

Agency Compliance with the “Guidance Executive Order”: Swift but Sundry

By: Laura Stanley | July 13, 2020

In brief...

Executive Order 13891 requires agencies to take actions to promote transparency and public participation in the development of certain guidance documents. Last month, some federal agencies hit a tight deadline set out in the executive order, while other agencies lag behind.

Last month, some federal agencies hit major milestones laid out in [Executive Order 13891](#): *Promoting the Rule of Law Through Improved Agency Guidance Documents*. Executive Order 13891, colloquially [referred to](#) as the “guidance executive order,” aims to make agency guidance documents more transparent and requires agencies to seek public input and conduct analysis before issuing certain types of guidance documents.

The executive order, released in October 2019, required agencies to 1) gather up existing guidance documents and make them available online and 2) set forth standards agencies must follow for issuing certain guidance documents that include interagency review, “notice-and-comment,” and impact analysis. At the end of June, agencies passed the final deadline for creating an online catalog of all their existing guidance documents. In May and June, many agencies released rules codifying final standards for issuing guidance documents, just missing the tight deadline of April set forth in the executive order. However, some agencies lag behind both in rounding up their existing guidance documents and releasing final standards for developing guidance documents.

What does Executive Order 13891 require?

Ideally, agency guidance documents clarify ambiguities and answer questions about compliance not tackled in an agency’s regulations. Guidance documents take a variety of forms. Most frequently, an agency posts a guidance document in the form of a memorandum on its website. But even a peripheral “frequently asked questions” webpage or a tailored letter to an individual facility describing its compliance status *might* be considered guidance. The Office of Management and Budget’s (OMB) follow-up [direction](#) to agencies on Executive Order 13891 points out that documents directed towards a single party count as guidance if meant to “guide the conduct of the broader regulated public.” For example, a search using the term “letter” in the Environmental Protection Agency’s (EPA) Office of Land and Emergency

Management online [catalog](#) returns 86 letters ostensibly to directed to single parties that would apply similarly to other parties facing the same compliance questions.

Unlike regulations that must go through “notice-and-comment” under the Administrative Procedure Act, guidance documents are not binding and historically could be issued quickly. Since agencies avoid the time-consuming process of taking public comment before finalizing them, guidance documents became a ubiquitous mechanism used to provide quick answers or deliver reassurances. Guidance documents are contentious, however, because regulated parties find from a practical perspective, they must comply with guidance documents even though they are not legally binding. A study by the Administrative Conference of the United States [suggests](#) this phenomenon holds even though agencies do not *intend* to produce this outcome.

Executive Order 13891 addresses two concerns about agency guidance documents: 1) that guidance documents are not transparent and easy for the public to find and 2) that agencies are influencing the behavior of regulated parties without seeking public comment, going through interagency review, or analyzing the impacts of their guidance documents.

First, the executive order required agencies to collect existing guidance documents and make them available on a single, searchable website by February 28, 2020. Agencies had a grace period, though, and could reinstate any guidance documents they missed up until June 27, 2020. Now that the June 27, 2020 deadline has passed, any guidance document that did not make it into an agency’s online catalog is considered rescinded and the agency cannot rely on it (unless it reinstates it by going through the new process for issuing guidance documents).

Second, the executive order required agencies to finalize regulations implementing the new process for issuing guidance documents by April 28, 2020. The regulations must include provisions requiring notice-and-comment and interagency review for guidance documents that raise novel legal or policy issues, have an annual impact of \$100 million, or create inconsistencies with other agency policies. For guidance documents that may have an annual impact of over \$100 million, the agency [must](#) do an analysis of its benefits, costs, or transfer impacts.

How are agencies handing the demands of Executive Order 13891?

Although some agencies scrambled to gather up existing guidance documents and make them publicly available by the June 27, 2020 deadline, and many released rules implementing the new required guidance process in recent months, compliance with the executive order is all over the board.

EPA, for example, met the June 27, 2020 deadline and put a whopping approximately 9,000 guidance documents into a searchable, indexed [website](#). EPA’s website goes beyond the executive order requirements and includes information about each guidance document in its catalog, such as summaries, key words, and issue dates. Other agencies, such as the Department of [Transportation](#) and the Department of [Labor](#), also have indexed, searchable websites with guidance documents.

Other agencies lag behind. USDA, for example, has a [webpage](#) containing links to various historical repositories of significant guidance documents, but does not have a “single, searchable, indexed website” as the executive order requires. The U.S. Department of Education also [links](#) to different repositories organized in different manners. The U.S. Department of the Treasury does not have a “single, searchable” website containing its guidance documents either. In fact, the Treasury Department [appears](#) to have not made *any* advances on making its guidance documents publicly accessible in a single website.

The deadline to finalize regulations implementing the new process for issuing guidance documents by April 28, 2020 was [tight](#). OMB [direction](#) released at the end of October gave agencies a recommended three months to submit a proposal to OMB. Unsurprisingly, many agencies missed this initial deadline. EPA, for example, did not release a [proposed rule](#) until late May and accepted comments through late June. The U.S. Department of Energy released a [proposed rule](#) on July 1, 2020 and will accept public comments through the end of the month. Other agencies opted not to take public comment (since these rules relate to internal agency procedure, public comment is [not required](#)). The Department of [Defense](#) (DoD) and the U.S. Department of [Agriculture](#) (USDA) released final rules over the past two months without first taking public comment.

These rules are generally straightforward codifications of the new guidance process requirements; most include similar language on seeking public comment. Some of the rules, such as the USDA and DoD rules, require agencies to conduct a “good faith cost estimate” to see if the guidance crosses the \$100 million/year threshold using the same level of analysis that would be required to determine if a rule is major under the Congressional Review Act. EPA’s rule, on the other hand, only explicitly requires any analysis if the guidance document crosses that threshold.

How do agencies issue new guidance documents moving forward?

For agencies that met the executive order’s deadlines, the path forward for issuing new guidance documents is relatively uncomplicated. That does not mean it will necessarily be easy; the impact will vary [depending](#) on the agency.

EPA, for example, is already [accustomed](#) to seeking public comments on guidance documents and sending them through interagency review on an ad hoc basis. EPA [rarely](#) issues a guidance document with an impact of more than \$100 million a year, which means it will not have to do a full analysis of the benefits, costs, or transfer impacts. EPA might need to occasionally conduct preliminary analysis to determine if a guidance document crosses the threshold, but most guidance documents should facially be below that threshold. For EPA, issuing new guidance under this executive order should be similar to business as usual.

Previous OMB [guidance](#) from 2007 required agencies to take public comment on guidance documents, but the requirement only applied to documents that had an impact of more than \$100 million per year. For agencies that rarely take public comment on guidance documents and are not accustomed to sending them through interagency review, transitioning to the new process may be more challenging.

It is unclear if agencies that missed the deadlines are caught in limbo. For example, as mentioned, Treasury Department did not make the deadline for releasing a catalog of existing guidance documents. Surely this does not mean *all* of the Treasury Department's guidance documents are rescinded. It is more plausible that OMB extended the deadlines (the executive order allows OMB to extend certain deadlines). However, OMB's deadline extension activity is opaque in this case, so the public is in the dark about which (if any) Treasury Department guidance documents they should look to for direction. On the other hand, the Department of Health and Human Services released a [notice](#) pointing out that OMB granted the agency an extension for establishing a guidance catalog.

Although many agencies are still coming on board, the swift efforts taken by other agencies to comply with the executive order promote transparency and public participation in policy making. At a minimum, agencies should be asking themselves healthy questions, like whether the public can help inform the development of their guidance documents, or whether their guidance documents might do more harm than good.