

definitions of terms used in this paragraph (b)(3)(ii)(C) and paragraph (b)(3)(ii)(D) of this section.)

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(5) * * *
(i) * * * An amended statute split-waiver election must be made in a separate statement entitled “THIS IS AN ELECTION UNDER SECTION 1.1502–21T(b)(3)(ii)(C)(1) TO WAIVE THE PRE-[insert first day of the first taxable year for which the acquired member was a member of the acquiring group] CARRYBACK PERIOD FOR THE CNOLS ATTRIBUTABLE TO THE [insert taxable year of losses] TAXABLE YEAR(S) OF [insert names and employer identification numbers of members]” (amended statute split-waiver election statement).

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(ii) * * * An extended split-waiver election must be made in a separate statement entitled “THIS IS AN ELECTION UNDER SECTION 1.1502–21T(b)(3)(iii)(C)(1) TO WAIVE THE PRE-[insert first day of the first taxable year for which the acquired member was a member of the acquiring group] EXTENDED CARRYBACK PERIOD FOR THE CNOLS ATTRIBUTABLE TO THE [insert taxable year of losses] TAXABLE YEAR(S) OF [insert names and employer identification numbers of members]” (extended split-waiver election statement).

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(D) * * *
(2) * * *
(ii) * * * See paragraph (b)(3)(ii)(C)(2)(v) of this section. * * *
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(4) * * *
(ii) * * * See paragraph (b)(3)(ii)(C)(2)(ix) of this section.
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Martin V. Franks,

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DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 89

RIN 1290–AA40

Promoting Regulatory Openness Through Good Guidance (PRO Good Guidance)

AGENCY: Office of the Secretary, U.S. Department of Labor.

ACTION: Final rule.

SUMMARY: This rule establishes the U.S. Department of Labor’s policy and requirements for issuing, modifying, withdrawing, and using guidance; making guidance available to the public; a notice-and-comment process for significant guidance; and taking and responding to petitions about guidance. This rule will help the Department use guidance lawfully and appropriately, and it gives Americans fairer notice of and improved access to guidance. The Department expects this rule will have meaningful benefits for employers, workers, and the American public overall.

DATES: Effective on September 28, 2020.

FOR FURTHER INFORMATION CONTACT: Erin FitzGerald, Senior Policy Advisor, U.S. Department of Labor, Room S–2312, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–5076 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (large print, Braille, audio tape or disc), upon request, by calling (202) 693–5959 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

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I. Background and Overview

On October 9, 2019, the President issued Executive Order 13891 (E.O.), titled “Promoting the Rule of Law through Improved Agency Guidance Documents,” addressing guidance issued by federal agencies outside of the context of formal rulemaking. Among other things, the E.O. requires that federal agencies generally treat guidance as non-binding; establish processes for issuing guidance; make all guidance available to the public; take comment on significant guidance; and receive and respond to petitions for withdrawal or modification of guidance. The E.O. directs the Department to finalize regulations related to these requirements. This Promoting Regulatory Openness through Good Guidance Rule (the “rule on guidance” or “PRO Good Guidance Rule”) complies with that directive.

Though informed and prompted by the E.O., the Department issues this rule under its own, independent authority. It does so expecting the rule will lead to

meaningful benefits for employers, workers, and the American public. Among other things, the rule clarifies when and how agencies should speak outside the context of notice-and-comment rulemaking. It ensures that all guidance is accessible. And it enables the public to comment on significant guidance documents and submit petitions concerning guidance. Increased clarity, greater public access, and input regarding agency policy will result in more useful and effective guidance. Just as important, better delineating what is and is not legally binding will give fairer notice to regulated entities and will enhance the Department’s efforts to take care that the law is faithfully executed.

Chief among its considerations, this rule is designed to take into account how powerful agency statements are. When agencies speak, Americans listen carefully and often change their behavior as a result. Ignorance or failure to abide by agency regulations and the laws agencies enforce can have immense ramifications. In light of the stakes, the public often treats guidance from agencies as binding, even if it technically is not. Thus, it is vital that agencies promulgate, maintain, and use guidance carefully.

II. Discussion of the Department’s PRO Good Guidance Rule: Promoting Regulatory Openness through Good Guidance

This rule has eight sections, each of which is explained in more detail below.

- Section 89.1 outlines the rule’s scope and purpose
- Section 89.2 defines key terms
- Section 89.3 provides general requirements for issuing and using guidance
- Section 89.4 establishes a review and approval process for guidance and identifies features guidance must generally have
- Section 89.5 requires guidance to be made publicly accessible
- Section 89.6 sets up special processes for significant guidance
- Section 89.7 enables the public to petition agencies to withdraw or modify guidance
- Section 89.8 makes clear that this rule is one of agency procedure and does not create enforceable rights

Section 89.1 Scope of This Part

In § 89.1, the Department explains the scope and purpose of this rule. Paragraph (a) begins by accounting for how guidance documents—in their proper place—are valuable tools of government. The American people are

best served by agencies that speak clearly and unambiguously about existing legal obligations. Well-crafted guidance enables agencies to do so. For example, agencies use guidance to interpret existing laws or clarify how they plan to enforce existing legal requirements. Agencies also use guidance to provide compliance assistance, which helps parties understand and obey the law, and to enhance worker protections. Appropriately used, guidance is valuable.

As is explained in Section 1 of the E.O., however, agencies can also misuse guidance in ways that weaken the rule of law. For example, unless law otherwise permits, an agency using guidance to explicitly announce new standards that the agency treats as binding violates the Administrative Procedure Act (APA). When agencies misuse guidance, regulated persons have less certainty about their actual obligations.

Agencies must do more than simply refrain from explicitly purporting to establish new legal requirements in guidance. Regulated persons are aware of the possibility of enforcement actions. They accordingly have strong incentive to comply with even ostensibly “non-binding” agency statements that they see as attempting to regulate them. For example, an agency may use guidance to suggest or imply that a standard for behavior in guidance is the only acceptable means of complying with statutory or duly-promulgated regulatory requirements, even when the statute itself permits other means. Yet a party may feel the need to comply with an implication in the guidance irrespective of the statutory or regulatory text because it considers the cost of following the guidance lower than the cost of a fight with the agency. This is especially the case for guidance interpreting agencies’ legislative rules, since tribunals often defer to such guidance.

Likewise, an agency may improperly use guidance to shape private parties’ conduct beyond legal requirements by targeting those who do not follow the guidance for heightened enforcement or inspection activity. Guidance is improper when imposed on the public in this manner.¹

¹ This kind of coercive guidance is different from truly voluntary Department programs. A program is voluntary when a person can freely choose to enter the program or not, without governmental consequences for declining. *See, e.g.*, OSHA, “Voluntary Protection Program,” [osha.gov/vpp](https://www.osha.gov/vpp). In an improperly coercive regime of threats and rewards, the private party’s choice to follow the guidance is itself subject to government pressure in

To account for such considerations, this rule establishes the Department’s policy and requirements for guidance. As explained in detail below, it communicates the Department’s policies and procedures for issuing, modifying, withdrawing, and applying guidance; making guidance available to the public; notice-and-comment procedures for significant guidance; and responding to petitions from the public about guidance.

