

## §8.5

(c)(1) The Secretary may allow an employee to testify if the Secretary determines that the demand satisfies the requirements of §8.3 and that granting permission—

(i) Would be appropriate under the rules of procedure governing the matter in which the demand arises and other applicable laws, rules, and regulations; and

(ii) Would not be contrary to an interest of the United States, which includes furthering a public interest of the Department and protecting the human and financial resources of the United States.

(2) The Secretary may establish conditions under which the employee may testify.

(d) If a response to a demand for testimony is required before the Secretary determines whether to allow an employee to testify, the employee or counsel for the employee shall—

(1) Inform the court or other authority of the regulations in this part; and

(2) Request that the demand be stayed pending the employee's receipt of the Secretary's instructions.

(e) If the court or other authority declines the request for a stay, or rules that the employee must comply with the demand regardless of the Secretary's instructions, the employee or counsel for the employee shall respectfully decline to comply with the demand, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), and the regulations in this part.

(Authority: 5 U.S.C. 301; 20 U.S.C. 3474)

### §8.5 What procedures are followed in response to a demand for records?

(a)(1) After an employee receives a demand for records issued pursuant to the rules governing the legal proceeding in which the demand arises, the employee shall immediately notify the Secretary and request instructions.

(2) If an employee receives any other demand for records, the Department—

(i) Considers the demand to be a request for records under the Freedom of Information Act; and

(ii) Handles the demand under rules governing public disclosure, as established in 34 CFR part 5.

(b) An employee may not produce records in response to a demand as de-

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scribed in paragraph (a)(1) of this section without the prior written authorization of the Secretary.

(c) The Secretary may make these records available if the Secretary determines that the demand satisfies the requirements of §8.3 and that disclosure—

(1) Would be appropriate under the rules of procedure governing the matter in which the demand arises and other applicable laws, rules, and regulations; and

(2) Would not be contrary to an interest of the United States, which includes furthering a public interest of the Department and protecting the human and financial resources of the United States.

(d) If a response to a demand for records as described in paragraph (a)(1) of this section is required before the Secretary determines whether to allow an employee to produce those records, the employee or counsel for the employee shall—

(1) Inform the court or other authority of the regulations in this part; and

(2) Request that the demand be stayed pending the employee's receipt of the Secretary's instructions.

(e) If the court or other authority declines the request for a stay, or rules that the employee must comply with the demand regardless of the Secretary's instructions, the employee or counsel for the employee shall respectfully decline to comply with the demand, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), and the regulations in this part.

(Authority: 5 U.S.C. 301; 5 U.S.C. 552; 20 U.S.C. 3474)

## PART 9—ADMINISTRATIVE RULE-MAKING AND GUIDANCE PROCEDURES

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AUTHORITY: 20 U.S.C. 1221e-3.

SOURCE: 85 FR 62600, Oct. 5, 2020, unless otherwise noted.

#### Subpart A—General Provisions

##### § 9.1 Purpose.

This part sets forth policies and procedures governing the development and issuance of regulations and guidance documents by the Department of Education (Department). The regulations in this part are intended to ensure that the Department adheres to—

(a) Constitutional and statutory requirements applicable to Department rulemaking, including the rulemaking provisions of the Administrative Procedure Act, referenced in § 9.2;

(b) Controlling Supreme Court decisions;

(c) Executive Orders 12866, 13771, 13777, and 13891, and any amendments thereto;

(d) All applicable Office of Management and Budget (OMB) directives for rulemaking; and

(e) Best practices for rulemaking, including best practices for economic analyses and for appropriate outreach to interested parties throughout the rulemaking process.

##### § 9.2 References.

(a) U.S. Const., including art. I sections 7, 8; art. II section 3. U.S. Const. amend. I and V.

(b) Administrative Procedure Act (APA), 5 U.S.C. 552(a)(1), 553, 556, 555, and 557, which prescribe general procedural requirements of law applicable to all Federal agencies regarding the formulation and issuance of regulations.

