

Act (21 U.S.C. 823(g)(2)(G)(iv)) who is clinical nurse specialist, certified registered nurse anesthetist, or certified nurse midwife. \* \* \*

\* \* \* \* \*

(iii) \* \* \*

(B) The applicable number is—

(1) 100 if not sooner than 1 year after the date on which the practitioner submitted the initial notification, the practitioner submits a second notification to the Secretary of Health and Human Services of the need and intent of the practitioner to treat up to 100 patients;

(2) 100 if the practitioner holds additional credentialing, as defined in 42 CFR 8.2;

(3) 100 if the practitioner provides medication-assisted treatment using covered medications (as such terms are defined in 42 CFR 8.615) in a qualified practice setting (as described in 42 CFR 8.615); and

(4) 275 if the practitioner meets the requirements specified in 42 CFR 8.610 through 8.655.

\* \* \* \* \*

## PART 1306—PRESCRIPTIONS

■ 3. The authority citation for 21 CFR part 1306 is revised to read as follows:

**Authority:** 21 U.S.C. 821, 823, 829, 829a, 831, 871(b) unless otherwise noted.

■ 4. In § 1306.04, add paragraph (d) to read as follows:

### § 1306.04 Purpose of issue of prescription.

\* \* \* \* \*

(d) A prescription may be issued by a qualifying practitioner, as defined in section 303(g)(2)(G)(iii) of the Act (21 U.S.C. 823(g)(2)(G)(iii)), in accordance with § 1306.05 for a Schedule III, IV, or V controlled substance for the purpose of maintenance or detoxification treatment for the purposes of administration in accordance with section 309A of the Act (21 U.S.C. 829a) and § 1306.07(f). Such prescription issued by a qualifying practitioner shall not be used to supply any practitioner with a stock of controlled substances for the purpose of general dispensing to patients.

■ 5. In § 1306.07, add a reserved paragraph (e) and paragraph (f) to read as follows:

### § 1306.07 Administering or dispensing of narcotic drugs

\* \* \* \* \*

(f) Notwithstanding the definition of dispense under section 102(10) of the Act (21 U.S.C. 802(10)), a pharmacy may deliver a controlled substance to a practitioner, pursuant to a prescription

that meets the requirements under § 1306.04 for the purpose of administering the controlled substance by the practitioner if:

(1) The controlled substance is delivered by the pharmacy to the prescribing practitioner or the practitioner administering the controlled substance, as applicable, at the location, listed on the practitioner's certificate of registration;

(2) The controlled substance is to be administered for the purpose of maintenance or detoxification treatment under section 303(g)(2)(G)(iii) of the Act (21 U.S.C. 823(g)(2)(G)(iii)); and

(i) The practitioner who issued the prescription is a qualifying practitioner as defined in section 303(g) of the Act (21 U.S.C. 823(g)); and

(ii) The controlled substance is to be administered by injection or implantation;

(3) The pharmacy and the practitioner are authorized to conduct such activities specified in this paragraph (f) under the law of the State in which such activities take place;

(4) The prescription is not issued to supply any practitioner with a stock of controlled substances for the purpose of general dispensing to patients;

(5) The controlled substance is to be administered only to the patient named on the prescription not later than 14 days after the date of receipt of the controlled substance by the practitioner; and

(6) Notwithstanding any exceptions under section 307 of the Act (21 U.S.C. 827), the prescribing practitioner, and the practitioner administering the controlled substance, as applicable, shall maintain complete and accurate records of all controlled substances delivered, received, administered, or otherwise disposed of, under this paragraph (f), including the persons to whom the controlled substances were delivered and such other information as may be required under this chapter.

**Timothy J. Shea,**

*Acting Administrator.*

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## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

### 29 CFR Part 1695

#### RIN 3046-AB18

#### Procedural Regulations for Issuing Guidance

**AGENCY:** Equal Employment Opportunity Commission.

**ACTION:** Final rule.

**SUMMARY:** The Equal Employment Opportunity Commission (EEOC or Commission) is issuing a final rule to establish procedural regulations for issuing guidance. These rules make guidance documents readily available to the public, ensure that guidance will be treated as non-binding, require a notice and public comment period for significant guidance, and establish a public petition process for the issuance, amendment, or repeal of guidance.

