



This document is scheduled to be published in the Federal Register on 05/28/2020 and available online at [federalregister.gov/d/2020-09353](https://federalregister.gov/d/2020-09353), and on [govinfo.gov](https://govinfo.gov)

BILLING CODE: 7515-01U

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### 36 CFR Part 1213

[FDMS No. NARA-20-0009; Agency No. NARA-2020-03f4]

RIN 3095-AC04

#### Administrative Guidance Procedures

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Final rule.

**SUMMARY:** This rule codifies our policies and procedures for reviewing and clearing administrative guidance documents.

**DATES:** Effective [INSERT DATE 40 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], unless we receive adverse comments by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] that warrant revising or rescinding this rulemaking.

**ADDRESSES:** You may submit comments, identified by RIN 3095-AC04, by either of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for RIN 3095-AC04 and follow the site's instructions for submitting comments.
- *Mail* (for paper, flash drive, or CD-ROM submissions. Include RIN 3095-AC04 on the submission): National Archives and Records Administration; Regulation Comments Desk, Suite 4100; 8601 Adelphi Road; College Park, MD 20740-6001.

We may publish any comments we receive without changes, including any personal information you include.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Keravuori, Regulatory and External Policy Program Manager, by email at [regulation\\_comments@nara.gov](mailto:regulation_comments@nara.gov), or by telephone at 301.837.3151.

**SUPPLEMENTARY INFORMATION:**

This rule codifies internal policies and procedures on developing, reviewing, and clearing guidance documents, which ensure that all guidance documents receive appropriate review before we issue them. This rule also responds to Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents (October 9, 2019), which requires Federal agencies to issue final regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents. As a result, this rule incorporates requirements from the E.O. that were not otherwise in our internal procedures, primarily a requirement for a centralized guidance portal on our web site and a requirement that the comment period for significant guidance documents be at least 30 days, except when the agency for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest.

The procedures contained in this rule apply to all guidance documents. We define guidance documents as established by OMB and the E.O.: any statement we make of agency policy or interpretation concerning a statute, regulation, or technical matter within our jurisdiction that we intend to have general applicability and future effect on the behavior of regulated parties, but which we do not intend to have the force or effect of law in its own right on non-Governmental regulated parties, and for which a statute does not otherwise require us to follow the rulemaking procedures of the Administrative

Procedure Act.

We review guidance documents before we issue them so they are written in plain language and do not impose any substantive requirements above and beyond statute, regulation, or other authority (such as an executive order). Although we have in the past complied with the requirements of the Administrative Procedure Act with regard to the content of our guidance documents and required procedures, we are now incorporating additional steps to show this compliance, as required by the E.O. and OMB's implementing memorandum (OMB M-20-02). This includes labeling each guidance document with a clear and prominent statement that the contents of the guidance document do not have the force and effect of law on the public and are not meant to bind the public beyond what is already required in a law, regulation, or other authority. This regulation also addresses significant guidance documents and their potential to, in some cases, have an economic impact on the public. We conduct a good faith cost assessment to determine economic impact on the public where possible, and submit significant guidance to OMB for review before providing informal notice-and-comment opportunity for the public.

### **Regulatory analysis**

#### **Administrative procedure**

Under the Administrative Procedure Act, 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 rule incorporates internal procedures about our administrative procedures into the Code of Federal Regulations, notice and comment are not necessary.

Executive Order 12866, Regulatory Planning and Review and Executive Order 13563,

Improving Regulation and Regulation Review

The Office of Management and Budget (OMB) has reviewed this rulemaking and determined it is not “significant” under section 3(f) of Executive Order 12866. It is not significant because it is a rule of agency procedure and practice, describing our procedures for promulgating and processing guidance documents, and we do not anticipate it having an economic impact on the public. It will help ensure transparency, robust public participation, and the quality and fairness of administrative actions.

Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*)

This requirement does not apply if the agency certifies that the rulemaking will not, if promulgated, have a significant economic impact on a substantial number of small entities (5 U.S.C. 603). We certify, after review and analysis, that this rulemaking will not have a significant adverse economic impact on small entities.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*)

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*) requires that agencies consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from OMB for each collection of information we conduct, sponsor, or require through regulations. There are no information collection requirements associated with this rule.