(c) Controlling Supreme Court decisions, including *Bostock v. Clayton Cnty.*, 140 U.S. 1731 (2020); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Dimya v. Sessions*, 138 S. Ct. 1204 (2018); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018); *Yates v. United States*, 574 U.S. 528 (2015); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014); *City of Arlington v. FCC*, 569 U.S. 290 (2013); *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012); *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *United States v. Mead Corp.*, 533 U.S. 218 (2001); and *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

(d) Executive Order 12866, “Regulatory Planning and Review” (Sept. 3, 1993), which sets forth a regulatory philosophy and principles to which all Federal agencies should adhere, including requirements to regulate in the most cost-effective manner, to make a reasoned determination that the benefits of the intended regulations justify its costs, and to develop regulations that impose the least burden on society.

(e) Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents” (Oct. 9, 2019), which provides direction to agencies on the use of guidance documents and directs them to publish regulations that set forth processes and procedures for issuing guidance documents.

##### § 9.3 Applicability.

(a) This part governs all Department employees and contractors involved with any phase of rulemaking or guidance at the Department.

(b) Unless otherwise required by statute, this part applies to all Department regulations, which include all rules of general applicability promulgated by

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the Department that affect the rights or obligations of persons outside the Department, including substantive rules, interpretive rules, and rules prescribing agency procedures and practice requirements applicable to outside parties. This part applies to all regulatory actions intended to lead to the promulgation of a rule and any other generally applicable directives, circulars, or pronouncements that are intended to have the force or effect of law or that are required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. 553 or 556.

(c) This part does not apply to the following:

(1) Any rulemaking in which a draft notice of proposed rulemaking was submitted to OMB before November 4, 2020.

(2) Rules addressed solely to internal agency management or personnel matters.

(3) Regulations related to Federal Government procurement and grants.

(4) Adjudications and investigations.

(5) Pleadings, briefs, and other filings in court or administrative proceedings.

### Subpart B—Rulemaking Authority

#### §9.4 Policies.

The following policies govern the development and issuance of regulations at the Department:

(a) Statutory text, read plainly and construed according to its ordinary public meaning at the time of enactment, authoritatively prescribes both the Department's power to act and how it may act. In connection with rulemaking, the threshold question for the Department is whether Congress has directly authorized the proposed action, based on the principle that Congress knows to speak in plain terms when it wishes to enlarge agency authority and when it wishes to circumscribe it. If, after exhausting all traditional rules of construction, the Department fairly determines a given statute is ambiguous, then it may exercise its interpretative authority and engage in rulemaking, but only after—

(1) Determining Congress has expressly delegated definitional and interpretative regulatory authority with respect to a given statute or provision; or

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(2)(i) Given the agency's general rulemaking authority in 410 of the General Education Provisions Act (GEPA) (20 U.S.C. 1221e-3) and section 414 of the Department of Education Organization Act (DEOA) (20 U.S.C. 3474), determining Congress has impliedly delegated definitional and interpretative regulatory authority through, *e.g.*, ambiguous language; and

(ii) Determining the interpretative issue presents no "major question" nor other circumstances supporting the inference that Congress did not intend the Department to decide the question.

(b) In considering whether to propose a regulation, policymakers at the Department will consider whether the specific problem to be addressed requires agency action, whether existing rules have created or contributed to the problem and should be revised or eliminated, and whether there are any other reasonable alternatives that obviate the need for a new regulation.

(c) All regulations must be authorized by statute, consistent with the Constitution, and promulgated in accordance with the Administrative Procedure Act.

(d) The Department must base the regulations on the best available evidence and data, and comply with all relevant laws, including the Information Quality Act, 44 U.S.C. 3516, note; the Foundations for Evidence-Based Policymaking Act of 2018, Public Law 115-435, 132 Stat. 5529; and OMB's "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" (Feb. 22, 2002).

(e) The Department should write its regulations clearly and in plain language, consistent with Executive Order 13563.

(f) Regulations should minimize burdens where feasible. Where they impose burdens, the Department should narrowly tailor regulations to address the identified specific problem in a manner that maximizes net benefits.

(g) Unless required by law, the Department should issue regulations only when it expects their benefits to exceed their costs, recognizing that some costs and benefits are difficult to quantify.

(h) Once issued, the Department should periodically review and revise regulations and other agency actions to ensure that they remain net-beneficial and continue to meet the needs that they sought to address.