**DATES:** Effective date: December 2, 2020.

**FOR FURTHER INFORMATION CONTACT:**

Robert Carter, Special Assistant, Office of Legal Counsel, (202) 663-4693 or [robert.carter@eeoc.gov](mailto:robert.carter@eeoc.gov).

**SUPPLEMENTARY INFORMATION:** The Administrative Procedure Act (APA), section 553 of title 5, United States Code, generally requires Federal agencies engaged in administrative rulemaking to give public notice of proposed regulations, provide interested parties an opportunity to comment, consider and respond to significant comments, and publish final regulations in the **Federal Register**.

On October 9, 2019, President Donald J. Trump issued Executive Order (E.O.) 13891, “Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents.” It directed most Federal departments, agencies, and commissions to adopt policies to ensure that “Americans are subject only to those binding rules imposed through duly enacted statutes or through regulations lawfully promulgated under them” and that those subject to such rules shall have “fair notice of their obligations.” E.O. 13891, 84 FR 55235 (October 9, 2019). E.O. 13891 asserts that some agencies have used guidance in the place of regulations to avoid the APA’s statutory safeguards. To address these concerns, the Executive order requires agencies to adopt regulations that make guidance documents more readily available to the public, better ensure that guidance will be treated as non-binding, require a notice and public comment period for significant guidance, and establish a public petition process for the issuance, amendment, or repeal of guidance.

Independent of E.O. 13891, the Commission believes that this final rule will provide clearer procedures for issuance of its guidance documents and ensure an opportunity for the public to comment on proposed significant guidance. Such steps will improve the guidance the Commission issues. Guidance documents are a critical component of the Commission’s

outreach and education efforts, as they inform the public of the Commission's current interpretations of the law on specific topics and promote voluntary compliance. So, establishing permanent procedures through its regulations on how the Commission will issue guidance will be beneficial to the Commission and its stakeholders.

This final rule creates a new part, 29 CFR part 1695, to address the requirements of Executive Order 13891 and the Office of Management and Budget's explanation in Memorandum M-20-02. The requirements of this regulation apply to EEOC guidance documents as defined herein; they do not apply to or otherwise replace the requirements of the APA and associated Executive orders for regulations or rules. The definitions, requirements, and procedures for issuing guidance adopted in §§ 1695.1 through 1695.6 of the rule are modeled on sections 2 and 4 of Executive Order 13891. The adoption of a public petition process for the issuance, amendment, or repeal of guidance in § 1695.7 of the rulemaking is mandated by section 4(a) of Executive Order 13891. The requirement in § 1695.8 of posting of all existing guidance on the Commission website in a single, searchable, indexed database (launched on February 28, 2020) is consistent with section 3(a) of the Executive order. The prohibition in § 1695.9 against the agency citing to rescinded guidance, except for historical purposes, reflects the requirements of section (3)(b) of Executive Order 13891, and the disclaimer of judicial or enforceable rights in regulation § 1695.10 reflects section 7 of the Executive order.

The Commission published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (85 FR 30667) on May 20, 2020 for a 30-day notice and comment period, which ended on June 19, 2020.

#### Comments Generally

The Commission received nine comments on the NPRM during the 30-day comment period. These were submitted through *Regulations.gov*, the Federal government's electronic docket system, under EEOC-2020-0004. No comments were faxed or mailed to the Executive Secretariat.

Of the nine comments, two organizations supported the proposed rule and three opposed it. Four individuals submitted comments that were non-responsive and require no additional discussion.

The Commission has reviewed and considered each of the comments in

preparing this final rule. They are discussed in further detail below.

#### Comments Supporting the NPRM

The American Road & Transportation Builders Association ("ARTBA") supported the mandatory disclaimer language of proposed § 1695.2(c)(7)(i) as a means to ensure that the Commission's guidance is considered non-binding. It noted that guidance has become a new *de facto* regulation of its own, creating additional mandates on the entities it covers, while evading the public comment process.

ARTBA further supported the creation of a web-based index of guidance pursuant to proposed § 1695.8. It affirmed that making guidance documents more accessible would help smaller businesses stay aware of their employment responsibilities and comply with EEOC objectives.

The Center for Workplace Compliance ("CWC") also supported the notice and public comment provisions of proposed § 1695.6, noting that the Commission has not always solicited public comments for guidance. It further supported the petition provisions of proposed § 1695.7, affirming that the Commission would be less likely to retain outdated or incorrect guidance if the public had an opportunity to petition for a rescission or revision of guidance. It noted that the Commission's 1997 *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment* was inconsistent with more than 20 Supreme Court decisions and rejected by every U.S. Court of Appeals, but not rescinded until December 2019.

