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## U.S. Department of Justice

### Office of Legal Policy

Office of the Assistant Attorney General

Washington, D.C. 20530

#### MEMORANDUM TO HEADS OF DEPARTMENT COMPONENTS

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SUBJECT: Review, Issuance, and Maintenance of Guidance Documents by Department Components

This Memorandum updates and clarifies the procedures Department components should follow when reviewing, issuing, and maintaining guidance documents, in accordance with the principles announced in the Attorney General's July 1, 2021 Memorandum. *See* Memorandum from the Attorney General, *Issuance and Use of Guidance Documents by the Department of Justice* (July 1, 2021) ("July 1 Memorandum" or "Memorandum").

#### I. Introduction

The July 1 Memorandum updated the principles that govern the issuance and use of guidance documents by the Department of Justice. That Memorandum explained that guidance documents are non-binding statements of general applicability issued by an agency to inform the public of its policies or legal interpretations. Although such documents do not have the force of law (except where a grant agreement or contract makes them binding), the Memorandum recognized their many valuable functions, including advising the public as to how an agency is likely to apply its binding statutes and legislative rules; clarifying an agency's programs and policies; and providing plain-language explanations of complex regulatory schemes.

Among the principles announced in the July 1 Memorandum were that Department guidance documents should "reflect the breadth of expertise within the Department" and should be "drafted in a way that does not create inconsistencies among different components." Additionally, the July 1 Memorandum directed that the Department's guidance documents be "readily accessible to the public" and instructed that, "whenever practicable, Department components should continue posting materials to the Department's Online Guidance Portal, <http://www.justice.gov/guidance>."

Consistent with these principles, this memorandum sets forth procedures for Department components to follow for the review, issuance, and maintenance of guidance

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documents, including “significant” guidance documents as defined by the Office of Management and Budget (OMB).<sup>1</sup>

These procedures are designed to be generally applicable, and are not intended to supplant existing cross-component or interagency review protocols that Department components have developed over time and already follow as a matter of course. Nor are they intended to alter any existing requirements imposed by law or Executive Order. This is an internal Department document and does not create any rights, substantive or procedural, enforceable by law.

## **II. Review of Department Guidance Documents**

As a general matter, whether a component-issued guidance document requires pre-issuance review by other Department components, Department leadership offices, OMB, or other federal agencies, is a matter of judgment best exercised, in the first instance, by individual components’ leadership offices, ultimately accountable to each component’s Assistant Attorney General or Director (as applicable). Key to such decisionmaking is the component’s unique institutional knowledge, expertise, and history of working with other components or Federal agencies.

For significant guidance documents, as explained further below, the Office of Legal Policy (OLP) expects to take on a central role in coordinating and managing review, but would leave the process of coordinating review and issuance of more routine guidance materials to components.

When considering the application of these procedures to a certain category of documents, Department components are encouraged to consult the definition of guidance documents included in the July 1 Memorandum, as well as the examples listed therein. Any questions about whether or how these procedures apply to a particular type of document may be directed to OLP.

### **A. Categories of Guidance Documents**

As the July 1 Memorandum explained, a guidance document as referred to in this document is “a statement of general applicability issued by an agency to inform the public of its policies or legal interpretations.” Examples of documents that fit within this definition may include “interpretive memoranda and manuals, policy statements, opinion letters of general applicability, and other similar materials,” but do not include “legislative rules; adjudicatory or administrative actions; rulings; legal advice or trainings directed at other federal agencies; internal policies or guidelines; or litigation filings.”

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<sup>1</sup> The Office of Management and Budget defines “significant” guidance documents as statements of general applicability agencies issue to the general public or regulated entities that may be reasonably anticipated to: (1) have an annual effect of \$100 million or more on the economy; (2) create serious inconsistencies or interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, or similar programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, Presidential priorities, or the principles set forth in Executive Order 12866. *See* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007).



As a general matter, most guidance documents issued by the Department will be entirely derivative of, repurpose, or repackage other public-facing materials that have previously been approved and publicly issued. Such documents are neither sensitive nor significant, and have no new equities within other components. Because such documents are entirely derivative of, repurpose, or repackage public-facing material that has already been cleared (including prior to the circulation of this Memorandum), they can and should be handled entirely within the component's preexisting review process.