(i) Full public participation should be encouraged in rulemaking actions, primarily through engagement in public meetings, written comment, and, where required or otherwise appropriate, negotiated rulemaking.

(j) The process for issuing a rule must allow for proper consideration of the economic impact of the rule; thus, the promulgation of rules that are expected to impose greater economic costs should be accompanied by additional procedural protections and additional avenues for public participation.

#### § 9.5 Responsibilities.

(a) The Secretary of Education (Secretary) supervises the overall planning, direction, and control of the Department's Regulatory Agenda; approves regulatory documents for issuance and submission to OMB under Executive Order 12866; identifies an approximate regulatory budget for each fiscal year as required by Executive Order 13771; establishes the Department's Regulatory Reform Task Force (RRTF); and designates the members of the RRTF and the Department's Regulatory Reform Officer (RRO) in accordance with Executive Order 13777.

(b) The RRO of the Department assists the Secretary in overseeing the overall planning, direction, and control of the Department's Regulatory Agenda and approves the initiation of regulatory action, as defined in Executive Order 12866, by the Department and its principals. The RRO also serves as the Chair of the Leadership Council of the RRTF.

(c) The RRO of the Department is delegated authority by the Secretary to oversee the implementation of the Department's regulatory reform initiatives and policies to ensure the effective implementation of regulatory reforms, consistent with Executive Order 13777 and applicable law. The RRO shall be responsible for ensuring the Department complies with this part, including but not limited to §§9.1 and 9.4, in all respects.

(d) The General Counsel of the Department is the chief legal officer of the Department, with final authority for providing legal assistance to the Secretary concerning the programs and policies of the Department and serves on the Leadership Council of the RRTF. The General Counsel shall closely assist the RRO in ensuring that the Department complies with this part, including but not limited to §§9.1 and 9.4, in all respects.

(e) The Department's Deputy General Counsel with responsibility for supervision of the Division of Regulatory Services (DRS) of the Office of the General Counsel (OGC) is a member of the RRTF as designated by the Secretary, serves as the Department's Regulatory Policy Officer (RPO) pursuant to section 6(a)(2) of Executive Order 12866, and chairs the RRTF Working Group.

(f) Except as otherwise agreed by senior agency officials due to exceptional circumstances, subject to the oversight of the General Counsel and Deputy General Counsel with responsibility for supervision of DRS, the Department's Assistant General Counsel for Regulatory Services supervises DRS within OGC; oversees the process for rulemaking; provides legal advice on compliance with all APA and other administrative law requirements and with Executive orders, OMB directives, and other regulatory procedures; circulates regulatory documents for departmental review and seeks concurrence from reviewing officials; submits significant regulatory documents to the Secretary for approval before issuance or submission to OMB; coordinates with the Office of Information and Regulatory Affairs (OIRA) within OMB on OIRA's designation and review of regulatory documents and the preparation of the Unified Agenda of Regulatory and Deregulatory Actions; and serves as a member of the RRTF Working Group.

(g) DRS attorneys will serve as Regulatory Quality Officers designated by the Regulatory Reform Officer who will have responsibility for reviewing all rulemaking documents for plain language, technical soundness, compliance with the provisions of this part, and general quality.

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### §9.6 Regulatory Reform Task Force.

(a) *Purpose.* The RRTF evaluates proposed and existing regulations and makes recommendations to the Secretary regarding their promulgation, repeal, replacement, or modification, consistent with applicable law and Executive Orders 12866, 13771, and 13777.

(b) *Structure.* The RRTF is comprised of a Working Group and a Leadership Council.

(1) The Working Group coordinates with the RRO and the applicable offices within the Department (referred to as Principal Operating Components (POCs) in this part), reviews and develops recommendations for regulatory and deregulatory action, and presents recommendations to the Leadership Council.

(2) The Leadership Council reviews the Working Group's recommendations and advises the Secretary.

(c) *Membership.* (1) The Working Group comprises the following:

(i) The RPO, who will serve as Chair of the Working Group.

(ii) The Assistant General Counsel for DRS.

(iii) Other agency officials from POCs, as determined by the RRO.

(2) The Leadership Council comprises the following:

(i) The RRO, who serves as Chair.

(ii) The Department's General Counsel.

(iii) The Department's RPO.