The CWC recommended improvements to the indexing and search capabilities of the guidance web portal. For example, it noted that searching for the topic "ADA" would not retrieve all documents related to the Americans with Disabilities Act because many are classified using the topic "disability." Issues regarding the methodology of the database's search function do not need to be addressed in the final rule and this comment was referred to the Commission's Office of Communications and Legislative Affairs, which controls the website.

#### Comments Opposing the NPRM

Comments opposing the NPRM were received from The Leadership Conference, National Women's Law Center, and a joint letter from the Texas RioGrande Legal Aid and Disability Rights Texas. Comments shared by all three letters are addressed together.

#### Comment Period

All three letters criticized the Commission's decision to issue the NPRM with a 30-day comment period during the Covid-19 pandemic. They contended that the decision did not provide sufficient time for comment and "casts a shadow on the integrity of the comment process."

#### Guidance Disclaimer

The three letters objected to the mandatory disclaimer language of proposed § 1695.2(c)(7)(i), alleging that it was broader than that required by Executive Order 13891. They further contended that while guidance is intended to provide clarity on the law, the disclaimer creates the impression that it cannot be relied upon to provide such clarity. They fear, therefore, that this language could confuse both workers and employers about their rights and obligations, and create uncertainty about the Commission's authority.

The three letters also noted that guidance is entitled to deference by courts pursuant to the standard in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and that the Supreme Court has held that EEOC guidance reflects "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)). They further alleged that courts can distinguish between guidance and rulemaking, citing the U.S Supreme Court's decision in *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019), which struck down an interpretive rule that created a substantive legal standard.

#### Petitions

The three letters alleged a lack of transparency in the petition process established by proposed § 1695.7, which allows "any interested person" to petition the Commission to issue, amend, or repeal a guidance document. They noted that the process does not require the Commission to publish the petition contents or identity of the petitioner. The Leadership Conference asked that the Commission make petitions publicly available through the EEOC guidance portal and in hard copy at EEOC headquarters.

The three letters also objected to the regulation's silence regarding the process for considering and resolving petitions, as well as the absence of a decision-making standard. They also objected to the provision in proposed § 1695.7(d) that allowed a petition to be

denied without a response if it were “self-explanatory.”

#### *Emergency Exception*

The Texas RioGrande Legal Aid and Disability Rights Texas objected to the emergency provisions of proposed §§ 1695.2(d) and 1695.4(c), which waive certain time and/or procedural requirements during an emergency. They contended that the NPRM provides no information as to what circumstances might properly be considered emergencies, how that determination would be made, or what checks limit the Chair’s power to declare an emergency.

#### *Executive Order Compliance*

The National Women’s Law Center comment questioned whether the NPRM adequately conformed to the provisions of Executive Order 12866, which requires agencies to assess the potential costs/benefits of a proposed rule and adopt an approach that produces the least total burden and most benefit to society. It contended that the Commission failed to adequately assess both the costs and benefits of the proposed rule.

The Texas RioGrande Legal Aid & Disability Rights Texas noted that while the NPRM referenced Executive Orders 12866, 13536, 13609, 13771, and 13777, it failed to acknowledge how those mandates would be affected by subjecting significant guidance documents to review by the Office of Information and Regulatory Affairs (OIRA) and a 30-day notice and comment period.

#### **The EEOC’s Response to the Comments**

##### *Comment Period*

The Commission believes that the 30-day comment period provided sufficient time for the public to comment on the proposed rule. The NPRM was a straightforward codification of E.O. 13891 into regulatory text. The public was able to submit comments through multiple avenues (electronically, mail, and fax). As noted above, five substantive comment were received, containing extensive legal citations and as many as 10 pages and 12 footnotes, which indicates that the comment period was sufficient for the public to provide detailed substantive comments.

##### *Guidance Disclaimer*

The disclaimer language in the NRPM is taken nearly verbatim from OMB’s implementing memorandum M-20-02. The disclaimer informs the public regarding the legal effect of the Commission’s guidance documents and does not interfere with a court’s ability

to find that the guidance has the “power to persuade.” *Skidmore*, 323 U.S. at 139.

