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DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 50

Docket No. OAG 174; AG Order No.

RIN 1105-AB61

Processes and Procedures for Issuance and Use of Guidance Documents

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Interim final rule; request for comments.

SUMMARY: This interim final rule (“rule”) implements Executive Order 13992, which, among other things, revoked Executive Order 13891 and directed the heads of all agencies to promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing the revoked Executive Order. By this rule, the Department of Justice (“Department” or “DOJ”) revokes amendments to its regulations that were made during 2020 pursuant to Executive Order 13891, which imposed limitations on the issuance and use of guidance documents. For further information on how the Department intends to address guidance documents going forward, interested parties should consult an Attorney General Memorandum that is being issued concurrently with this rule.

DATES: Effective date: This rule is effective [PLEASE INSERT DATE OF SIGNATURE].

Comments: Comments are due on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: To ensure proper handling of comments, please reference Docket No. OAG 174

on all electronic and written correspondence. The Department encourages the electronic submission of all comments through <https://www.regulations.gov> using the electronic comment form provided on that site. For ease of reference, an electronic copy of this document is also available at that website. It is not necessary to submit paper comments that duplicate the electronic submission, as comments submitted to <https://www.regulations.gov> will be posted for public review and are part of the official docket record. However, should you wish to submit written comments through regular or express mail, they should be sent to Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, Room 4252 RFK Building, 950 Pennsylvania Avenue NW, Washington, DC 20530. Comments received by mail will be considered timely if they are postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The electronic Federal eRulemaking portal will accept comments until Midnight Eastern Time at the end of that day.

FOR FURTHER INFORMATION CONTACT: Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, telephone (202) 514-8059 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at <https://www.regulations.gov>. Information made available for public inspection includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

You are not required to submit personal identifying information in order to comment on this rule. Nevertheless, if you want to submit personal identifying information (such as your

name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You must also locate all the personal identifying information that you do not want posted online in the first paragraph of your comment and identify what information you want the agency to redact. Personal identifying information identified and located as set forth above will be placed in the agency’s public docket file, but not posted online.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify the confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the agency may choose not to post that comment (or to post that comment only partially) on <https://www.regulations.gov>. Confidential business information identified and located as set forth above will not be placed in the public docket file, nor will it be posted online.

If you want to inspect the agency’s public docket file in person by appointment, please see the “**FOR FURTHER INFORMATION CONTACT**” paragraph.

II. Discussion

A. Overview

This rule implements Executive Order 13992, “Revocation of Certain Executive Orders Concerning Federal Regulation” (86 FR 7049), by revoking the Department’s regulations at 28 CFR 50.26 and 50.27. Going forward, the Department’s approach to those matters will be governed by a new Attorney General Memorandum being issued concurrently with this rule.

B. Background - Existing Regulations and Memoranda

In 2020, the Department of Justice published two interim final rules (“IFRs,” “rules,” or “regulations”) that regulate the issuance and use of guidance documents by the Department and its components. The first rule, which was entitled “Prohibition on the Issuance of Improper Guidance Documents Within the Justice Department” and added a new 28 CFR 50.26, was published August 19, 2020 (85 FR 50951). That rule emphasized that guidance documents generally may not be used “create rights or obligations binding on persons or entities outside the Executive Branch.” 28 CFR 50.26(a)(4). It also instituted compliance procedures requiring Department components to include disclaimers and other specific language in all guidance documents. *Id.* 50.26(b).

The first rule was followed by a second, entitled “Processes and Procedures for Issuance and Use of Guidance Documents” and published on October 7, 2020 (85 FR 63200), which expanded on aspects of the first rule by adding a new 28 CFR 50.27. Briefly, this second rule set forth processes and procedures governing the review, clearance, and issuance of guidance documents, and included limitations on the use of guidance documents in criminal and civil enforcement actions brought by the Department.