(iv) The Department's Assistant Secretary, Office of Planning, Evaluation and Policy Development (OPEPD).

(v) Any additional senior agency officials as determined by the Secretary.

(d) *Functions and responsibilities.* In addition to the functions and responsibilities enumerated in Executive Order 13777, the RRTF performs the following duties:

(1) Reviews each request for a new rulemaking action initiated by a POC.

(2) Considers each proposed or final regulation and regulatory policy question referred to it and makes a recommendation to the Secretary for its disposition.

(e) *Support.* DRS provides support to the RRTF.

(f) *Meetings.* The Leadership Council meets quarterly, or as needed, and will hold specially scheduled meetings

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when necessary to address particular regulatory matters. The Working Group meets monthly, or as needed, and may establish subcommittees, as appropriate, to focus on specific regulatory matters.

### §9.7 Initiating a rulemaking.

(a) Before a POC may proceed to develop a significant proposed regulation (*e.g.*, an advanced notice of proposed rulemaking, notice of proposed rulemaking (NPRM), or interim final rule), the POC must consider the regulatory philosophy and principles of regulation identified in section 1 of Executive Order 12866 and the policies set forth in §9.4. If the POC head determines, after consultation with OGC and the Office of Budget Service, that rulemaking is warranted consistent with those policies and principles, the POC may prepare a Rulemaking Initiation Request.

(b) The Rulemaking Initiation Request should specifically state or describe—

(1) A proposed title for the rulemaking;

(2) The need for the regulation, including a description of any statutory mandate necessitating the rulemaking;

(3) The legal authority for the rulemaking;

(4) Whether the rulemaking is expected to be regulatory or deregulatory;

(5) Whether the rulemaking is expected to be significant, as defined by Executive Order 12866;

(6) Whether the final rule is expected to be an economically significant rule or a high-impact rule, as defined in §9.10;

(7) A general description of the expected economic impact associated with the rulemaking, including whether the rulemaking is likely to generate benefits, impose costs, or generate cost savings;

(8) A description of any scientific, technical, economic, or other information or evidence relied on or needed to inform rulemaking;

(9) The tentative target dates for completing each stage of the rulemaking; and

(10) Whether there is a statutory or judicial deadline, or some other urgency, associated with the rulemaking.

(c) The POC submits the Rulemaking Initiation Request to the RPO and Assistant General Counsel for DRS, together with any other documents that may assist in the RRTF's consideration of the request.

(d) The RPO includes the Rulemaking Initiation Request on the agenda for consideration at the next Working Group meeting.

(e) The Working Group forwards the Rulemaking Initiation Request to the Leadership Council and provides the Leadership Council with a recommendation.

(f) The POC requests that DRS assign a Regulatory Information Number (RIN) to the rulemaking only upon the Leadership Council's (or RRO's) approval of the Rulemaking Initiation Request.

(g) Rulemaking Initiation Requests will be considered on a rolling basis; however, as applicable, DRS will establish deadlines for submission of Rulemaking Initiation Requests so that new rulemakings may be included in the Unified Agenda of Regulatory and Deregulatory Actions.

#### § 9.8 Unified Agenda of Regulatory and Deregulatory Actions.

(a) The Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda) provides uniform reporting of data on regulatory and deregulatory activities under development throughout the Federal Government. The Department participates in the Unified Agenda.

(b) Fall editions of the Unified Agenda include the Regulatory Plan, which presents the Department's statement of regulatory priorities for the coming year. Fall editions also include the outcome and status of the Department's reviews of existing regulations, conducted in accordance with § 9.9(d).

(c) Each POC must—

(1) Carefully consider the principles contained in Executive Orders 12866, 13771, and 13777, and any Executive orders that supersede such orders, in the preparation of all submissions for the Unified Agenda;

(2) Ensure that all information pertaining to the Department's regulatory and deregulatory actions are accu-

rately reflected in the Department's Unified Agenda submission;

(3) Timely submit all information to DRS in accordance with the deadlines and procedures communicated by that office; and

(4) Obtain the approval of the RRO to submit any new rulemaking as part of the Unified Agenda.