#### *Petition*

The petition language of proposed § 1695.7 is modeled after the Commission’s regulations for the issuance, amendment, or repeal of rules contained in 29 CFR 1601.35 and 1601.36. These provisions were first established on October 14, 1977 and amended twice, on August 4, 1989 and January 21, 2009. As the final rule states, handling these petitions will follow the agency’s usual procedures, which have existed for more than four decades.

Regarding petitions denied without requiring a response, the Commission does occasionally receive comments that are irrelevant and unfit for a response. Indeed, four of the nine comments received for the NPRM were not responsive to the issues raised in it. Substantive petitions will be defined broadly and considered on their merits.

The Commission will not specify in the rule that all petitions it receives will be published. Doing so would infringe on the Commission’s internal deliberations and deliberative process and be inconsistent with the Commission’s approach to handling petitions for rulemaking under §§ 1601.35 and 1601.36.

#### *Emergency Exception*

Commenters’ objections regarding the narrow emergency exception of proposed § 1695.4(c) are misplaced. Proposed § 1695.4(c) merely allows the Chair to bypass OIRA’s review of a “significant guidance” determination and allow guidance to be issued on an emergency basis. The determination would, however, be reviewed later.

In similar manner, the emergency exception of proposed § 1695.2(d) only waives the five-day review period for Commissioners to review a document that “is not setting forth a new or changed legal position, is reiterating already established Commission policies, or is otherwise simply providing technical assistance on the laws the Commission enforces without announcing any new policy or legal position.” Commission procedures already allow the Chair to approve such guidance without a Commission vote.

#### *Executive Order Compliance*

The National Women’s Law Center challenged whether the Commission assessed both the costs and benefits of the proposed rule. In response, the Commission affirms that it complied with section 1(b)(6) of Executive Order 12866, which requires each agency to

assess the costs and benefits of an intended regulation (recognizing that these can be difficult to quantify) and adopt a regulation only when the benefits justify its costs.

The final rule is focused solely on the Commission’s internal procedures for issuing guidance and imposes no direct costs on any third parties. The rule does not prevent the Commission from issuing guidance and will ensure that the guidance the Commission does issue: Clearly states its legal effect, when necessary has been subject to public input, can be found by the public, and is overall legally and economically sound. All of these are benefits to both employers and employees, as well as the public at large.

The Texas RioGrande Legal Aid & Disability Rights Texas alleged that the Commission failed to acknowledge how the NPRM would affect the requirements of Executive Orders 12866, 13536, 13609, 13771, and 13777, since they subject significant guidance documents to review by OIRA and require a 30-day notice and comment period. Given that OIRA review and public comment procedures already exist for Commission regulations, the addition of a relatively few significant guidance documents to the existing system will not be overly burdensome.

#### **Determination**

After considering all responsive comments, the Commission has determined that this final rule will adopt the language as proposed in the NPRM without change, except for a non-substantive change in § 1695.1(a) and including that the Chair must also inform other Commissioners in § 1695.4(c).<sup>1</sup> The final rule adopts the requirements of E.O. 13891 and OMB M-20-02 into the Commission’s processes and will further E.O. 13891’s important goal of improving the Commission’s guidance documents. As noted above, independent of E.O. 13891, the Commission believes that the procedures described in this final rule are good policy that will improve its guidance documents. As discussed above, the comments have not provided

<sup>1</sup> In § 1695.1(a) the Commission is making a stylistic change to the proposed language by adding “and” prior to “advisories.” Section 1695.4(c) discusses when the Chair can avoid the normal review procedures outlined in this rule due to emergencies, statutory deadlines, or court orders. As originally proposed, § 1695.4(c) only stated that the Chair had to inform OIRA, but in the final rule, the Commission is adding that all Commissioners must also be notified to ensure that all Commissioners are fully aware that the Commission will not be going through normal review procedures.

compelling reasons to adjust what the Commission initially proposed. Therefore, other than a minor stylistic change in § 1695.1(a) and adding that the Chair must inform Commissioners as well in § 1695.4(c), the Commission adopts as a final rule the language proposed in the NPRM.

## Regulatory Procedures

### *Executive Order 12866*

This rule will govern the internal practices of the Commission. It will not have 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. This rule also will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, nor will it materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. Furthermore, it will not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. In consequence, this rule is not a "significant regulatory action" within the meaning of section 3 of Executive Order 12866.