Those two regulations published in 2020 were developed from, and promulgated pursuant to, three documents. The first was a November 16, 2017, memorandum issued by Attorney General Sessions, entitled “Prohibition on Improper Guidance Documents” (“the November 2017 Memorandum”). The November 2017 Memorandum acknowledged the importance of guidance documents but also stated that “guidance may not be used as a substitute for rulemaking and may not be used to impose new requirements on entities outside the Executive

Branch.” These principles were subsequently memorialized in the Justice Manual at section 1-19.000, <https://www.justice.gov/jm/justice-manual>.

The second underlying document was a memorandum issued by Associate Attorney General Brand on January 25, 2018, entitled “Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases” (“the January 2018 Memorandum”). The January 2018 Memorandum reiterated many aspects of the November 2017 Memorandum, and stated more explicitly that the Department could not “convert” guidance documents into binding rules through litigation, and that failure to comply with a guidance document should not be used as presumptive or conclusive evidence that a party violated a related statute or regulation. That 2018 policy statement was then codified in the Justice Manual at section 1-20.000.

The third relevant document was President Trump’s Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents,” which was issued on October 9, 2019, and published in the *Federal Register* the next week. *See* 84 FR 55235 (Oct. 15, 2019). That Executive Order embodied some of the same concepts as the November 2017 Memorandum and January 2018 Memorandum, with some differences. In particular, Executive Order 13891 required, among other things, that each agency, as appropriate, build a single, searchable, online database to which the agency would publicly post all guidance documents. Executive Order 13891 also required that agencies promulgate or amend regulations to establish procedures for issuing guidance documents, including requiring non-binding disclaimer language and the publication of “significant” guidance documents for notice and comment. Executive Order 13891 also directed agencies to incorporate a series of detailed and prescriptive requirements into their regulations for the development, review, issuance, and use of guidance

documents.

The two regulations that are the subject of this rulemaking were issued pursuant to the requirements of Executive Order 13891, though some of their provisions were based on the somewhat similar language of the November 2017 Memorandum and January 2018 Memorandum.

C. Executive Order 13992

On January 20, 2021, President Biden issued Executive Order 13992, which, among other things, revoked Executive Order 13891 and stated that “agencies must be equipped with the flexibility to use robust regulatory action to address national priorities.” 86 FR 7049 (Jan. 25, 2021). Executive Order 13992 directed the heads of all agencies to “promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing” the revoked Executive Order.

D. Revocation of 28 CFR 50.26 and 28 CFR 50.27

Based on its evaluation of the regulations at 28 CFR 50.26 and 28 CFR 50.27, the Department has concluded that those regulations are unnecessary and unduly burdensome, lack flexibility and nuance, and limit the ability of the Department to do its work effectively. Among other things, the regulations have generated collateral disputes in affirmative and enforcement litigation, and they have discouraged Department components from preparing and issuing guidance that would be helpful to members of the public. In addition, because the regulations imposed requirements on a particular category of agency documents deemed to be “guidance,” the regulations caused Department staff to expend significant resources determining whether each agency document, product or communication constituted “guidance” and was therefore

subject to these regulations. The Department has determined that the rules should be revoked.

In revoking the rules, the Department is not departing from the principle that guidance documents cannot impose legal requirements beyond those found in relevant constitutional provisions, statutes, and legislative rules. The Department also continues to believe that guidance documents should be clear, transparent, and readily accessible to the public. But these principles, and other related Department policies and practices concerning guidance documents, have traditionally been addressed through memoranda from Department leadership rather than through regulations. The Department is therefore revoking 28 CFR 50.26 and 28 CFR 50.27 in their entirety, and the Attorney General is concurrently issuing a new Memorandum setting forth the Department's policies going forward.

E. Public Comments on the Two IFRs Pertaining to 28 CFR 50.26 and 50.27

The two IFRs issued in 2020 to promulgate 28 CFR 50.26 and 50.27 were made effective upon issuance, and by their nature they did not require a pre-promulgation notice-and-comment period under the Administrative Procedure Act. However, the Department chose to provide a 30-day period for post-promulgation public comment for each rule.