In paragraph (a), the Department describes how agencies should give fair notice of, and full access to, agencies’ guidance. Among other things, this means making all current guidance documents publicly available.

In paragraph (b), the Department explains that its rule on guidance applies broadly to the Department of Labor and to all of its agencies involved with any phase of developing, issuing, modifying, withdrawing, using, or defending guidance documents.

Section 89.2 Definitions

In this section, the Department defines key terms for this rule. To develop its definitions, the Department took direction from E.O. 13891 and OIRA’s *Guidance Implementing Executive Order 13891* (Oct. 31, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf>.

Paragraph (a) defines “agency” as the Department of Labor or any of its agencies, agency components, offices, or other similar organizational units. This broad definition accounts for the variety of Departmental entities that issue guidance.

Paragraph (b) defines “agency head” as the actual head of the respective agency within the Department.

Paragraph (c) defines “Department” as the Department of Labor.

Paragraph (d) defines “guidance” or “guidance document” as “an agency statement of general applicability, intended to have future effect on the behavior of regulated persons, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation.” Generally, if a document is unavailable to the public, it is not guidance. This is because an agency statement is generally not intended to have future effect on the behavior of regulated persons if it is internal to an agency and not publicly available. The definition accounts for how agencies issue guidance in a variety of formats. These include letters,

the form of, for example, more frequent inspections. *See Chamber of Commerce of U.S. v. U.S. Dep’t of Labor*, 174 F. 3d 206 (D.C. Cir. 1999).

memoranda, circulars, bulletins, or advisories, and may include video, audio, and web-based formats. An agency statement in any format that satisfies the definition of “guidance” could qualify, regardless of how it is labeled.

The definition of guidance has nine exceptions. The first four reflect that Congress in the APA has already categorized certain types of agency statements and has addressed what process is needed to make them. The last five exceptions reflect common types of agency statements that typically fall outside the general definition of guidance.

Under paragraph (d)(1), guidance does not include rules promulgated by notice and comment under 5 U.S.C. 553 or similar statutory provisions. Legislative rules promulgated through notice and comment under the APA qualify for this exception, as do interpretive rules and statements of policy that go through notice and comment despite being exempt from those requirements under § 553(b) of the APA. By contrast, an interpretive rule or statement of policy not issued through notice-and-comment would not qualify for the exception and thus would constitute guidance. The last phrase in (d)(1), “or similar statutory provisions,” accounts for rules that may be promulgated under rulemaking procedures distinct from the APA.

Under paragraph (d)(2), guidance does not include rules exempt from rulemaking requirements under 5 U.S.C. 553(a) or similar statutory provisions. That section makes the APA’s informal rulemaking requirements inapplicable “to the extent that there is involved—(1) a military or foreign affairs function of the United States; or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” If an existing or future statute other than the APA provides for rulemaking but then exempts rules addressing these matters, a rule arising under that statute would also qualify under (d)(2) as something that is not guidance.

Under paragraph (d)(3), guidance does not include rules of agency organization, procedure, or practice. This language parallels an exception from the requirement to issue a notice of proposed rulemaking in the APA. *See* 5 U.S.C. 553(b)(A). Applying paragraph (d)(3) requires a functional test, and it does not exclude statements of agency organization, procedure, or practice that are in fact used to shape the behavior of regulated parties. For instance, a document ostensibly addressed to regional agency officials directing them

to make enforcement decisions based on a particular construction of a statute, but then released to the public with the predictable result of dissuading the public from taking actions inconsistent with the statute as the document construed it, would constitute guidance. This rule itself is an example of a rule of agency organization, procedure, or practice that is accordingly not subject to the definition of guidance.

Under paragraph (d)(4), guidance does not include decisions of agency adjudications under 5 U.S.C. 554 or similar statutory provisions. Under this exception, an agency judicial opinion following formal adjudication under the APA or similar law would not be guidance.

The next five exceptions, in paragraphs (d)(5) through (d)(9), contain common types of agency statements that generally fall outside the rule's definition of guidance. As illustrated in the discussion of paragraph (d)(3) above, however, in applying the definition of guidance and its exceptions, agencies should assess agency statements independent of their labels. If a document's title suggests an exception but the agency actually uses the document as guidance, that exception may not apply.

Under paragraph (d)(5), guidance does not include internal statements directed to the issuing agency or other agencies that are not intended to have substantial future effect on the behavior of regulated persons. This includes statements made solely to the issuing agency or other agencies or their personnel. For example, a memorandum addressed and sent to an agency's regional administrators, and not publicly disseminated, would presumptively be excluded. Internal agency documents made public only because of FOIA or agency disclosure policies requiring their release would be presumptively excluded as well. However, agencies should assess whether such statements will have substantial future effect on the behavior of regulated persons. If so, they would likely be guidance.

Under paragraph (d)(6), guidance does not include internal executive branch legal advice or legal opinions addressed to executive branch officials. For example, a memorandum giving legal opinions from the Department's Office of the Solicitor to client agencies would not be guidance.

Paragraph (d)(7) excepts legal briefs and other court filings. Such documents are not guidance because they are intended to inform or persuade a court, not affect the conduct of regulated persons.

Paragraph (d)(8) excepts agency statements of specific applicability. For example, advisory or legal opinions directed to particular persons about circumstance-specific questions would generally not be guidance, especially if the Department never makes the opinions public beyond the specific addressee. This exception includes documents such as case or investigatory letters, responses to complaints, and warning letters. Similarly, notices regarding particular locations or facilities—such as a memorandum pertaining to the use, operation, or control of a government facility or property—are not guidance under this rule. Nor is correspondence with individual persons or entities, such as congressional correspondence or notices of violations.

However, agency statements ostensibly directed to a particular person but also designed or used to guide the conduct of the broader regulated public may be guidance. For example, when an agency sends an opinion letter to a particular person in response to an inquiry, but then publishes or otherwise issues the opinion letter and then cites it in a letter to a different person, that letter would likely be guidance.

Paragraph (d)(9) excepts agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation. This would generally include, for example, statements that merely transmit news updates about the agency (such as a speech or press release announcing a new program), or publications that merely repeat, summarize, or put into lay language laws or regulations for a worker audience that is the beneficiary of those laws or regulations (such as a "know your rights" card).

The Department notes that other types of agency statements may not be "guidance" even if they are not listed explicitly in exceptions (d)(1) through (d)(9). For example, Information Collection Request (ICR) packages, submitted to OMB and subject to notice and comment, would not generally be guidance. Generally speaking, neither would agency homepages. However, agencies should still assess these and other documents on a case-by-case basis, since any agency statement could function as guidance depending on how it is used.

Paragraph (e) defines "OIRA" as the Office of Management and Budget's Office of Information and Regulatory Affairs.

Paragraph (f) defines "person" to include entities such as state, tribal, and

local governments; corporations, companies, associations, labor unions, firms, partnerships, societies; and individuals. This illustrative list generally reflects the types of "persons" with which the Department interacts. This preamble also uses the term "person" throughout in a manner that is consistent with this definition.

In paragraph (g), the Department defines "pre-enforcement ruling" as 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. 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. Pre-enforcement rulings can be guidance but, as explained below, are exempt from procedures for issuing significant guidance.

In paragraph (h), the Department defines "significant guidance" or "significant guidance document" as guidance that falls into several different categories. The Department's approach codifies existing practice, developed over time in line with the definition of "significant guidance" in OMB's *Final Bulletin for Agency Good Guidance Practices*, 72 FR 3432, 3439 (Jan. 25, 2007), and the Department's approach to "significant regulatory actions" under E.O. 12866.

Under paragraph (h)(1), guidance is significant if it may reasonably be anticipated to 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. Under paragraph (h)(2), guidance is significant if it may reasonably be anticipated to create a serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency (one outside the Department). Under paragraph (h)(3), guidance is significant if it may reasonably be anticipated to materially alter the budgetary impact of entitlements, grants, user fees, loan programs, or the rights and obligations of recipients thereof. Under paragraph (h)(4), guidance is significant if it may reasonably be anticipated to raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866. Under § 89.6(a), discussed below, OIRA will determine whether guidance is

significant, and the Department will work closely with OIRA on such determinations.

Section 89.3 General Requirements

This section outlines general requirements for the issuance and use of guidance documents and reflects a central consideration of this rule: Unless law otherwise permits or the guidance is incorporated into a contract, cooperative agreement, or grant, guidance itself cannot impose binding requirements. Paragraph (a) implements as an internal rule the Department's existing obligation under the APA that all legislative rules must comply with all applicable notice-and-comment requirements set out in 5 U.S.C. 553 or with other appropriate processes under applicable law.

Under paragraph (b), all agency guidance issued after the effective date of this rule must be issued in accordance with the procedures codified in this rule. This paragraph is prospective.

Paragraph (b) also provides that, for each guidance document an agency issues jointly with other federal agencies (outside the Department), an agency may, subsequent to consultation with those outside agencies about that document, modify its approach from the requirements of part 89 as necessary. This paragraph accounts for how some agencies at the Department such as the Employee Benefits Security Administration may issue guidance jointly with other federal agencies outside the Department. When issuing such guidance, the agency should attempt to comply with the requirements of this rule to the extent possible.

In paragraph (c), the Department first limits the use of guidance in actions initiated after the effective date of the rule and then gives examples of permissible uses of guidance in such actions.

In paragraph (c)(1), the Department makes clear that enforcement actions must be based on violations of applicable legal requirements, not mere noncompliance with guidance documents. Guidance documents cannot, by themselves, create binding requirements unless binding guidance is authorized by law or the guidance is incorporated into a contract, cooperative agreement, or grant. Thus, an agency may not use noncompliance with a guidance document as itself a violation of applicable statutes or regulations, and may not bring actions based solely on allegations of noncompliance with guidance documents. This limitation will not, and is not intended to, have

any effect on agencies' ability to bring enforcement actions and prove violations of the law. This limitation merely prevents agencies from relying on noncompliance with nonbinding guidance rather than proving an actual violation of a binding legal standard.

Paragraph (c)(2) illustrates three recurring permissible uses of guidance in legal actions. First, if guidance describes existing legal requirements, an agency may use the guidance as evidence that a person had the requisite scienter, notice, or knowledge of the law. This example is relevant to certain types of agency enforcement actions. Second, an agency may cite guidance as evidence of its past positions or to establish the consistency of those positions with the agency's current views. For example, if a party argues an agency's position is arbitrary and capricious, the agency may use previous guidance to show its position has been consistent over time. Third, an agency may use a guidance document to show that a party has failed to meet professional or industry standards when those are relevant to statutory or regulatory requirements. For example, showing industry recognition of a condition or activity as hazardous is one way to establish an element of a violation of the general-duty clause of the Occupational Safety and Health Act of 1970. These examples are not exhaustive.

Paragraphs (c)(1) and (2) should be read together. The former strengthens the rule of law and prevents misuse of guidance by focusing agency actions on the actual bases of legal obligations. The latter provides important examples of permissible uses of guidance.

Paragraph (d) forbids using guidance issued or modified after the effective date of this rule in attempts to regulate the public beyond what the law allows. This paragraph bars the use of guidance to coerce parties into taking action beyond what the substantive terms of applicable statutes or legislative rules actually require. For instance, an agency should not use guidance to suggest that a standard of behavior in a guidance document is the only acceptable means of complying with statutory requirements if the relevant statute or legislative rule permits other means of complying. Likewise, an agency should not threaten enforcement actions against persons who do not follow substantive requirements in the guidance itself (unless the guidance is binding because binding guidance is authorized by law or because the guidance is incorporated into a contract, cooperative agreement, or grant). For example, if an agency's guidance purports to establish a

standard higher than that of an underlying legislative rule and then announces the agency will increase the frequency of inspections for employers that fall short of the standard, that approach would likely violate this provision. Similarly, an agency should avoid using guidance that "rewards" regulated persons for compliance with substantive requirements in guidance by reducing the frequency of inspections or audits, if those rewards effectively make the guidance coercive beyond what is permitted by law. As noted earlier, these concerns do not arise with truly voluntary programs for which persons suffer no adverse consequences for declining to participate.

Paragraph (e) reminds agencies that in issuing or modifying guidance, they must comply with any applicable requirements of the Congressional Review Act (CRA). The CRA creates obligations on agencies that issue "rules," which the CRA defines broadly to include certain types of guidance. See 5 U.S.C. 804(3).² Accordingly, as agencies review guidance, they should ensure that if guidance also constitutes a "rule" under the CRA, they comply with the CRA with respect to that guidance. In complying with this paragraph, the Department should consult with OIRA, which determines whether a rule is "major" under the CRA, consistent with this rule's § 89.6(a).

Section 89.4 Requirements for Guidance

This section establishes a review and approval process for guidance and other requirements for guidance documents. These provisions ensure that guidance receives appropriate approval and clearance; is clearly identified as non-binding (or binding, but only when law permits); and is more useful for employers, workers, and other members of the American public.

Paragraphs (a)(1) through (3) require that before any guidance is issued, modified, or withdrawn, it must be reviewed and approved by an agency official. These officials include (i) the appropriate agency head; (ii) an acting agency head or official otherwise leading the agency; or (iii) an appropriately designated official. By contrast to the non-delegable review and approval processes for significant

² See also OMB, "Guidance on Compliance with the Congressional Review Act," (Apr. 11, 2019) ("The CRA applies to more than just notice-and-comment rules; it also encompasses a wide range of other regulatory actions, including, *inter alia*, guidance documents . . ."), <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf>.

guidance documents in § 89.6(b)(2) below, § 89.4(a) retains flexibility to account for how some fairly routine guidance is issued.

Paragraph (b) requires that an official that reviews and approves guidance under paragraph (a) ensure that guidance follows all relevant statutes and regulations, including the requirements of this rule. The review required by paragraph (b) looks at all the surrounding circumstances, including the anticipated public response to the guidance, and goes beyond the four corners of the document under review.

Paragraph (c) requires that, in conducting the review required by paragraph (a), the reviewing official must evaluate whether the agency's statement in question is in fact guidance, regardless of its label. Even documents that expressly disclaim the force and effect of law could still appear to establish binding requirements or otherwise inappropriately attempt to regulate private parties. This is impermissible.

Under paragraph (d), guidance issued or modified after the effective date of this rule must include an appropriate disclaimer. The Department expects that the disclaimer language in (d)(1), derived from OIRA's Guidance Implementing Executive Order 13891, will be suitable for most guidance: "This document does not have the force and effect of law and is 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." This disclaimer makes clear that any given guidance document does not itself bind the public, and exists only in relation to other authorities.

Paragraph (d)(2) authorizes modifying the language in (d)(1) if binding guidance is permitted based on underlying statute or other legal authority and the modified disclaimer language is developed in consultation with OIRA, such that OIRA has an opportunity to review and comment on the modified disclaimer. Such a modified disclaimer is appropriate when the agency's guidance is binding because binding guidance is authorized by law or because the guidance is incorporated into a contract, cooperative agreement, or grant. The modified disclaimer must explain why the guidance is binding. For example, if an agency ties a funding announcement to guidance that the successful grant applicants must agree to follow, the agency should use a modified disclaimer to explain that the guidance is binding.

Next, paragraph (d) provides general parameters for how agencies should display the disclaimer language under (d)(1) or (d)(2). These parameters are designed to ensure that disclaimers are legible and prominently displayed. These parameters are that a disclaimer should be prominently located; and should direct readers to www.dol.gov/guidance for questions or additional information.

These parameters generally apply, but on occasion modifications may be appropriate and make guidance more effective and useful. For example, a brochure with a cover sheet does not need a disclaimer on its cover. Breakroom posters providing guidance might need 24-point font to be legible, where wallet-sized cards would need only 6-point font. And guidance in a video or interactive web page may require other modifications. However, the Department expects the parameters will suit the vast majority of guidance.

Paragraph (d) is prospective only. Before issuing this rule, the Department fully reviewed all its agencies' guidance and placed all guidance in effect on a public website. That website's landing page has a disclaimer akin to the language in paragraph (d)(1) and already informs readers that the Department's guidance does not have the force and effect of law. Given the large amount of work that would be necessary to revise each piece of guidance to apply new disclaimer language, the Department will apply paragraph (d)(1) only to newly-issued or modified guidance.

Paragraph (e) requires that guidance documents issued or modified after the effective date of the rule avoid using mandatory language—language such as "shall," "must," "required," or "requirement"—to direct persons outside the Department to take or refrain from taking action. This paragraph is generally consistent with OMB's *Good Guidance Practices*, 72 FR at 3440. It gives agencies a practical means to avoid issuing guidance that appears to create binding obligations or that inappropriately attempts to regulate the public. At the same time, paragraph (e) permits mandatory language when guidance restates requirements, provisions, or holdings contained in binding legal authorities, and similarly, when binding guidance is authorized by law, or is binding by incorporation into a contract, cooperative agreement, or grant.

Paragraph (f) requires that guidance documents be written in plain and understandable language. This is consistent with the Department's goal of making guidance as useful as possible,

and such clarity will effectively advance agencies' missions.

Paragraphs (g)(1) through (9) list additional features that guidance must reflect, except when not feasible. These features will increase transparency and help communicate the purpose and the nature of the document in question. For example, when agencies issue guidance through interactive online formats, small brochures, or wallet-sized cards, they may be unable to incorporate every feature in (g)(1) through (9).

Paragraph (g)(1) requires that guidance prominently display the term "guidance." This will reduce potential confusion about the nature of any given agency statement—helping distinguish the guidance from an internal rule of agency procedure, for example.

Paragraph (g)(2) requires that guidance identify the agency that issued it.

Paragraph (g)(3) requires that each guidance document provide the title of the guidance and its identification number, which will be posted on the website under § 89.6. This will help keep track of and readily identify any given guidance document. It also enhances the petition process under § 89.7.

Paragraph (g)(4) requires that guidance include a date of issuance. Among other benefits, this will prevent confusion when successive guidance documents address the same topic.

Paragraph (g)(5) requires that each guidance document include, at the top of the document, a short summary of the subject matter covered. However, this feature may not always be feasible, given the formats of certain agency guidance (for example, brochures). Under such circumstances, agencies need not include a summary.

Paragraph (g)(6) requires that guidance identify the activities to which and the persons to whom the guidance applies. This is a requirement that agencies can readily satisfy even when guidance applies broadly. For example, a guidance document from the Wage and Hour Division about internships could include language as simple as: "This guidance is intended for employers covered by the FLSA who intend to hire interns."

Paragraph (g)(7) requires that guidance include the citation to the statutory provision(s) or regulation(s) (in the Code of Federal Regulations format) to which it applies or which it interprets. This is consistent with and will reinforce conformity to other requirements in this rule. For example, including citations to relevant legal authorities will help ensure that the

agency statement is actually guidance under the definition in § 89.2(d).

Paragraph (g)(8) requires that a guidance document note if it revises a previously issued guidance document. If it does, it should identify the guidance it replaces.

Paragraph (g)(9) requires that guidance have a statement indicating if the guidance is valid for only a limited duration or, instead, until it is modified or rescinded. This feature will help keep track of the expiration date of guidance (where such a date exists).

Taken together, the Department believes the requirements in this section will result in more uniform, clear, and useful guidance.

Section 89.5 Public Access to Guidance Documents

This section ensures that the public will have access to all guidance documents in effect at any given point in time. It also describes requirements for the Department's guidance website. This section will enhance fair notice of agency policies. By creating a complete digital inventory of all current guidance and requiring that agencies routinely publish a list of changes to guidance, this section will lower the cost of staying current with any given agency's policies.

Paragraph (a) requires that the Department maintain a single, searchable, indexed website that contains, or links to, each agency's guidance documents that are in effect. The Department established this website in February 2020. It is available at www.dol.gov/guidance. Under paragraph (a), guidance posted to the website will be deemed final unless it is proposed significant guidance. This provision helps ensure agencies treat guidance consistently in various contexts. For example, it will help agencies characterize guidance as final both in pre-enforcement discussions with parties, as well as when describing the same guidance to a tribunal.

Paragraph (b) requires that the Department's guidance website have two statements, both of which are presently visible on the website. First, under paragraph (b)(1), the website must note that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract, cooperative agreement, or grant. As explained above in the discussion of § 89.4, guidance documents issued before this rule's effective date need not each individually have the disclaimer this rule requires. The language on the website will provide the necessary

context for guidance created before this rule was promulgated.

Under paragraph (b)(2), the website must note an agency may not cite, use, or rely on any guidance that is not posted on the website except to establish historical facts.