(d) Unless required to address an emergency or otherwise required by law or approved by the RRO and by OMB, no significant regulation may be issued if it was not included on the most recent version of the published Unified Agenda. Furthermore, no significant regulatory action may take effect until it has appeared in the Unified Agenda for at least 6 months prior to its issuance, unless good cause exists for an earlier effective date and action is otherwise approved by the RRTF or RRO.

#### § 9.9 General rulemaking procedures.

(a) *Definitions.* (1) *Significant rulemaking* means a regulatory action designated by OMB under Executive Order 12866 as likely to result in a rule that may—

(i) Have an annual effect on the U.S. 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;

(ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

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

(iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

(2) *Nonsignificant rulemaking* means a regulatory action not designated as significant by OMB.

(b) *Departmental review process.* (1) Except as provided in this paragraph (b), all departmental rulemakings are to be reviewed and cleared by the Office of the Secretary prior to submission to OMB.

(2) Each POC head must—

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(i) Ensure that all of the POC's rulemaking documents are written in plain language, technically sound, and generally of high quality;

(ii) Ensure that the division within OGC that is responsible for providing the POC with legal advice reviews all rulemaking documents for legal support and legal sufficiency, including compliance with all applicable legal authorities, including but not limited to those listed in §9.1; and

(iii) Approve the submission of all rulemaking documents, including any regulatory impact analysis, to DRS for submission for departmental clearance.

(3) DRS transmits the rulemaking documents to POCs for review and comments in one or more rounds of departmental clearance, as appropriate, for a review period determined by DRS based on the length, complexity, and urgency of the particular rulemaking documents.

(4) Reviewing offices should provide comments or otherwise concur on rulemaking documents within 10 calendar days or as otherwise determined by DRS based on such factors as the length, complexity, and urgency of the documents.

(5) After each round of clearance, DRS sends reviewing offices' comments to the proposing POC for resolution. The POC resolves any comments and submits a revised draft to DRS for another round of clearance or for the next step following the completion of departmental clearance as determined by DRS.

(6) Following the completion of departmental clearance, DRS prepares a rulemaking package to request the Secretary's approval for the rulemaking to be submitted to OMB for review or to the FEDERAL REGISTER for publication. These rulemaking packages are submitted to the Office of the Executive Secretariat, with a copy to the RRO, who must approve the rulemaking prior to submission to the Secretary.

(7) DRS notifies the POC and the RRO when the Secretary approves or disapproves the submission of the rulemaking to OMB or to the FEDERAL REGISTER.

(8) DRS is responsible for coordination with OIRA staff on OIRA's des-

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ignation of all rulemaking documents, submission and clearance of all significant rulemaking documents, and all discussions or meetings with OMB concerning these documents. Generally, POCs must not schedule their own meetings with OMB without DRS and RRO involvement. Each POC should coordinate with DRS and the RRO before holding any discussions with OMB concerning regulatory policy or agreements to modify significant regulatory documents.

(c) *Petitions for rulemaking, exemptions, or retrospective review.* (1) Any interested person may petition the Department to issue, amend, or repeal a rule, or for an exemption from a rule that authorizes a permanent or temporary exemption; or to perform a retrospective review of an existing rule.

(2) A petition must—

(i) Be submitted to the Department through its docket designated for petitions on regulations.gov;

(ii) Contain the petitioner's name and contact information, including, at a minimum, an email address or mailing address;

(iii) Describe the nature of the request, and identify the rule at issue, including the specific text or substance of the rule;

(iv) Explain the interest of the petitioner in the action requested, including, in the case of a petition for an exemption, the nature and extent of the relief sought and a description of the persons to be covered by the exemption; and

(v) Contain an adequate justification for the action sought.

(3)(i) Within 60 calendar days of the Department's receipt of the petition, the head of the POC with regulatory responsibility over the matter described in the petition, or their designee, must recommend whether to—

(A) Proceed with consideration of rulemaking, an exemption, or retrospective review; or

(B) Deny, in whole or in part, the petition.

(ii) The head of the POC, in consultation with the RRO and General Counsel, as needed, determines which petitions to deny. If the head of the POC determines that the petition contains adequate justification to issue, amend,

or repeal a rule; to provide for a permanent or temporary exemption from any rule; or to perform a retrospective review of an existing rule, it refers the proposed action to the RRTF.