The Department received fewer than ten substantive comments on the two rules. The comments discussed the need to ensure that regulated parties have notice of legal obligations, and for enforcement actions to be predicated on statutes and regulations. Other comments noted the importance of issuing agency guidance to the public, as agencies use interpretative guidance to explain legal requirements and put them in context. The Department has considered these comments in connection with the decision to revoke the rules.

III. CONCLUSION

After having considered Executive Order 13992, the views of the Department's components and their experience with the two rules, and the public comments on the two IFRs published in 2020, the Department has concluded that the best approach at this point is to revoke the two regulations, 28 CFR 50.26 and 50.27, in their entirety, effective immediately.

Revocation frees Department personnel, including those in its litigating components and those in components that issue guidance documents, from the overly prescriptive nature of these two regulations. Accordingly, this rule removes the regulations at 28 CFR 50.26 and 50.27.

The current provisions of the Justice Manual at sections 1-19.000 and 1-20.000 (<https://www.justice.gov/jm/justice-manual>) will be revised as appropriate at a later date. The new Attorney General Memorandum, issued concurrently with this rule, sets forth the Department's policies in this area going forward.

III. Regulatory Certifications

A. Administrative Procedure Act

This rule relates to a matter of agency management or personnel and is a rule of agency organization, procedure, or practice. As such, this rule is exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date. *See* 5 U.S.C. 553(a)(2), (b)(A), (d). The rule is effective upon signature. The Department, however, is, in its discretion, seeking post-promulgation public comment on this rulemaking.

B. Regulatory Flexibility Act

A Regulatory Flexibility Analysis was not required for this final rule because the Department was not required to publish a general notice of proposed rulemaking for this matter.

See 5 U.S.C. 601(2), 604(a).

C. Executive Orders 12866 and 13563 - Regulatory Review

This rule has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), The Principles of Regulation, and Executive Order 13563, “Improving Regulation and Regulatory Review,” section 1(b), General Principles of Regulation.

This final rule is “limited to agency organization, management, or personnel matters” and thus is not a “rule” for purposes of review by the Office of Management and Budget (OMB), a determination in which OMB has concurred. *See* Executive Order 12866, sec. 3(d)(3). Accordingly, this rule has not been reviewed by OMB. The Department had claimed a similar exemption at the time of promulgating the two regulations (28 CFR 50.26 and 50.27) that are being revoked by this rule. *See* 85 FR 50951, 50952; 85 FR 63200, 63201.

D. Executive Order 12988 - Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, “Civil Justice Reform.”

E. Executive Order 13132 - Federalism

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, “Federalism,” the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted for inflation) in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

G. Congressional Review Act

This rule is not a major rule as defined by section 804 of the Congressional Review Act (CRA), 5 U.S.C. 804. This action pertains to agency management or personnel, and agency organization, procedure, or practice, and does not substantially affect the rights or obligations of non-agency parties. Accordingly, it is not a “rule” as that term is used in the CRA, 5 U.S.C. 804(3)(B), (C), and the reporting requirement of 5 U.S.C. 801 does not apply.

H. Paperwork Reduction Act of 1995

This final rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521.

List of Subjects in 28 CFR part 50

Administrative practice and procedure.

Accordingly, for the reasons set forth in the preamble, part 50 of chapter I of title 28 of the Code of Federal Regulations is amended as follows:

PART 50 — STATEMENTS OF POLICY

1. The authority citation for part 50 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 1162; 28 U.S.C. 509, 510, 516, and 519; 42 U.S.C. 1921 *et*

seq., 1973c; and Pub. L. 107-273, 116 Stat. 1758, 1824.

2. Sections 50.26 and 50.27 are removed and reserved.

Date

7/1/21

Merrick B. Garland
Attorney General