Executive Order 13132, Federalism

Executive Order 13132 requires agencies to ensure state and local officials have the opportunity for meaningful and timely input when developing regulatory policies that may have a substantial, direct effect on the states, on the relationship between the Federal

Government and the states, or on the distribution of power and responsibilities among the various levels of government. If the effects of the rule on state and local governments are sufficiently substantial, the agency must prepare a Federal assessment to assist senior policy makers. This rulemaking will not have any effects on state and local governments within the meaning of the E.O. Therefore, no Federalism assessment is required.

**Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs**

Review under E.O. 13771 seeks to reduce Federal regulations that impose private expenditures in order to comply with them, and to control those costs in any such regulations. OMB has reviewed this rulemaking and determined that it is exempt from E.O. 13771 requirements. This rulemaking is exempt because it is not significant under E.O. 12866 and because it is a rule of agency procedure and practice.

**Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104-4; 2 U.S.C. 1532)**

The Unfunded Mandates Reform Act requires that agencies determine whether any Federal mandate in the rulemaking may result in state, local, and tribal governments, in the aggregate, or the private sector, expending \$100 million in any one year. This rule does not contain a Federal mandate that may result in such an expenditure.

**List of Subjects in 36 CFR Part 1213**

Administrative procedure, Agency administration, Agency guidance, Public notice and comment

For the reasons discussed in the preamble, NARA adds part 1213 as follows:

**PART 1213 – AGENCY GUIDANCE PROCEDURES**

Sec.

1213.1        Scope.

- 1213.2 Definitions.
- 1213.4 Requirements for review and clearance.
- 1213.6 Public access to guidance documents.
- 1213.8 Significant guidance.
- 1213.10 Petitions for guidance.
- 1213.12 Rescinded guidance.
- 1213.14 Exigent circumstances.
- 1213.16 No judicial review or enforceable rights.

Authority: 44 U.S.C. 2104(a).

**§ 1213.1 Scope.**

- (a) This part prescribes general procedures that apply to guidance documents NARA and its components issue after April 30, 2020, and to all NARA employees and contractors involved in all phases of developing and issuing policy and guidance.
- (b) This part does not apply to:
  - (1) Regulations; although some regulations are subject to rulemaking requirements under 5 U.S.C. 553(a), they do not constitute guidance, so are not covered by this rule. In addition, this rule does not apply to regulations exempt from rulemaking requirements under 5 U.S.C. 553(a) and regulations of agency organization, procedure, or practice;
  - (2) Decisions of agency adjudications under 5 U.S.C. 554 or similar statutory provisions;
  - (3) Internal executive branch legal advice or legal advisory opinions addressed to executive branch officials;

- (4) 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 using, operating, or controlling a Government facility or property), and correspondence with individual people or entities (*e.g.*, congressional correspondence), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated parties;
- (5) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;
- (6) 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 or guidance;
- (7) Guidance pertaining to military or foreign affairs functions;
- (8) Grant solicitations and awards;
- (9) Contract solicitations and awards; or
- (10) Purely internal agency policies or guidance directed solely to NARA employees or contractors or to other Federal agencies that we do not intend to have substantial future effect on the behavior of regulated parties.

## **§ 1213.2      Definitions.**

(a) *Guidance or guidance document* means any statement of agency policy or interpretation concerning a statute, regulation, or technical matter within our jurisdiction that we intend to have general applicability and future effect on the behavior of regulated parties, but which we do not intend to have the force or effect of law in its own right on non-Governmental regulated parties, and for which we are not otherwise required by statute to satisfy the rulemaking procedures in 5 U.S.C. 553 or 5 U.S.C. 556. 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, advisories, notices, handbooks and manuals, and may include video, audio, and web-based formats. *See* OMB Bulletin 07-02, Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3434, 3439 (January 25, 2007) (“OMB Good Guidance Bulletin”).

(b) *Significant guidance document* means a guidance document that we reasonably anticipate will:

- (1) 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;
- (2) Create serious inconsistency or otherwise interfere with an action another Federal agency takes or plans;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of those who receive them; or

- (4) 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.