### *Paperwork Reduction Act*

This rule contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

### *Regulatory Flexibility Act*

The Commission certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities because it primarily affects internal Commission procedure. To the extent that this rule does affect small entities, it provides free access to all EEOC guidance documents. Further, allowing small employers advance notice of significant guidance, and an opportunity to comment on proposed significant guidance, gives small employers a greater opportunity to have their concerns heard and addressed before documents are finalized.

### *Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not

significantly or uniquely affect small governments.<sup>2</sup> It is strictly internal, and does not impose mandates on any entity outside the Commission. Indeed, the rule's advance notice and comment requirements give small governments a greater opportunity to voice their concerns and have them addressed before documents are finalized. In consequence, it is not anticipated to significantly or uniquely affect small government. In consequence, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### *Congressional Review Act*

While this action concerns agency procedure, it does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). The Commission will continue to follow the reporting requirement of 5 U.S.C. 801.

### **List of Subjects in 29 CFR Part 1695**

Administrative practice and procedure, Equal employment opportunity.

For the Commission.

**Janet Dhillon,**

*Chair.*

■ For the reasons set forth in the preamble, the Equal Employment Opportunity Commission amends 29 CFR chapter XIV by adding part 1695 to read as follows:

## **PART 1695—GUIDANCE PROCEDURES**

Sec.

- 1695.0 Applicability.
- 1695.1 Definitions.
- 1695.2 Guidance requirements.
- 1695.3 Good faith cost estimates.
- 1695.4 Significance determination.
- 1695.5 Significant guidance requirements.
- 1695.6 Notice and public comment.
- 1695.7 Petitions.
- 1695.8 Public access to current guidance documents.
- 1695.9 Rescinded guidance.
- 1695.10 No judicial review or enforceable rights.

**Authority:** 5 U.S.C. 553, 42 U.S.C. 2000e-12, 29 U.S.C. 201 *et seq.*, 29 U.S.C. 628, 42 U.S.C. 12116, 42 U.S.C. 2000ff-10; E.O. 13891, 84 FR 55235; OMB Memorandum M-20-02.

<sup>2</sup> The Unfunded Mandates Reform Act of 1995 adopts the term "small governments" from 5 U.S.C. 601(5): "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."

### **§ 1695.0 Applicability.**

This part prescribes general procedures that apply to guidance documents of the Equal Employment Opportunity Commission (EEOC or Commission) under all statutes enforced by the Commission.

### **§ 1695.1 Definitions.**

(a) *Guidance document* means any statement of Commission policy or interpretation concerning a statute, regulation, or technical matter within its jurisdiction that is intended to have general applicability and future effect, but which is not intended to be binding in its own right and is not otherwise required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. 553 or 5 U.S.C. 556. The term is not confined to formal written documents, and may include letters, memoranda, circulars, bulletins, and advisories that set forth for the first time a new regulatory policy. It may also include equivalent video, audio, and web-based formats. The definition does not apply to:

- (1) Rules promulgated pursuant to notice and comment requirements under 5 U.S.C. 553 or similar statutory provisions;
- (2) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);
- (3) Rules of Commission organization, procedure, or practice;
- (4) Decisions of Commission adjudications under 5 U.S.C. 554 or similar statutory provisions;
- (5) Internal executive branch legal advice or legal advisory opinions addressed to executive branch officials;
- (6) Commission statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions, notices regarding particular locations or facilities, and correspondence with individual persons or entities;
- (7) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;
- (8) Commission statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and individual presentations, PowerPoint slides, editorials, media interviews, press materials, or congressional testimony that do not set forth for the first time a new regulatory policy;
- (9) Guidance pertaining to military or foreign affairs functions;
- (10) Grant solicitations and awards;
- (11) Contract solicitations and awards; or

(12) Purely internal Commission policies or guidance directed solely to EEOC employees or contractors or to other Federal agencies that are not anticipated to have substantial future effect on the behavior of regulated parties outside of the government; for example, Volume I of the Commission's Compliance Manual, which is only for internal use.

(b) *Significant guidance document.* (1) *Significant guidance document* means a guidance document that will be disseminated to regulated entities or the general public and that may reasonably be anticipated:

(i) To lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the U.S. economy, a sector of the U.S. economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(ii) To create serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency;

(iii) To alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(iv) To raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866, as further amended.