Relatedly, paragraph (c) explains that all guidance documents not posted on the Department's website are no longer in effect. Consistent with the language on the website, such guidance must not be cited, used, or relied on by any agency as indicative of the agency's policies or views except to establish historical facts. For example, an agency could use withdrawn guidance to establish the agency's historical position on a topic in defense against claims that recent agency action is arbitrary and capricious. Importantly, this provision does not prevent regulated parties from attempting to use guidance that is no longer in effect as a defense to an enforcement action or other agency action where that guidance is used to establish a historical fact, such as willfulness or knowledge. For example, it may be appropriate for a person to use a guidance document that is now withdrawn but was in effect at the time of a cited violation of law as evidence that the person did not willfully violate the law.

Paragraph (d) requires that the Department maintain and advertise on its website a means for the public to comment electronically on any guidance documents subject to the notice and comment procedures required in § 89.6, discussed below.

Under paragraph (e), the Department must provide clear instructions on its website about how to submit petitions for withdrawal or modification of any guidance document, consistent with § 89.7. Those instructions must be clearly displayed on the website and must include, at a minimum, an email address or web portal; a physical mailing address for hard-copy petitions; and the office responsible for coordinating responses to petitions.

Paragraph (f) requires that, within 14 calendar days after the end of each quarter, the Department publish a list of each agency's guidance documents issued, modified, or withdrawn in that immediately preceding quarter. The list must include links to those guidance documents, unless it is not feasible. For example, links might not exist for withdrawn guidance. The quarterly-reporting requirement creates an efficient way for the American public to stay abreast of agencies' policies as they change. For example, rather than paying a law firm to monitor all agency statements and send periodic updates,

an HR manager could scan this list each quarter to learn whether relevant policies have changed. This provision will help make clear what guidance agencies have withdrawn, which may not be immediately apparent from reviewing the website.

Section 89.6 Procedures for Significant Guidance

Though guidance cannot generally create binding legal requirements, it can still have significant impact. To improve such guidance and provide better notice of its contents, the Department, following OIRA's *Guidance Implementing Executive Order 13891* (Oct. 31, 2019), is establishing additional procedures for guidance OIRA deems "significant." These procedures will benefit the American public by ensuring that significant guidance receives careful review from the agency issuing the guidance; from OIRA, and other federal agencies when appropriate; and from those the guidance will impact.

Section 89.6 applies to guidance issued, modified, or withdrawn after the effective date of this rule. It accounts for reliance interests on existing guidance because guidance that predates this rule, later modified or withdrawn, must still comply with this section if deemed significant.

Under § 89.6(a), the Department must consult with OIRA to determine whether guidance is significant guidance, or "major" under the Congressional Review Act, unless the guidance is otherwise exempted from such a determination by the OIRA Administrator.³ Prior to issuing guidance, the Department will give OIRA opportunity to review guidance and make a significance determination.⁴ The Department will provide this opportunity through their regular notification to OIRA of upcoming guidance. Notice can be provided through a list of guidance documents planned, with summaries of each guidance document and the agency's recommended designation of "not significant," "significant," or "economically significant," and the

³ See 5 U.S.C. 804(2) (defining "major rule").

⁴ The Department will evaluate whether, although not legally binding, an agency guidance document may result in a significant economic impact (e.g., by inducing private parties to alter their conduct to conform) where "significant" is defined by E.O. 12866. E.O. 12866 also requires agencies to estimate the net benefits of regulations. Net benefits are defined as total benefits minus total costs. When it is determined that a guidance document will be economically significant, the agency must prepare a Regulatory Impact Analysis and make it publicly available in the same manner it would accompany an economically significant rulemaking.

reason for the designation. For example, an agency could recommend that guidance not be deemed significant because it is routine or ministerial. The Department will provide OIRA with any additional information needed, as well as any information for determining whether the guidance is a major rule under the CRA. Under this section, the required consultation with OIRA will consist of giving OIRA an opportunity to review each guidance document on a timeline reasonable for the size, complexity, and importance of the guidance document.

Once OIRA deems guidance significant, it will generally be subject to additional requirements, including notice and comment. However, under paragraph (b) an agency and the OIRA Administrator may agree that exigency, safety, health, or other compelling cause warrant an exemption from some of paragraph (b)'s requirements. Absent such an exemption, paragraphs (b)(1) through (b)(4) establish requirements applicable to significant guidance.

Under paragraph (b)(1), significant guidance must undergo a period of public notice and comment of at least 30 days before issuance of the final guidance. When finalized, significant guidance must be accompanied by a publicly posted response from the agency, made available either as part of the final guidance or in a companion document, that addresses major concerns raised in timely submitted comments. This response-to-comments should be similar to what typically appears in the preamble to a final rule under the APA. An agency need not respond to every comment or every issue raised, but it should provide explanations of its choices in the final guidance document, including why it disagreed with the principal suggestions received.

Under (b)(1), notice and comment will not be necessary when an agency for good cause finds that notice and public comment is impracticable, unnecessary, or contrary to the public interest. This exception parallels an APA exception for informal rulemaking. 5 U.S.C. 553(b)(B). Agencies must, as required under paragraph (e), incorporate the good cause finding and a brief statement of reasons for it into the guidance.

Paragraph (b)(2) requires that agency component heads, acting component heads, or the Secretary or the Deputy Secretary approve and sign significant guidance. Approval and signature are non-delegable due to the importance of significant guidance, and this provision is less flexible than the review and approval process for non-significant guidance in § 89.4(a). Approval and

signature must come from (i) an agency component head appointed by the President, with or without confirmation by the Senate; (ii) by an official serving in an acting capacity as the foregoing; or (iii) by the Secretary or the Deputy Secretary.

Paragraph (b)(3) requires that significant guidance undergo review by OIRA under Executive Order 12866 before issuance. Among other things, this provision will help ensure that federal agencies outside the Department provide feedback, as needed, on significant guidance.

Paragraph (b)(4) requires that significant guidance comply with the requirements of certain executive orders (E.O.s) that otherwise apply to rules, including significant regulatory actions, including E.O.s 12866, 13563, 13609, 13771, and 13777. Compliance with E.O.s 12866 and 13563 requires that an agency explain the analysis it has conducted that shows that the guidance under consideration maximizes net benefits. The agency should also discuss the alternatives it has considered and whether it is issuing the guidance as a result of any retrospective review. Compliance with E.O. 13609, if applicable, requires the agency to explain how the guidance promotes international regulatory cooperation and how the agency considered the effect the guidance may have on interactions with other countries. Compliance with E.O. 13777 requires an explanation whether the guidance is being issued as a result of the Department's regulatory reform agenda or through a recommendation as a result of the Department's Regulatory Reform Task Force. The Department expects to work closely with OIRA so that significant guidance adequately addresses applicable requirements in these E.O.s.

Paragraph (c) requires agencies to publish notices in the **Federal Register** to announce the availability of all proposed and final significant guidance documents. Agencies also must make proposed and final significant guidance available on the website maintained under § 89.5. In this section, as with this rule as a whole, the Department seeks to give fair notice of agency statements and positions, in particular when they will likely have significant impact.

Paragraph (d) requires agencies to ensure that comments timely submitted in response to each proposed significant guidance document are published online, on or linked from the website maintained under § 89.5, before publishing a final significant guidance document. This will make the agency's response to comments received more intelligible for anyone wishing to view

the comments to which the agency responds.