**§ 1213.4 Requirements for review and clearance.**

- (a) NARA's regulatory office must review and clear, according to this subpart, all NARA guidance documents before we issue them.
- (b) The regulatory office ensures that each guidance document satisfies the following requirements:
  - (1) It complies with relevant statutes and regulations, and other applicable authorities;
  - (2) It identifies or includes:
    - (i) The term "guidance" or its functional equivalent;
    - (ii) The issuing office's name;
    - (iii) A unique agency identifier, according to naming conventions we establish, and a z-RIN, if applicable;
    - (iv) A concise title;
    - (v) The issuing or effective date;
    - (vi) A notice about the guidance document's force and effect that is consistent with OMB M-2020-02, Q20;
    - (vii) An indicator of whether the guidance revises or replaces any previously issued guidance and, if so, sufficient information to identify the previously issued guidance; and

- (vii) Appropriate citations to applicable statutes, regulations, and other authorities;
- (3) It is consistent with NARA policies, guidance, strategic initiatives, and other authorities, is written in plain and understandable English, and meets other guidance and policy analysis factors; and
- (4) It avoids using mandatory language, such as “shall,” “must,” or “required,” unless the language is describing an established statutory or regulatory requirement or is addressed to agency staff or other Federal employees and will not foreclose our ability to consider positions advanced by any affected private parties.
- (c) The guidance document must also either contain or be accompanied by an appropriate topic keyword and a short summary of the subject matter covered in the guidance document, for use on the guidance portal.
- (d) The regulatory office also assesses whether the guidance document constitutes significant guidance and works with the submitting office to make a good faith cost estimate, as applicable, in accordance with § 1213.8(a). If we determine that a guidance document might be significant, the regulatory office coordinates with OMB’s Office of Information and Regulatory Affairs (OIRA), as outlined in § 1213.8(d).
- (e) We also assess whether the guidance document might be otherwise important to the agency’s interests, if we reasonably anticipate that it might: relate to a major program, policy, or activity, or a high-profile issue involving the agency or its interests; involve one of NARA’s top policy priorities; garner significant press, congressional, or other attention; or raise significant questions or concerns from constituencies such as

committees of Congress, states or Indian tribes, the White House or other departments of the executive branch, courts, public interest groups, or leading representatives of industry. When appropriate, we may determine that a particular guidance document that is otherwise of importance to the agency's interests be subject to the informal notice-and-comment procedures described in § 1213.8(f).

(f) The regulatory office submits guidance documents we determine may be significant to OIRA for significance determinations, before clearing the submitting office to issue them.

(f) When we issue a guidance document, we post it on our centralized guidance portal (see § 1213.6(a)).

#### **§ 1213.6 Public access to guidance documents.**

(a) We post the cleared document on our centralized guidance portal at [www.archives.gov/guidance](http://www.archives.gov/guidance). The portal contains a searchable, indexed database of our various kinds of guidance along with links to each document and an agency-unique identifier, title, date issued, z-RIN, if applicable, topic keywords, brief summary, date added to the portal, and any status information (for example, that it supersedes a previous guidance document). All guidance currently in effect (including guidance originally issued before April 30, 2020) must appear on the portal; if it does not, it is deemed rescinded and without any effect.

(b) The guidance portal notes that guidance documents lack the force and effect of law on the public, except as authorized by law, executive order, or regulation or as incorporated into a contract, and that the guidance is not legally binding on the public, except as established by such law, regulation, or contract. Each guidance document and

web page that contains a listing of guidance must also include an appropriate notice about the force and effect of the guidance.

(c) The guidance portal also includes instructions for how the public can comment on guidance documents that are subject to the informal notice-and-comment procedures described in § 1213.8 and to submit requests that we issue, reconsider, modify, or rescind guidance documents, in accordance with § 1213.10. It also provides contact information for the public to submit complaints that an office is not following the requirements of OMB's Good Guidance Bulletin or is improperly treating a guidance document as a requirement binding on the public.