(2) It does not include any other category of guidance documents exempted in writing by OMB's Office of Information and Regulatory Affairs (OIRA).

#### **§ 1695.2 Guidance requirements.**

(a) Each guidance document shall comply with all relevant statutes and regulations.

(b) It shall be written in plain and understandable English and avoid using mandatory language, such as "shall," "must," "required," or "requirement," unless the language describes an established statutory or regulatory requirement or is addressed to EEOC staff and will not foreclose the Commission's consideration of positions advanced by affected private parties;

(c) It shall identify or include:

(1) The term "guidance" or its functional equivalent and that the Commission is issuing the document;

(2) A unique identifier that provides information on whether the document was subject to a vote (CV) or not (NVT), the year of issuance, and unique number of its issuance and, if applicable, a Z-RIN;

(3) The activity or entities to which the guidance applies;

(4) A short summary of the subject matter covered in the guidance document at the top of the document.

(5) A statement noting whether the guidance is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance; and

(6) Citations to applicable statutes and regulations;

(7)(i) A clear and prominent statement of the following: "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 Commission policies."

(ii) When binding guidance is authorized by law or is incorporated into contract, the language in paragraph (c)(7)(i) of this section may be modified to reflect either of those facts.

(d) If the guidance document sets forth the Commission's position on a legal principle for the first time or changes the Commission's legal position on any issue, the Commission must approve the guidance document by majority vote. Any significant guidance or guidance that is otherwise subject to notice and comment procedures must be approved by a Commission vote. Any guidance document that requires a vote of the Commission to be approved shall be circulated to the Commissioners, and, if approved, shall be signed by the Chair on behalf of the Commission. If the document is not setting forth a new or changed legal position, is reiterating already established Commission policies, or is otherwise simply providing technical assistance on the laws the Commission enforces without announcing any new policy or legal position, it shall be circulated to the Commission for informational purposes for a period of not less than five days, unless emergency circumstances do not allow, and shall only require approval, but not signature, by the Chair.

#### **§ 1695.3 Good faith cost estimates.**

(a) A good faith effort shall be made, to the extent practicable, to estimate the likely economic cost impact of the guidance document to determine whether the document might be significant. It may, however, be difficult to predict with precision the economic impact of voluntary guidance.

(b) When determining the likely economic cost impact, the same level of analysis should be given as that required for a major determination under the Congressional Review Act (5 U.S.C. 801 *et seq.*) and the economic impact on small entities under the

Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### **§ 1695.4 Significance determination.**

(a) Prior to issuance, the Commission shall provide OIRA with an opportunity to review a guidance document to determine if it meets the definition of "significant guidance document."

(b) If the guidance document is determined not to be significant, the Commission shall proceed with issuance of the guidance without going through the procedures described in § 1695.5.

(c) In emergency situations, or when required by statutory deadline or court order to act more quickly than normal review procedures allow, the Chair shall notify OIRA and all Commissioners as soon as possible and, to the extent practicable, comply with the requirements of this part at the earliest opportunity.

#### **§ 1695.5 Significant guidance requirements.**

(a) Each proposed significant guidance document shall be:

(1) Approved by the Commission before issuance and assigned a Z-RIN through the Regulatory Management System (RMS), or a successor data management system.

(2) Comply with the applicable requirements for regulations, including significant regulatory actions, in E.O. 12866, E.O. 13563, E.O. 13609, E.O. 13771, and E.O. 13777.

(3) Submitted to OMB for coordinated review. Proposed guidance documents that are otherwise important to the Commission's interests may also be submitted for review.

(4) Reviewed by OIRA under E.O. 12866 before issuance.

(b) The Chair may determine that it is appropriate to coordinate with OMB in the review of guidance documents that are otherwise of importance to the Commission's interests.

#### **§ 1695.6 Notice and public comment.**

(a) Each proposed significant guidance document shall have a period of notice and public comment of at least 30 days, unless the Commission, in consultation with OIRA, finds good cause that such notice and public comment are impracticable, unnecessary, or contrary to the public interest, and incorporates such finding and a brief statement of reasons therefor into the guidance document.

(b) Notice shall be published in the **Federal Register** announcing that a draft of the proposed guidance document is publicly available on the Federal e-regulation website, and the proposed

significant guidance document also shall be posted on the Commission website.