Paragraph (e) applies when OIRA and an agency have agreed that exigency, safety, health, or other compelling cause warrants an exemption under paragraph (b). When this occurs, the agency must incorporate that finding and a brief statement of reasons for it into the guidance issued. This provision resembles the requirement in paragraph (b)(1) and gives the public notice of an agency's rationale for its approach.

Under paragraph (f), any significant guidance initially exempt from certain requirements under paragraph (b), including (b)(1), is only temporary. Such guidance will be rescinded automatically 270 days after its publication unless the agency later makes it permanent by following the procedures for significant guidance not exempt under paragraph (b). Paragraph (f) guarantees that all significant guidance eventually benefits from the notice and comment process. The Department expects taking comment on such guidance may be particularly valuable due to the public having had experience with it for an extended period of time.

Under paragraph (g), procedures for significant guidance documents do not apply to pre-enforcement rulings that are guidance. Among other considerations, this approach accounts for the importance of giving parties timely direction as they face market pressures. For example, an employer may have opportunities that weigh in favor of changing current business practices. Absent an agency's opinion, though, the employer may be unwilling to make the change due to perceived legal risk. An agency's rapid response to such an inquiry may be vital to such an employer, and may improve only marginally through notice and comment—especially when the underlying basis for the agency response may itself have gone through notice and comment and the agency's response is specific to the facts of the inquiry.

Section 89.7 Petitions for Withdrawal or Modification

This section establishes that members of the public may submit petitions for withdrawal or modification of guidance documents. It also outlines how agencies must respond. The Department believes the petition process will help agencies receive important feedback, which will lead to more useful and effective guidance. The Department also expects that petitions will prevent needless litigation. For example, if an agency mistakenly issues guidance that ostensibly but unlawfully establishes a

binding requirement, an employer could submit a petition requesting the document's withdrawal and drawing the agency's attention to what it may have overlooked.

Paragraph (a) provides that any member of the public can petition an agency for withdrawal or modification of its guidance.

Paragraph (b) establishes requirements for petitions. They must be written. They must include an email and mailing address as well as any other preferred means for the agency to respond to the petitioner (where the petitioner has means of electronic communication). The Department expects that some agencies will receive numerous petitions, including some by postal mail. It may be costly to respond to each individual petition if the Department cannot respond electronically. This requirement furthers the Department's ongoing cost-saving and modernization efforts.

Under paragraph (b), the petition must identify the specific guidance that is the subject of the petition. The Department expects this will typically include the title of the guidance, the agency that issued it and the date it was issued, and any available document identification numbers.

A petition must also state in detail the reasons for requesting withdrawal or modification. For example, a petition could explain in detail that the document was treated as guidance, but, despite how the document is labeled, it appears to contain a binding requirement and should have been promulgated through notice and comment rulemaking. By contrast, general petitions or those lacking in detailed reasoning and argument would not satisfy paragraph (b). For example, summarily and generally disagreeing with an agency's policy and then simply listing links to relevant guidance would fall short. So would a petition that baldly requests modification or withdrawal of all, or a significant portion, of an agency's guidance. Detailed explanations will enable agencies to fairly evaluate petitions and reassess guidance as needed. Absent such detail, reasoning, and argument, agencies have no obligation to respond.

Under paragraph (c), the petition must be directed to the relevant agency official, pursuant to instructions provided on the website described in § 89.5. This ensures that the petition reaches the right agency and receives due consideration.

Under paragraph (d), an agency may choose to withdraw, modify, or retain guidance. Decisions to withdraw or

modify guidance are subject to applicable provisions of this rule.

Paragraph (e) describes how agencies must respond to petitions. Under paragraph (e), an agency must provide a response in writing to a petition promptly, but no later than 90 days after receiving it. This means agencies must respond to all petitions satisfying § 89.7(b). However, paragraph (e) gives agencies discretion over how they respond. Decisions should depend on factors such as the nature of the petition; the complexity of the guidance under review; and relevant resource constraints. An agency that receives only a few petitions each year may opt to respond in detail to each one. Or, for example, if an agency receives multiple similar petitions, it may choose to respond substantively only to the first such petition and then respond to the rest by acknowledging their receipt and enclosing a link to the initial response. The agency also may simply acknowledge receipt of a petition in writing when appropriate under the circumstances.

Section 89.8 Enforceability

In § 89.8, the Department explains that this rule on guidance is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. The Department includes this paragraph to make clear that this rule is one of agency procedure. And though this rule establishes a means for the Department to accept petitions, it does not create associated rights or benefits.

III. Final Rule

The Department has determined that this rule is suitable for final rulemaking. The revisions to the Department's policies and requirements surrounding guidance are purely internal matters of agency management, as well as the agency's organization, procedure, and practice. Accordingly, the Department is not required to engage in a notice and comment process to issue them, under either the APA or this rule itself. *See* 5 U.S.C. 553(a)(2), 553(b)(A), *infra* § 89.2(d)(3).

List of Subjects

Administrative practice and procedure, Labor.

■ For the reasons discussed in the preamble, the Department of Labor adds 29 CFR part 89 to read as follows:

PART 89—GUIDANCE DOCUMENTS

Sec.

- 89.1 Scope of this Part.
- 89.2 Definitions.
- 89.3 General Requirements.
- 89.4 Requirements for Guidance.
- 89.5 Public Access to Guidance.
- 89.6 Procedures for Significant Guidance.
- 89.7 Petitions for Withdrawal or Modification.
- 89.8 Enforceability.

Authority: 5 U.S.C. 301, E.O. 13891.

§ 89.1 Scope of this part.

(a) Guidance documents can provide a valuable means for an agency, among other things, to interpret existing law or to clarify how it intends to enforce an existing legal requirement. However, unless law permits, guidance documents should not establish new requirements that the agency treats as binding; any such requirements should be issued pursuant to applicable notice and comment requirements of the Administrative Procedure Act or pursuant to other appropriate process under applicable law.

(b) This part governs the Department of Labor and its agencies involved with any phase(s) of developing, issuing, modifying, withdrawing, or using guidance documents.

(c) Except where other law or this part provide otherwise, the provisions of this part apply to guidance issued and modifications or withdrawals of existing guidance that occur after September 28, 2020.

§ 89.2 Definitions.

The following definitions apply for purposes of this part:

Agency means the Department of Labor or any of its agencies, agency components, offices, or other similar organizational units.

Agency head means the actual head of the respective Agency within the Department.

Department means the Department of Labor.

Guidance or *guidance document* means an agency statement of general applicability, intended to have future effect on the behavior of regulated persons, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation. Guidance may come in a variety of forms, including letters, memoranda, circulars, bulletins, or advisories, and may include video, audio, and web-based formats. Guidance 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 5 U.S.C. 553's rulemaking requirements under 5 U.S.C. 553(a) or any other statute;

(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 agency statements directed to the issuing agency or other agencies that are not intended to have substantial future effect on the behavior of regulated persons;

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

(7) Legal briefs and other court filings;

(8) Agency statements of specific applicability, including advisory or legal opinions directed to particular persons about circumstance-specific questions (e.g., case or investigatory letters, responses to complaints, warning letters), notices regarding particular locations or facilities (e.g., an agency statement pertaining to the use, operation, or control of a government facility or property), and correspondence with individual persons or entities (e.g., congressional correspondence or notices of violations), except statements ostensibly directed to a particular person but also designed or used by the agency to guide the conduct of the broader regulated public—for example, an opinion letter to a particular person that an agency publishes or otherwise issues and then cites in a letter to a different person could be guidance; or

(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, such as statements merely communicating news updates about the agency (e.g., speeches or press releases).

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

Person includes entities such as state, tribal, and local governments; corporations, companies, associations, labor unions, firms, partnerships, societies; and individuals.

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. The term includes letter rulings, advisory opinions, no-action letters, and informal guidance under section 213 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Title II), as amended.

Significant guidance or *Significant guidance document* means guidance or a guidance document that 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 a serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency (one outside the Department);

(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.

§ 89.3 General requirements.

(a) Unless law otherwise permits, all legislative rules must comply with all applicable notice and comment requirements set out in 5 U.S.C. 553 or other appropriate process under applicable law.

(b) All guidance documents issued after September 28, 2020 must be issued in accordance with this part. For each guidance document an agency issues jointly with other federal agencies (outside the Department), an agency may, subsequent to consultation with those outside agencies about that document, modify its approach from the requirements of this part as necessary.

(c) In any enforcement action commenced after September 28, 2020:

(1) An agency may not treat a party's noncompliance with a guidance document as itself a violation of applicable statutes or regulations.

(2) However, among other permissible uses of guidance—

(i) If guidance explains or paraphrases existing legal requirements, an agency may use the guidance as evidence that a person had the requisite scienter, notice, or knowledge of the law;

(ii) An agency may cite guidance as evidence of its past positions or to establish the consistency of the agency's current view(s) with those positions; and

(iii) An agency may use a guidance document as probative evidence that a party has satisfied, or failed to satisfy, professional or industry standards or practices relating to applicable statutory or regulatory requirements.

(d) Guidance must not be used to attempt to regulate the public unless the guidance is binding because binding

guidance is authorized by law or because the guidance is incorporated into a contract, cooperative agreement, or grant. Guidance should not, for instance, suggest that a standard for behavior in a guidance document is the only acceptable means of complying with statutory requirements where the relevant statute and any relevant legislative rule permits other means of complying. Guidance also should not threaten enforcement action against persons that do not follow the guidance itself.

(e) In issuing or modifying guidance, an agency must comply with any applicable requirements of the Congressional Review Act (5 U.S.C. 801–808).

§ 89.4 Requirements for guidance.

(a) Before any guidance is issued, modified, or withdrawn, it must be reviewed and approved by:

(1) The appropriate agency head;

(2) An official who is serving in an acting capacity as the agency head, or when there is no acting agency head, the official otherwise leading the agency; or

(3) An official designated by the appropriate agency head, acting agency head, or the official otherwise leading the agency.

(b) An official reviewing and approving guidance under paragraph (a) must ensure that each guidance document follows all relevant statutes and regulations, including the applicable requirements of this part.

(c) In assessing whether an agency's statement is in fact guidance during the review under paragraph (a) of this section, an official should evaluate the statement independent of how it is labeled.

(d) Guidance issued or modified after September 28, 2020 must:

(1) Include a disclaimer that states: “This document does not have the force and effect of law and is 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.”; or,

(2) Include a modified version of the disclaimer described in paragraph (d)(1)—if permitted by underlying statute or other legal authority and developed in consultation with OIRA—explaining that the agency's guidance document is binding because it is authorized by law or because the guidance is incorporated into a contract, cooperative agreement, or grant. Such a modified disclaimer must provide the reason why the guidance document is binding.

In general, a disclaimer under (d)(1) or (2) of this section must be located prominently and direct readers to www.dol.gov/guidance for questions or additional information. However, an agency may modify those requirements for a disclaimer if appropriate given the nature of the guidance (for example, for a video, interactive web page, a brochure, a letter of interpretation, or a wallet-sized guidance card), so long as the disclaimer is still legible.

(e) Guidance issued or modified must avoid using mandatory language such as “shall,” “must,” “required,” or “requirement” to direct persons outside the Department to take or refrain from taking action, except when restating—with applicable citations—the relevant requirements, provisions, or holdings contained in binding legal authorities, or when the guidance is binding because binding guidance is authorized by law or because the guidance is incorporated into a contract, cooperative agreement, or grant.

(f) Guidance issued or modified must be written in plain and understandable language.

(g) In general, except when not feasible given the nature of the guidance document (for example, guidance issued in interactive online formats, small brochures, or on wallet-sized cards designed to be carried by workers for quick reference), each guidance document issued or modified must:

- (1) Prominently display the term “guidance”;
- (2) Identify the agency issuing the guidance;
- (3) Provide the title of the guidance and the document identification number;
- (4) Include the date of issuance;
- (5) Include a short summary at the top of the document of the subject matter covered in the guidance;
- (6) Identify the activities to which and the persons to whom the guidance applies;
- (7) Include the citation to the statutory provision(s) or regulation(s) (in the Code of Federal Regulations format) to which it applies or which it interprets;
- (8) Note if the guidance is a revision to a previously issued guidance document and, if so, identify the guidance document that it replaces; and
- (9) Include a statement indicating if the guidance is valid for only a limited duration or, instead, until it is modified or rescinded.

§ 89.5 Public Access to guidance.

(a) The Department must maintain a single, searchable, indexed website that contains, or links to, each agency’s

guidance documents in effect. Each agency must ensure that all its guidance is available through this website; any guidance posted will be deemed final unless it is a proposed significant guidance document under § 89.6.

(b) The website described in paragraph (a) of this section must clearly note that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract, cooperative agreement, or grant and that an agency may not cite, use, or rely on any guidance that is not posted on the website, except to establish historical facts.

(c) All guidance documents that are not posted on the Department’s website described in paragraph (a) of this section shall be deemed no longer in effect. Such guidance must not be cited, used, or relied upon by any agency as indicative of an agency’s policies or views except to establish historical facts, including the agency’s position at the time and the regulated party’s knowledge, or (where the legal standard so permits) constructive knowledge or reckless disregard, of legal requirements at the time an enforcement action was initiated.

(d) The Department must maintain and advertise on its website a means for the public to comment electronically on any guidance documents that are the subject of the notice-and-comment procedures described in § 89.6.

(e) The Department must provide clear instructions on its website regarding how to submit petitions for withdrawal or modification of any guidance document, consistent with § 89.7. These instructions must include an email address or web portal, a physical mailing address for hard-copy petitions, and the office responsible for coordinating responses to petitions. This website should clearly identify the relevant agency official(s) to whom petitions should be directed.

(f) Within 14 calendar days after the end of each fiscal quarter, the Department must publish a list of each agency’s guidance documents issued, modified, or withdrawn in that immediately preceding quarter, including links to those guidance documents when feasible.