(4) After action by the RRTF, the POC responsible for the subject matter of the petition notifies the petitioner of any action on the petition. If the petition is denied, then the POC must provide an appropriately reasoned statement of the grounds for denial.

(d) *Review of existing regulations.* (1) All significant departmental regulations will be reviewed on a 10-year cycle.

(2) The POC that issued the regulation will review it for the following:

(i) *Continued policy justification.* Whether there is a policy justification for maintaining the regulation that is compelling and evidence-based.

(ii) *Continued cost justification.* Whether the regulation requires adjustment due to changed market conditions or is no longer net beneficial.

(iii) *Regulatory flexibility.* Whether the regulation has a significant economic impact on a substantial number of small entities and requires review under 5 U.S.C. 610 (commonly known as the Regulatory Flexibility Act).

(iv) *General updates.* Whether the regulation may need technical corrections, updates, revisions, or repeal.

(v) *Plain language.* Whether the regulation needs revisions for plain language.

(vi) *Other considerations.* Whether there are other considerations under relevant Executive orders and laws.

(3) The results of each POC's review will be reported annually in the fall Unified Agenda.

(e) *Regulatory impact analysis.* (1) The Office of Budget Service has primary responsibility for conducting and approving regulatory impact analyses.

(2) Rules include, at a minimum—

(i) An assessment of the potential costs and benefits of the regulatory action (a regulatory impact analysis) or a reasoned determination that the expected economic impact is so minimal that a formal analysis of costs and benefits is not warranted; and

(ii) If the regulatory action is expected to impose costs, either a reasoned determination that the benefits

outweigh the costs or, if the particular rulemaking is mandated by statute notwithstanding a negative cost-benefit assessment, a detailed discussion of the rationale supporting the specific regulatory action proposed and an explanation of why this approach maximizes net benefits.

(3) To the extent practicable, economic assessments will quantify the foreseeable annual economic costs and cost savings within the United States that would likely result from issuance of the rule and be conducted in accordance with section 1(b)(6) of Executive Order 12866 and OMB Circular A-4 (Regulatory Analysis), as specified by OMB in consultation with DRS. If the Office of Budget Service has estimated that the rule will likely impose economic costs on persons outside the United States, such costs should be reported separately.

(4) Deregulatory significant rulemakings will be evaluated for quantifiable as well as qualitative cost savings. If it is determined that quantification of cost savings is not possible or appropriate, then the proposing POC will provide a reasoned justification for the lack of quantification upon submission of the rulemaking to the Office of Budget Service.

(f) *Regulatory flexibility analysis.* All rulemakings subject to the requirements of 5 U.S.C. 603-604 (as enacted by the Regulatory Flexibility Act), and any amendment thereto, must include the required analysis regarding the potential impact of the rule on small entities.

(g) *Notices of proposed rulemaking (NPRM)*—(1) *Timing.* After obtaining approval from the RRTF under §9.7, if applicable, the proposing POC proceeds with rulemaking, consistent with applicable statutory and regulatory procedures (such as negotiated rulemaking, public hearings, and notice-and-comment rulemaking) in consultation with DRS.

(2) *Contents.* The NPRM must include, at a minimum—

(i) A statement of the time and place for submission of public comments and the time, place, and nature of any related public rulemaking proceedings;

(ii) Reference to the legal authority under which the rule is proposed and



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consistency with applicable authorities cited in §9.1 and with the policy set forth in §9.4;

(iii) The terms of the proposed rule;

(iv) A description of material information known to the POC on the subject of the proposed rule, including but not limited to—

(A) The considerations specified in §9.7(b);

(B) For economically significant rules or documents over 100 pages, a summary of any regulatory impact analysis performed by the Department; and

(C) Information specifically identifying material data, studies, models, and other evidence or information considered or used by the Department in connection with its determination to propose the rule;

(v) A reasoned preliminary analysis of the need for the proposed rule based on the information described in the preamble to the NPRM, and an additional statement of whether a rule is required by statute;

(vi) A reasoned preliminary analysis indicating whether the expected benefits of the proposed rule will meet the relevant statutory objectives and will outweigh the estimated costs of the proposed rule, in accordance with any applicable requirements;

(vii) When possible, and especially if the rulemaking is significant, a summary discussion of the alternatives to the proposed rule considered by the POC, the relative costs and benefits of those alternatives, whether the alternatives would meet relevant statutory objectives, and why the POC chose not to propose or pursue the alternatives;

(viii) A statement of whether existing rules have created or contributed to the issue the Department seeks to address with the proposed rule and, if so, whether the Department proposes to amend or rescind any such rules and why; and

(ix) All other statements and analyses required by law, including, without limitation, the Regulatory Flexibility Act.