There are two categories of documents that may warrant review beyond the issuing component:

1. **Routine Guidance** – This category includes guidance documents that introduce new policies or interpretations, but do not meet the criteria for “significant” guidance documents set forth by OMB. Such guidance documents are unlikely to be of significant interest to Congress, the media, or a significant portion of the general population. They may touch upon the equities of a limited number of Department components beyond that of the issuing component, but do not substantially implicate either Administration or Department policy priorities. Documents that fall in this category are unlikely to significantly impact ongoing or anticipated high-profile litigation.
2. **Significant Guidance** – This category describes guidance documents that meet the criteria for “significant” guidance documents set forth by OMB. The portion of the OMB definition that most often applies to Department guidance is documents that “raise novel legal or policy issues arising out of legal mandates, Presidential priorities, or the principles set forth in Executive Order 12866.” *See* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007). Factors to consider when determining whether guidance documents meet this definition include: the likelihood that a document will be of significant interest to Congress, the media, or large segments of the population; whether a document interprets for the first time newly enacted statutes or regulations; whether a document bears significantly upon the equities of other federal agencies; whether a document is likely to significantly affect Administration or Department policy priorities; whether a document reverses or significantly alters existing policies or interpretations; and whether a document presents significant litigation risk or has a significant likelihood of impacting high-profile ongoing litigation.

## **B. Procedures for Issuance of Guidance Documents**

It is often appropriate for a component to issue guidance materials that are entirely derivative of, or mere repackaging and repurposing of, previously issued public-facing guidance, whether to reach a different audience, to present the guidance in a different format, to highlight certain aspects of that guidance separately, to respond to specific questions posed by regulated entities, or for other reasons. In such situations, additional review of that derivative guidance would be duplicative, inefficient, and unnecessary. Accordingly, such derivative guidance may be issued



upon approval of the management, and according to the established procedures, of the individual component subunit—including at the division, branch, section, or equivalent level—issuing that guidance.

This level of review is particularly appropriate in situations where component subunits regularly provide the public with guidance that is created and disseminated in a decentralized manner, such as through field offices, or in response to specific inquiries from regulated entities. With the understanding that it would be impracticable for component leadership to review all such guidance, such guidance may be disseminated without review beyond any preexisting procedures already established by the subunit, *provided it breaks no new ground*. This level of review serves the dual goals of ensuring valuable guidance reaches local communities and individual regulated entities without undue delay, while promoting consistent messaging across guidance disseminated by Department components.

Additional review of guidance is appropriate, however, where a guidance document falls into one of the two categories introduced above.

***Routine Guidance.*** Guidance put forth by Department components may, at times, involve new substantive content, but would not be deemed “significant.” Such guidance would typically not substantially concern Administration policy priorities, Department policy priorities, or matters likely to be of significant interest to Congress, the media, or the general public. This type of guidance is unlikely to require review by agencies outside of the Department.

Such materials may be drafted, and cross-component review sought, by individual component subunits according to their experience and expertise. Many components, for example, already have established relationships with other interested components for review of guidance documents, and this memorandum does not affect any such preexisting arrangements.

Any guidance document with new substantive content should, however, be reviewed and approved by component leadership, within the Office of the Assistant Attorney General, Director, or equivalent, as appropriate, to confirm that review by other Department components, Department leadership, OMB, or other agencies is unnecessary. OLP does not need to be involved with these decisions as a matter of course, but is available on an as-needed basis to advise components as to whether a guidance document requires review by other Department components, Department leadership offices, OMB, or other agencies.

For issuance of guidance that falls within this category, components should work together to establish clear, reasonable time frames for review that take into account both the interest of the issuing component in providing guidance to the public, and the need of the reviewing component for sufficient time to provide meaningful feedback. Except in extenuating circumstances, issuing components should strive to provide reviewing components with one to two weeks in which to provide feedback on new guidance materials—which could be shortened or extended depending on factors like exigency, and the length or complexity of the document. Reviewing components, in turn, should consistently meet these deadlines. When issuing components are managing the cross-component review process, it is their responsibility to consider and, to the extent possible,

work to incorporate feedback from other components, including working collaboratively with other components to reconcile competing or inconsistent feedback.

***Significant Guidance.*** Guidance that falls within this category meets the OMB definition of “significant” guidance, as further expanded upon above, and requires review by Department leadership, OMB, and potentially other agencies outside the Department. As such, all guidance materials in this category should be raised to component leadership at the level of the Office of the Assistant Attorney General or Director or equivalent, as applicable, not only for ultimate approval, but also to ensure appropriate review.

