA has issued a categorical exception applicable to the guidance document through a memorandum issued pursuant to section 4(b) of Executive Order 13891. The Department will seek a determination of significance from OIRA for certain guidance documents, as appropriate, in the same manner as for rulemakings.

(iii) *Notice and comment and response.* (A) Before issuance, a significant guidance document shall be made available for public notice and comment for no less than 30 days, except when the Department or a component finds that notice and public comment are impracticable,

unnecessary, or contrary to the public interest. Any such finding, and a brief statement of reasons therefor, shall be incorporated into any significant guidance document that is not made available for public notice and comment.

(B) Notice that a draft significant guidance document is available for public comment shall be accomplished by publication of a notice in the Federal Register and posting of the draft significant guidance document on the Guidance Portal. The document that is published in the Federal Register shall announce the availability of a draft significant guidance document, provide a title and descriptive summary of the draft significant guidance document, and state the length of the comment period and the method or methods by which public comments may be submitted.

(C) The Department shall ensure that persons with disabilities are afforded an opportunity to comment during any period of public notice and comment that is equal to that afforded to other members of the public.

(D) The Department shall make comments available to the public for online review by posting them on the Guidance Portal or on another website with a direct link to the Guidance Portal.

(E) The Department or a component seeking to issue a significant guidance document need not respond to every comment or issue raised in a comment, but the Department or a component shall provide a public response to each major concern raised in comments. The Department or a component shall also provide a public explanation of the Department's or component's choices in the final guidance document, including why the Department or component did or did not agree with relevant suggestions from commenters.

(F) The public response to comments shall be incorporated into the final guidance document or into a companion document that is made available on the Guidance Portal.

(iv) The development and issuance of significant guidance documents shall comply with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in Executive Orders 12866, 13563, 13609, 13771, and 13777.

(3) *Contact.* Components having questions regarding implementation of § 50.27(c) should contact the Department's Office of Legal Policy.

(d) *Public access to all guidance documents.* (1) All final guidance documents for which OMB has not issued a waiver or extension pursuant to section 3(c) of Executive Order 13891 shall be publicly available on the Guidance Portal.

(2) Except for a guidance document for which OMB has issued a waiver or extension pursuant to section 3(c) of Executive Order 13891, a guidance document shall not represent the Department's policy on a statutory, regulatory, or technical issue or represent the Department's interpretation of a statute or regulation unless and until it is publicly available on the Guidance Portal.

(e) *Department's reliance on guidance documents.* (1) No guidance document that has been withdrawn or superseded by modification may be cited, used, or relied upon by the Department for purposes other than to establish historical facts.

(2) Final guidance documents that are expressly incorporated into a contract with a specific party or parties may be cited, used, or relied upon by the Department with respect to that contract.

(3) Except as provided in paragraph (e)(2) of this section, of the final guidance documents for which OMB has not issued a waiver or extension pursuant to section 3(c) of

Executive Order 13891, only those that are publicly available on the Guidance Portal may be cited, used, or relied upon by the Department for purposes other than to establish historical facts.

(f) *Procedure to petition for withdrawal or modification of a guidance document.* (1) Any member of the public may petition to withdraw or modify a guidance document.

(2) A member of the public wishing to petition for the withdrawal or modification of a guidance document shall submit a petition in writing, directed to the component that issued or maintains the guidance document, containing a statement of reasons for the petition. Upon receipt of a petition for withdrawal or modification, the receiving component shall forward a copy of the petition to the Department's Office of Legal Policy, which shall coordinate such requests.

(3) The Guidance Portal shall provide clear instructions to members of the public regarding how to submit a petition for the withdrawal or modification of a guidance document, including an e-mail address or web portal where electronic petitions can be submitted, a mailing address where petitions can be submitted, and instructions that petitions shall:

(i) Be in writing (which may include using electronic means) and, if the petition is not in English, be accompanied by an English translation;

(ii) Be directed to the component that issued or maintains the guidance document;

(iii) Be titled as a petition for withdrawal or a petition for modification of a guidance document;

(iv) Identify the guidance document at issue; and

(v) Contain a statement of the reasons for the petition.

(4) The component that issued or maintains the guidance document shall respond to a petition in writing (which may include using electronic means) no later than 90 days after it

receives the petition. The response shall state whether the petition is granted, granted in part and denied in part, denied, or provisionally denied for lack of adequate information. If the petition is provisionally denied for lack of adequate information, the response shall indicate what additional information is necessary to adjudicate the petition. Upon receipt of the necessary additional information, the receiving component shall forward the information to the Department's Office of Legal Policy, and the component that issued or maintains the guidance document shall respond to the petition in writing no later than 90 days after it receives the necessary additional information. The response shall state whether the petition is granted, granted in part and denied in part, or denied.

(5) The Department or a component may consider in a coordinated manner, or provide a coordinated response to, similar petitions for withdrawal or modification.

(g) *Exclusions.* (1) Notwithstanding any other provision in this section, except for the provisions of paragraph (b)(1) of this section, nothing in this rule shall apply:

(i) 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 non-defense articles and services);

(ii) To any action related to a criminal investigation or prosecution, including undercover operations, or any civil enforcement action or related investigation by the Department, including any action related to a civil investigative demand under 18 U.S.C. 1968;

(iii) To any investigation of misconduct by an agency employee or any disciplinary, corrective, or employment action taken against an agency employee;

(iv) To any document or information that is exempt from disclosure under section 552(b) of title 5, United States Code (commonly known as the Freedom of Information Act); or

(v) In any other circumstance or proceeding to which application of this rule, or any part of this rule, would, in the judgment of the Attorney General or his designee, undermine the national security.

(2) Notwithstanding any other provision in this regulation, except for the provisions of paragraph (b)(1) of this section, nothing in this regulation shall apply to categories of guidance documents made exempt from Executive Order 13891 by the Administrator of OIRA through memoranda issued pursuant to section 4(b) of Executive Order 13891.

August 21, 2020.

Date

William P. Barr
Attorney General

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