### **§ 1213.8        Significant guidance.**

(a) *Good faith cost estimates.* Even though not legally binding on the public, some agency guidance may result in a substantial economic impact on the public. For example, the guidance's existence may induce private parties to alter their conduct to conform to recommended standards or practices, thereby incurring costs beyond the costs of complying with existing statutes, regulations, and other authorities. While it may be difficult to predict with precision the economic impact of voluntary guidance on the public, we, to the extent practicable, make a good faith effort to estimate the likely economic cost impact on the public, to determine whether the document might be significant.

(b) *Regulatory impact analyses.* When we, or OIRA, determine that a guidance document will have an economically significant impact on the public, we conduct and publish a regulatory impact analysis of the sort that would accompany an economically significant rulemaking, to the extent reasonably possible.

- (c) *Excluded guidance.* Significant guidance documents do not include the categories of documents excluded by § 1213.1(b) or any other category of guidance documents the regulatory office exempts in writing in consultation with OIRA.
- (d) *OIRA review of significant guidance.* If OIRA designates a guidance document as significant or economically significant, we submit it to OIRA for review under E.O. 12866 before we issue it, as with regulations; and we process significant guidance in compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in E.O. 12866, E.O. 13563, E.O. 13609, E.O. 13771, and E.O. 13777.
- (e) *Signature or approval.* The Archivist of the United States or a senior executive designee signs or approves significant guidance.
- (f) *Informal notice-and-comment procedures.* Except as outlined in paragraph (g) of this section, we subject all proposed guidance documents OIRA determines to be significant to the following informal notice-and-comment procedures. We publish a notice in the **Federal Register** announcing that a draft of the proposed guidance document is publicly available and where, either post the draft guidance document on our guidance portal or on regulations.gov in a docket with the notice (depending on the nature, size, and scope of the guidance), invite public comment on the draft document for a minimum of 30 days, and prepare and post a public response to major concerns raised in the comments, as appropriate, on our guidance portal or in the docket on regulations.gov (whichever location we used to post the draft guidance), either before or when we issue the guidance document.

(g) *Exceptions to notice-and-comment procedures.* The requirements of paragraph (f) of this section do not apply to any significant guidance document or categories of significant guidance documents for which we find, in consultation with OIRA, good cause that notice and public comments are impracticable, unnecessary, or contrary to the public interest (and we will incorporate the finding of good cause and a brief statement of reasons in the guidance).

**§ 1213.10 Petitions for guidance.**

- (a) Any person may petition that we issue, reconsider, modify, or rescind a particular guidance document by using the procedures described here and on our guidance portal at [www.archives.gov/guidance](http://www.archives.gov/guidance).
- (b) Submit your petition using the contact information and method noted on the guidance portal, which includes an email address or web portal for submitting electronic petitions, a mailing address for submitting hard copy petitions, and the office responsible for coordinating the request. You must submit your petition through one of these means, and the petition must:
- (1) Describe the nature of the request and set out the text or substance of the guidance you are requesting or that you wish us to reconsider, modify, or rescind;
  - (2) Explain your interest in the action you are requesting; and
  - (3) Contain any information and arguments you have to support the action you are seeking.
- (c) We will review your request and make a decision whether to grant the request or deny it in whole or in part. We will provide you with a response to your request

and a status update or our decision within 90 days after we receive the petition, if you provide email or mail contact information.

**§ 1213.14 Rescinded guidance.**

We may not cite, use, or rely on guidance documents that we have rescinded, except to establish historical facts.

**§ 1213.16 Exigent circumstances.**

In emergency situations or when we are required by statutory deadline, court order, or other exigent circumstances to act more quickly than normal review procedures allow, we notify OIRA as soon as possible and, to the extent practicable, comply with the requirements of this subpart at the earliest opportunity. Whenever practicable, we permit sufficient time to comply with the procedures in this subpart.

**§ 1213.18 No judicial review or enforceable rights.**

We intend this part to improve our internal management. As a result, it is for the use of NARA personnel only and we do not intend it to, nor does it, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

DAVID S. FERRIERO,

Archivist of the United States.

[FR Doc. 2020-09353 Filed: 5/27/2020 8:45 am; Publication Date: 5/28/2020]