Although it will not be appropriate in every circumstance, the following is a general framework for review of significant guidance:

- Components first determine, in consultation with OLP as necessary, which other Department components have significant equities and therefore require review.
- Components consolidate and reconcile feedback from other Department components, and then elevate to Department leadership for review and approval.
- Once Department leadership has approved, components work with OLP to prepare a communication to OMB that provides context for the document, identifies other agencies or equities that might be implicated, and explains why the guidance document is significant or otherwise warrants review.<sup>2</sup>
- OLP manages the review process with OMB, conveying any feedback to the component. OLP may set up calls or meetings as needed between the component and OMB to reconcile differences.
- Once OMB approves of the document, it goes through final internal clearance, which OLP manages. If the document is to be issued by a leadership office, it may require clearance through Exec Sec.

It is the responsibility of component leadership offices to determine in the first instance, in consultation with OLP as necessary, whether a guidance document falls within the significant category. Components should plan to work with OLP when, in the component’s determination, a guidance document is likely to be deemed “significant,” which may include guidance that is the direct result of Administration directives or priorities, or likely of substantial interest to

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<sup>2</sup> These recommendations are not intended to supplant any preexisting protocols components have established for review of, or collaboration on, documents that, as a matter of course, involve recognized areas of overlapping expertise, jurisdiction, or shared equities among different agencies. To the extent a guidance document requires such interagency coordination, however, wherever feasible internal Department views should be solicited and reconciled before engaging with agencies outside the Department to ensure that all Department views are known and taken into account early in the process.



Congress, the media, or the general public. Absent emergency circumstances, all communications with OMB should be routed through OLP or, in appropriate circumstances, Department leadership offices.<sup>3</sup>

Because guidance documents with this level of visibility are likely to require more extensive review, components should reach out to OLP as early as feasible to allow OLP to work with OMB in advance to establish a reasonable time frame for review. When contacting OLP, issuing components should include all relevant information in their initial communication, including whether any specific deadline for issuance of the guidance exists, and whether the guidance relates to, for example, a statutory requirement, regulatory requirement, Executive Order or other Presidential directive, emergency circumstances, Administration priority, etc.

### **C. Procedures for Maintenance of Existing Guidance Documents**

To promote transparency and ensure that the public has access to the most up-to-date information possible, Department components should not only keep account of the guidance documents their component has put out that are currently in force, but also remove or update, as appropriate, guidance documents that are outdated or otherwise no longer applicable. As a default, to the extent feasible and consistent with component resources, components are encouraged to review public-facing guidance materials every five years from the date of issuance to ensure that the guidance is still in effect, and to evaluate whether updates are necessary. If a component determines that there is value in retaining as public-facing guidance documents that have been revised, rescinded, or are otherwise no longer in effect, that component should take steps to clearly mark the guidance as such on its face.

Maintaining an organized list of guidance each component has published is critical to this effort and provides an opportunity for components to identify and, as appropriate, remove from circulation guidance that is no longer in effect. Accordingly, all components that issue guidance should designate an individual to prepare and maintain such a list within 180 days of the date of this memorandum, and establish procedures for review of all public-facing guidance documents issued by the component five years from their date of issuance—or a comparable defined time period that is consistent with component resources, in the judgment of component leadership.

### **D. Posting of Department Guidance Documents**

As explained in the July 1 Memorandum, Department components should endeavor to post all guidance on the public portal, found at <http://www.justice.gov/guidance>, to promote transparency and ease of access. Accordingly, each component should continue to post guidance on the Department's portal shortly after issuance, and this step should be incorporated into each component's protocols for issuing guidance. Such posting may be in addition to posting on

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<sup>3</sup> Circumstances that may warrant deviation from these default procedures include where guidance must be issued quickly to preserve the public safety, national security, or foreign policy of the United States. Where Department leadership is directly involved in approving significant guidance, OLP involvement may be unnecessary.



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individual components' websites. Consistent with the directives in the July 1 Memorandum, materials posted on the public portal should include issuance and revision dates.

The July 1 Memorandum also advises that Department components may submit to the Department portal other public-facing materials that do not meet the definition of guidance included in that memorandum, but where such publication may benefit the public. Accordingly, OLP recommends that the components undergo a review of public-facing materials that are not guidance (because, for example, they describe internal policies or guidelines, or are not intended as statements of general applicability), but that are regularly consulted by the public, to determine whether posting such documents on the portal would increase transparency, inclusivity, and ease of understanding for individuals less familiar with components' standard practices. Such documents that are not guidance, but which components may wish to consider posting on the portal include, but are not limited to, manuals that guide Department attorneys in the exercise of enforcement or prosecutorial discretion, or responses to individual regulated entities—with appropriate redactions for privacy or other purposes—that represent components' resolutions of novel issues or responses to novel questions.