(c) The Commission shall prepare and post a public response to major concerns raised in the comments, as appropriate, either before or when the significant guidance document is finalized and issued.

(d) When appropriate, the Chair may determine that a guidance document that is not otherwise required to go through notice and public comment shall also be subject to a period of public comment following the document's approval by the Commission before the document becomes effective.

(e) Unless otherwise determined in writing by the Chair, upon issuing a significant guidance document, a report shall be submitted to Congress and GAO in accordance with the procedures described in 5 U.S.C. 801 (the "Congressional Review Act").

#### **§ 1695.7 Petitions.**

(a) Any interested person may petition the Commission, in writing, for the issuance, amendment, or repeal of a guidance. Such petition shall state the guidance, regulation, or rule, together with a statement of grounds in support of such petition.

(b) Petitions may be filed with the EEOC, Office of Executive Secretariat, either electronically at the EEOC guidance portal, <http://www.eeoc.gov/guidance>, or in hard copy to U.S. Equal Employment Opportunity Commission, Executive Secretariat, 131 M Street NE, Washington, DC 20507.

(c) Upon the filing of such petition, the Commission shall consider the same and may thereupon either grant or deny the petition in whole or in part, conduct an appropriate proceeding thereon, or make other disposition of the petition.

(d) The Commission should respond to all petitions in a timely manner, but no later than 90 days after receipt of the petition, as to how it intends to proceed. Should the petition be denied in whole or in part, prompt notice shall be given of the denial, accompanied by a simple statement of the grounds unless the denial be self-explanatory.

(e) The issuance, amendment, or repeal of a guidance in response to a petition shall be considered by the Commission pursuant to its regular procedures.

#### **§ 1695.8 Public access to current guidance documents.**

(a) All current guidance documents shall be published with a unique identifier including, at a minimum, the document's title, date of issuance or revision, and its Z-RIN (if applicable).

(b) All current guidance documents shall made available through a single "guidance portal" on the Commission website, together with a single, searchable, indexed database available to the public;

(c) The guidance portal shall include a statement that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract;

(d) The Commission shall maintain and advertise on its website a means for the public to comment electronically on any guidance documents that are subject to the notice and comment procedures described in § 1695.6 and to submit requests electronically for issuance, reconsideration, modification, or rescission of guidance documents in accordance with § 1695.7; and

(e) Designate an office to receive and address complaints from the public that the Commission is not following the relevant requirements for issuing guidance or is improperly treating a guidance document as a binding requirement.

#### **§ 1695.9 Rescinded guidance.**

The Commission shall not cite, use, or rely on guidance documents that are rescinded, except to establish historical facts.

#### **§ 1695.10 No judicial review or enforceable rights.**

This part is intended to improve the internal management of the Commission. As such, it is for the use of EEOC personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

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navigable waters of the east channel of the East River between the Roosevelt Island Bridge (mile 6.4) and Gibbs Point approximately 800 yards northeast of the bridge. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by the installation of one TriFrame with three attached underwater turbines, associated cabling and 4 to 6 Private Aids to Navigation. When enforced, entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port New York.

**DATES:** This rule is effective without actual notice from November 2, 2020 through 11:59 p.m., December 31, 2020. For the purposes of enforcement, actual notice will be used from 7 a.m., October 22, 2020 through November 2, 2020.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG-2020-0600 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email Mr. Jeff Yunker, Sector New York Waterways Management Division; U. S. Coast Guard; telephone 718-354-4195, email [jeffrey.m.yunker@uscg.mil](mailto:jeffrey.m.yunker@uscg.mil).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Table of Abbreviations**

CFR	Code of Federal Regulations
DHS	Department of Homeland Security
FR	Federal Register
NPRM	Notice of proposed rulemaking
PATON	Private Aids to Navigation
RITE	Roosevelt Island Tidal Energy Project
§	Section
U.S.C.	United States Code

##### **II. Background Information and Regulatory History**

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the contractor did not provide enough notice that three barges, three tugs and three work vessels will be conducting heavy lift operations and installing 4 to

#### **DEPARTMENT OF HOMELAND SECURITY**

#### **Coast Guard**

#### **33 CFR Part 165**

**[Docket Number USCG-2020-0600]**

**RIN 1625-AA00**

#### **Safety Zone; East River, New York, NY**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone for