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CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Part 2509

RIN 3045-AA74

Procedures for Issuing Guidance Documents

AGENCY: Corporation for National and Community Service.

ACTION: Final rule.

SUMMARY: The Corporation for National and Community Service (CNCS) is publishing its procedures for issuing Guidance Documents. This rule implements section 4 of Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents” (October 9, 2019).

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

FOR FURTHER INFORMATION CONTACT: Amy Borgstrom, Corporation for National and Community Service, 250 E Street SW, Washington, DC 20525, by email at aborgstrom@cns.gov, or by phone: 202-422-2781.

SUPPLEMENTARY INFORMATION:

I. 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, CNCS 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 whom petitions should be directed; and

(3) for a significant guidance document, as determined by the Administrator of the Office of Management and Budget's (OMB's) 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 requirements, 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).

II. Regulatory Procedures

Administrative Procedure Act

This final rule incorporates requirements of the Executive order and CNCS'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 E.O. 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)), CNCS 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.

List of Subjects in 45 CFR Part 2509

Administrative practice and procedure.

For the reasons discussed in the preamble, under the authority of 42 U.S.C. 12651c(c), the Corporation for National and Community Service adds 45 CFR part 2509 to read as follows:

PART 2509—ADMINISTRATIVE PRACTICE AND PROCEDURES

Subpart A – Guidance Documents

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Subpart B [Reserved]

Authority: 42 U.S.C. 12651c(c); E.O. 13891, 84 FR 55235.

Subpart A – Guidance Documents

§2509.10 What does this subpart cover?

(a) This subpart sets forth the Corporation for National and Community Service’s (CNCS’s) procedures for issuing guidance documents. It applies to all CNCS employees and contractors involved in issuing CNCS guidance documents on or after April 28, 2020.

(b) For the purposes of this subpart, “guidance document” means any statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statute, regulatory, or technical issue, or an interpretation of a statute or regulation, but does not include:

(1) Legislative rules promulgated under 5 U.S.C. 553 (or similar statutory provisions), or exempt from rulemaking requirements under 5 U.S.C. 553(a);

(2) Rules of agency organization, procedure, or practice;

- (3) Decisions of agency adjudications under 5 U.S.C. 554 or similar statutory provisions;
- (4) Internal executive branch legal advice or legal advisory opinions addressed to executive branch officials;
- (5) Agency statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions, notices regarding particular locations or facilities, and correspondence with individual persons or entities, except documents directed to a particular party and designed to guide the conduct of the broader regulated public;
- (6) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;
- (7) Agency statements that do not set forth for the first time a new regulatory 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;
- (8) Grant solicitations and awards;
- (9) Contract solicitations and awards; or
- (10) Purely internal agency policies or guidance directed solely to CNCS employees or contractors or to other Federal agencies that are not intended to have substantial future effect on the behavior of regulated parties.

§2509.12 What should I do if a guidance document is covered by this subpart?

- (a) All CNCS guidance documents require review and clearance in accordance with this subpart.
- (b) Guidance proposed by CNCS must be reviewed by the Office of General Counsel

(OGC) and cleared by the General Counsel or his/her designee.

(c) Additional reviews by other CNCS officials are also conducted as described in CNCS Policy 100 – Preparing Policies and Procedures and Policy 103 – Clearing Controlled Correspondence and Other Documents with the Board, Chief Executive Officer, and Chief of Staff, or subsequent updates or revisions to those policies.

§2509.14 What is the purpose of the review and clearance procedure?

CNCS's guidance issuance process shall ensure that each proposed guidance document satisfies the following requirements:

- (a) The guidance document complies with all relevant statutes and regulations (including any statutory deadlines for Agency action);
- (b) The guidance document identifies or includes:
 - (1) The term “guidance” or its functional equivalent;
 - (2) The issuing CNCS 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 CNCS employees and will not foreclose

CNCS’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 CNCS’s guidance document is binding because binding guidance is authorized by law or because the guidance is incorporated into a contract, CNCS will modify the disclaimer above to reflect either of those facts.

§2509.16 How will CNCS make guidance documents available to the public?

CNCS 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 § 2905.16;

(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; and

(c) Publish on its website where the public can comment electronically on any guidance documents that are subject to the notice-and-comment procedures described in § 2509.22 and to submit requests electronically for issuance, reconsideration, modification, or rescission of guidance documents.

(d) Guidance documents that do not appear on the Agency's single, searchable, indexed database are rescinded.

§2509.18 What procedures apply to guidance documents identified as “significant”?

(a) OGC review of proposed guidance documents will include a preliminary determination as to whether the proposed guidance document is significant within the meaning of § 2509.20. Unless exempt, each proposed guidance document determined to be significant must be approved by the Chief Executive Officer before issuance. In such instances, CNCS will:

- (1) Obtain a RIN to report what CNCS is planning to issue;
- (2) Coordinate the guidance document with the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA) for the interagency review, final significance determination, and clearance; and
- (3) Coordinate internal review and clearance of the guidance document before submitting it to the Chief Executive Officer for approval, consistent with CNCS Policy 103.

(b) If the guidance document is determined to be significant under § 2509.20, CNCS may proceed with publication in the *Federal Register*. For each significant guidance document, the originating CNCS office should include a statement in the clearance memorandum indicating that the guidance document has been reviewed and cleared in accordance with this section.

§2509.20 What is a “significant” guidance document?

(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;
 - (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 § 2509.12 or any other category of guidance documents exempted in writing by CNCS in consultation with 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 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.

§2509.22 When will guidance be published for public notice-and-comment?

- (a) Except as provided in paragraph (b) of this section, all proposed CNCS guidance documents determined to be significant within the meaning of § 2509.20 are subject to public notice-and-comment. CNCS shall publish notification in the Federal Register of the proposed significant 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) The requirements of paragraph (a) of this section will not apply to any significant guidance document for which CNCS finds, in consultation with OIRA, good cause that notice-and-comment procedures 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).

(c) CNCS 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.

§2509.24 How may the public submit a petition to CNCS for the withdrawal or modification of a guidance document?

(a) Interested parties may submit petitions to CNCS requesting withdrawal or modification of any effective guidance document by sending an email to Guidance@cns.gov or by sending the request to Corporation for National and Community Service ATT: Associate Director of Policy, 250 E Street S.W., Washington DC 20525.

(b) Interested parties should include the guidance document's title and a summary justification describing why the document should be withdrawn, how it should be modified, or the nature of the concern with the guidance.

(c) The responsible CNCS department, in consultation with OGC, will review the petition, determine if withdrawal or modification is necessary or the best way to resolve the concern, and respond to the petitioner no later than 90 days after receipt of the request.

§2509.26 What is the effect of rescinded guidance documents?

CNCS may not cite, use, or rely on rescinded guidance documents, except to establish historical facts.

§2509.28 How will significant guidance be issued when there are exigent circumstances?

Under exigent circumstances, such as safety, health, or when statutory deadlines or court order or other compelling cause require CNCS to act more quickly than normal review procedures allow, CNCS will notify OIRA as soon as possible and, to the extent practicable, comply with the requirements of this subpart at the earliest opportunity.

§2509.30 No judicial review or enforceable rights.

This subpart is intended to improve the internal management of CNCS. As such, it is for the use of CNCS employees 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.

Subpart B [Reserved]

Dated: June 24, 2020.

Helen Serassio,

Acting General Counsel.

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