§ 89.6 Procedures for significant guidance.

In this section, requirements that apply to issuance of guidance also apply to modification or withdrawal of guidance.

(a) The Department must consult with OIRA to determine whether guidance is significant guidance, or qualifies as “major” guidance under the criteria in 5 U.S.C. 804(2), unless the guidance is

otherwise exempted from such a determination by the Administrator of OIRA. Consultation with OIRA will consist of giving OIRA an opportunity to review each guidance document on a timeline reasonable for the size, complexity, and importance of the guidance document.

(b) For a significant guidance document, as determined by the Administrator of OIRA, unless the agency and the Administrator agree that exigency, safety, health, or other compelling cause warrants an exemption from some or all requirements of this paragraph, each significant guidance document must:

(1) Undergo a period of public notice and comment of at least 30 days before issuance of the final guidance document and be accompanied by a publicly posted response from the agency, made available either as part of the final guidance document or in a companion document, that addresses major concerns raised in timely submitted comments, except when the agency for good cause finds (and incorporates the finding and a brief statement of reasons for the finding into the guidance) that notice and public comment under this paragraph are impracticable, unnecessary, or contrary to the public interest;

(2) Before initial and final issuance, receive both approval and signature on a non-delegable basis by:

- (i) The agency head;
- (ii) An official who is serving in an acting capacity as the foregoing; or
- (iii) The Secretary or the Deputy Secretary, as appropriate;

(3) Undergo review by OIRA under Executive Order 12866 before issuance; and,

(4) Comply with the applicable requirements that would otherwise apply to regulations or rules, including significant regulatory actions as set forth in Executive Orders 12866 (Regulatory Planning and Review), 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).

(c) An agency must publish a notice in the **Federal Register** announcing the availability of each proposed and final significant guidance document and must make each proposed and final significant guidance document available on the website maintained under § 89.5.

(d) An agency must ensure that comments timely submitted in response to each proposed significant guidance document are published online or linked from the website maintained

under § 89.5, before publishing the final significant guidance document.

(e) For each significant guidance document where the agency and the Administrator of OIRA agree that exigency, safety, health, or other compelling cause warrants an exemption from some or all requirements under paragraph (b) of this section, the agency must incorporate that finding and a brief statement of reasons for the finding into the guidance.

(f) For all significant guidance exempt from requirements under this section as permitted by paragraph (b) of this section, such significant guidance shall be treated as temporary and will be rescinded by operation of law 270 days after it is published. The agency may make the temporary significant guidance permanent before the automatic rescission by following the procedures outlined for all significant guidance not exempt under paragraph (b).

(g) This section does not apply to pre-enforcement rulings, defined in § 89.2(g), that are guidance under this rule.

§ 89.7 Petitions for withdrawal or modification.

(a) Any member of the public may petition an agency for withdrawal or modification of a guidance document issued by the agency.

(b) Such a petition must be submitted in writing; include an email address and mailing address, as well as any other preferred means for the agency to respond electronically to the petitioner (where the petitioner has a means of electronic communication); identify the guidance document that is the subject of the petition; and state in detail the reason(s) for requesting withdrawal or modification.

(c) A petition must be directed to the relevant agency official, pursuant to instructions provided on the website described in § 89.5.

(d) The agency may choose to withdraw, modify, or retain a guidance document.

(e) Under this section an agency must provide a response in writing to a petition that meets the requirements of paragraph (b) of this section promptly, but no later than 90 days after receiving the petition.

§ 89.8 Enforceability.

This rule is intended to improve the internal management of the Department. As such, it is for the use of Department personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at

law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Signed at Washington, DC, this 19th day of August, 2020.

Jonathan A. Wolfson,
Deputy Assistant Secretary of Labor for Policy.

[FR Doc. 2020–18500 Filed 8–27–20; 8:45 am]

BILLING CODE 4510–HL–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AQ68

Provider-Based Requirements

AGENCY: Department of Veterans Affairs.
ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) adopts as final, with no changes, a proposed rule to revise its medical regulations concerning collection and recovery by VA for medical care and services provided to an individual at a VA medical facility for treatment of a nonservice-connected condition. Specifically, this rulemaking adds a regulation that establishes the requirements VA will use to determine whether a VA medical facility has provider-based status.

DATES: This final rule is effective on September 28, 2020.

FOR FURTHER INFORMATION CONTACT: Joseph Duran, Office of Community Care (10D), Veterans Health Administration, Department of Veterans Affairs, Ptarmigan at Cherry Creek, Denver, CO 80209; (303) 372–4629. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: VA is authorized under 38 U.S.C. 1729 to recover or collect from a third party the reasonable charges for medical care or services VA furnishes to an individual for a non-service connected disability, to the extent that the individual, or the provider of care or services, would be eligible to receive payment from the third party if the care or services had not been furnished by VA. VA's collection or recovery under section 1729 is limited to care or services furnished by VA for a nonservice-connected disability: Incurred incident to the individual's employment and covered under a worker's compensation law or plan that provides reimbursement or indemnification for such care and services; incurred as the result of a crime of personal violence that occurred in a State, or a political

subdivision of a State, in which a person injured as the result of such a crime is entitled to receive health care and services at such State's or subdivision's expense for personal injuries suffered as the result of such crime; incurred as a result of a motor vehicle accident in a State that requires automobile accident reparations (no-fault) insurance; or for which the individual is entitled to care (or the payment of expenses of care) under a health plan contract. VA implements its authority under section 1729 through regulations at title 38 Code of Federal Regulations (CFR) 17.101 through 17.106. More specifically, the methodology that VA uses to determine the amount of its collection or recovery for is established in 38 CFR 17.101.

On November 21, 2019, VA published a proposed rule to revise the methodology in § 17.101 with regards to calculating the reasonable charges for care and services VA provides on an outpatient basis. 84 FR 64235. That proposed rule primarily sought to revise 38 CFR 17.101 to remove the regulatory requirement that VA use the Centers for Medicare and Medicaid Services (CMS) provider-based criteria with regards to VA billing of third parties, and sought to add a new regulation at 38 CFR 17.100 to establish the criteria that VA would use instead to determine whether a VA facility has provider-based status. In so doing, VA modelled a majority of the criteria in new proposed 38 CFR 17.100 on CMS provider-based criteria in 42 CFR 413.65, but VA's revisions addressed the unique structure of VA's health care system, versus the CMS requirements that are more generally applicable to private health care systems. We reiterate from the proposed rule that VA is an integrated, national health care system and, therefore, some of the CMS requirements in 42 CFR 413.65, especially as they pertain to proximity limitations and licensure, are not appropriate to use for VA facilities. 84 FR 64235, 64236. The CMS requirements that were not appropriate to use for VA facilities were further identified and explained in more detail in the proposed rule, as were the alternative VA criteria in § 17.100 as proposed. 84 FR 64235, 64236–64239.

VA received three comments in response to the proposed rule, all of which supported the proposed rule and none of which suggested changes to any provisions in the proposed rule. We therefore adopt the proposed rule as final with no changes.

Paperwork Reduction Act

This final rule contains no collections of information under the Paperwork