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To: Clients and Friends

From: David F. Dulock

Subject: VA Publishes Regulations Establishing Processes and Procedures for Issuing Guidance Documents

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In the November 13, 2020, issue of the Federal Register (85 FR 72569, [click here](#)) VA published a final rule that creates a new part 5 in title 38 of the Code of Federal Regulations that sets forth policy and procedures for issuing guidance documents of general applicability. The final rule is effective December 14, 2020.

New 38 CFR Part 5 comprises five sections, which are reprinted below:

PART 5—Administrative Procedures: Guidance Documents

§ 5.0 Purpose.

Sections 5.0 through 5.25 provide VA’s processes and procedures for issuing and managing guidance documents in accordance with Executive Order 13891.

§ 5.10 Definitions relating to guidance documents.

The following definitions apply to §§ 5.0 through 5.25.

Guidance document means an agency statement of general applicability (*i.e.*, it applies to more than just one person, event, or transaction), that is intended to have a future effect on the behavior or actions of regulated parties (to include non-VA actors), and that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation. A guidance document does not include the following:

- (1) Rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code, or similar statutory provisions;
- (2) Rules exempt from rulemaking requirements under section 553(a) of title 5, United States Code;
- (3) Rules of agency organization, procedure, or practice;
- (4) Decisions of agency adjudications under section 554 of title 5, United States Code, or similar statutory provisions;
- (5) Internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties; or
- (6) Internal executive branch legal advice or legal opinions addressed to executive branch officials.

Significant guidance document means a guidance document that the Administrator of the Office of Information and Regulatory Affairs determines is reasonably 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;

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(3) Materially alter the budgetary impact of entitlements, grants, user fees, or 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.

VA means the Department of Veterans Affairs.

5.15 Procedures for issuing guidance documents.

(a) *General.* (1) Each guidance document must clearly and prominently state that it does not bind the public, except as authorized by law or as incorporated into a contract. Guidance documents may include the following or similar disclaimer language: The contents of this document do not have the force and effect of law and are 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.

(2) Each guidance document must include the following information in the published guidance document:

(i) The term guidance;

(ii) The agency or office issuing the document;

(iii) To what and to whom the document applies;

(iv) The date of issuance;

(v) The title and unique identification number of the document;

(vi) Citation to statutory or regulatory authority that the guidance document interprets or applies;

(vii) A short summary of the subject matter covered at the beginning of the guidance document;

(viii) The statement required under paragraph (a)(1) of this section; and

(ix) As applicable, the guidance document being revised or replaced.

(b) *Significant guidance documents.* We will refer to the Administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget, or the Administrator's designee, the question of whether a guidance document is significant. Significant guidance documents must follow the requirements provided in paragraph 5.15(a). Additionally, unless the Administrator of OIRA, pursuant to review under E.O. 12866, and VA agree that exigency, safety, health, or other compelling cause warrants an exemption, the following additional procedures apply:

(1) VA will provide for a period of public notice and comment of at least 30 days before issuance of such significant guidance document and will provide a public response to major concerns raised in comments, except when VA for good cause finds (and incorporates such finding and a brief statement of reasons therefor into the guidance document) that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest.

(2) The Secretary or a VA component head appointed by the President (with or without confirmation by the Senate), or by an official who is serving in an acting capacity as either of the foregoing, must approve any significant guidance document prior to issuance; pursuant to section 4(a)(iii)(B) of Executive Order 13891, this approval authority is not delegable.

(3) Significant guidance documents must be submitted to OIRA for review under Executive Order 12866 prior to issuance.

(4) Significant guidance documents must comply with the applicable requirements for regulations or rules set forth in Executive Orders 12866, 13563, 13609, 13771, and 13777.

§ 5.20 Procedures for petition for the withdrawal or modification of a guidance document.

Petitions for withdrawal or modification of a guidance document. The following procedures apply for the public to petition for withdrawal or modification of a guidance document.

(a) A member of the public wishing to petition for withdrawal or modification of a guidance document may submit such petition via email to: *OEIDMO@va.gov*. Petitions may also be mailed to the following address: Office of Policy and Interagency Collaboration, Office of Enterprise Integration, 810 Vermont Avenue NW, Washington, DC 20420.

(b) A petition for withdrawal or modification of a guidance document must contain the following information:

- (1) The petitioner's name and address;
- (2) Information identifying the guidance document to which the petition pertains;
- (3) A statement of the reasons the petitioner believes the document should be withdrawn or modified.

(c) VA will provide a response to a petition within 90 days of receipt of the request.

§ 5.25 Guidance website.

VA has a guidance website that contains, or links to, guidance documents that are currently in effect. VA will not cite, use, or rely on any guidance document that is not posted on the website existing under Executive Order 13891, except to establish historical facts. The website can be found at the following address: *www.VA.gov/guidance*.

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