



U.S. Department of **JUSTICE**

This is archived content from the U.S. Department of Justice website. The information here may be outdated and links may no longer function.

WITHDRAWAL-OF-GUIDANCE PROCEDURES FOR DOJ COMPONENTS

Reminder of procedures for issuance of guidance documents.

Per the April 2022 memorandum from the Office of Legal Policy (OLP) (attached), guidance documents issued by the Department of Justice are divided into three categories:

- (1) guidance that is entirely *derivative* of, repurposes, or repackages other public-facing, previously approved, and publicly issued materials;
- (2) *routine* guidance, which introduces new policies or interpretations but does not meet the criteria for “significant” guidance set forth by the Office of Management and Budget (OMB); and
- (3) *significant* guidance, as defined by OMB, which typically includes documents that “raise novel legal or policy issues arising out of legal mandates, Presidential priorities, or the principles set forth in Executive Order 12866, as further amended.”¹

As a reminder, guidance materials in the first category can be handled entirely within the component’s preexisting review process, though we encourage components to consult with OLP on whether a particular guidance document falls within the scope of category 1.

Routine guidance (category 2) should be reviewed by the component’s leadership to confirm that further review by other Department components, OMB, other agencies, is unnecessary. OLP is available to advise upon request. If a routine guidance requires or may require other review, it should be sent to OLP, particularly if it may impact other component or agency equities. OLP will circulate it for review and then circulate to Department Leadership.

Significant guidance (category 3) should follow the full clearance process outlined in the 2022 OLP memorandum, including review by Department Leadership and OMB and coordination with OLP. OLP will manage the internal clearance process and contact OMB.

Withdrawal-of-guidance procedures.

As a preliminary matter, we encourage a component to contact OLP when it intends to withdraw any guidance document, even if the guidance is routine or entirely derivative of an

¹ OMB defines “significant guidance document” to also include guidance documents that may 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 agency”; or (3) “Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof.” Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007). Executive Order 14094 (April 3, 2023) modified the definition of a “significant rulemaking action” in Executive Order 12866, sec. 3(f)(4) by removing the language “raise novel legal or policy issues arising out of legal mandates, Presidential priorities, or the principles set forth in Executive Order 12866,” and substituting the new language, “raise legal or policy issues for which centralized review would meaningfully further the President’s priorities or the principles set forth in this Executive order.” Though OMB has not provided direction to agencies regarding the applicability of the revised language in the context of guidance documents, it is possible that OMB will apply the new language in deciding whether a guidance document is “significant” for purposes of OMB review under E.O. 12866.

earlier document. OLP can ensure all relevant offices are apprised of the intended withdrawal and can advise on the withdrawal procedures as is helpful, including by consulting with OMB to determine if the guidance is significant.

To withdraw previously issued guidance, components should generally follow the same review and approval process that corresponds with the applicable issuance process described above and in OLP's 2022 memorandum. For example, if a component wishes to withdraw a routine guidance document (category 2), it should determine whether the withdrawal requires input from other Department components, Department leadership, OMB, or other agencies. If the component determines cross-component review is needed, it should notify those components. If the component determines that Department leadership, OMB, or other agency review is needed or may be needed, it should send notice to OLP for OLP to seek OMB review, interagency review, and other Department leadership review, as appropriate.

Likewise, if a component wishes to replace an old guidance document with new guidance instead of withdrawing it altogether, the component should follow the same review and approval process that corresponds with the issuance process for that type of guidance in OLP's 2022 memorandum. Depending on the circumstances, a component seeking to issue updated or replacement guidance may only have to follow one set of procedures for the issuance of guidance, while making clear that existing guidance will be superseded. If a component is unsure whether it should follow both the issuance and withdrawal processes for such a policy, please contact OLP for advice.

Documentation of the withdrawal.

Consistent with Leadership requests for improved documentation of component actions, OLP is working with the Office of the Executive Secretariat (OES) to properly document the withdrawal of guidance documents. OES will provide greater detail at a later date but, as a general matter, what will be required will depend on the significance of the guidance.

- For non-significant guidance—i.e., guidance categorized as routine or derivative per the 2022 OLP memorandum--OES expects to implement a memorandum-to-file protocol to document the guidance's issuance or withdrawal. In conjunction with the finalization of the procedures discussed in this email, OES plans to provide a memorandum template for component use.
- For significant guidance, components should work with OLP and OES to draft an action memorandum for Department Leadership review and approval.

Notification to the public.

Components should broadly distribute a notice of the withdrawal of existing guidance documents to minimize confusion about whether the previously issued guidance is still in effect. Components should also endeavor to post withdrawal-of-guidance notifications on the public guidance portal, found at <http://www.justice.gov/guidance>, to promote transparency and ease of access, as the 2022 OLP Memorandum instructs components to do after issuing guidance.

ATTACHMENTS:

-- Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007);

-- U.S. Dep't of Justice, Office of Legal Policy, *Memorandum to Heads of Dep't Components, Review, Issuance, and Maintenance Guidance by Dep't Components* (Apr. 1, 2022).