(3) *Information access and quality.* (i) To inform public comment when the NPRM is published, the proposing POC will place in the docket for the proposed rule and make accessible to the

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public, including by electronic means, material information relied upon by the POC in the NPRM that is not provided in the NPRM, unless the information is exempt from disclosure under 5 U.S.C. 552(b), 5 U.S.C. 552a, or any other applicable law. Material provided electronically should be made available in accordance with the requirements of section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d).

(ii) The proposing POC will determine the most reliable and relevant scientific, technical, and economic information reasonably available to the Department as a basis for the proposal, identify the sources and availability of such information, and affirm such information complies with all applicable quality, objectivity, utility, and integrity provisions of OMB's "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" (Feb. 22, 2002) in the NPRM.

(h) *Public comment.* (1) Through the NPRM, or other applicable statutory procedures, the Department will provide the public a fair and sufficient opportunity to participate in the rulemaking through submission of written data, analysis, views, and recommendations.

(2) The Department—in coordination with OMB under Executive Order 12866 for significant rulemakings—will ensure that the public is given an adequate period for comment, taking into account the scope, complexity, and nature of the issues and considerations involved in the proposed regulatory action.

(3) Unless a longer comment period is required by statute, absent special considerations and after individualized determinations, the comment period for nonsignificant regulatory actions generally should be at least 30 calendar days, and the comment period for significant regulatory actions should be at least 60 calendar days.

(i) *Exemptions from notice and comment.* (1) Except when prior notice and an opportunity for public comment are required by statute or determined by

the Secretary to be appropriate for policy or programmatic reasons, the responsible POC may, subject to the approval of the RRTF (in consultation with OMB, as appropriate), publish certain final rules in the FEDERAL REGISTER without prior notice and comment, provided the reasons to forgo public comment are explained in the preamble to the final rule. These may include, consistent with the Administrative Procedure Act (5 U.S.C. 553)—

(i) Interpretive rules and rules addressing only Department organization, procedure, or practice;

(ii) Rules for which notice and comment are unnecessary to inform the rulemaking, such as rules correcting minor technical or clerical errors or rules that merely update regulations to include new or revised statutory language; and

(iii) Rules that require finalization without delay, such as rules to address an urgent need, and other rules for which it would be impracticable or contrary to the public interest to accommodate a period of public comment, provided the responsible POC finds that good cause exists to forgo public comment pursuant to 5 U.S.C. 553(b)(B).

(2) Except when required by statute, issuing a substantive Department rule without completing notice and comment, including as an interim final rule (IFR) and direct final rule (DFR), must be the exception. In most cases in which a POC has issued an IFR, the responsible POC will proceed at the earliest opportunity to finalize the IFR.

(j) *Final rules.* The Department will adopt a final rule only after consulting with the RRTF. The final rule, which includes the text of the rule as adopted along with a supporting preamble, will be published in the FEDERAL REGISTER and must satisfy the following requirements:

(1) The preamble to the final rule will include—

(i) A concise, general statement of the rule's basis and purpose, including clear reference to the legal authority supporting the rule;

(ii) A reasoned determination by the adopting POC regarding each of the considerations required to be addressed

in an NPRM under paragraph (g)(2) of this section;

(iii) A response to comments on the proposed rule;

(iv) If the final rule has changed in significant respects from the rule as proposed in the NPRM, an explanation of the changes and the reasons why the changes are needed or are more appropriate to advance the objectives identified in the rulemaking; and

(v) A reasoned discussion supporting a final determination that the information upon which the POC bases the rule complies with the Information Quality Act, 44 U.S.C. 3516, note, or any subsequent amendments thereto; the Foundations for Evidence-Based Policy-making Act of 2018, Public Law 115-435, 132 Stat. 5529; and OMB's "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies" (Feb. 22, 2002).

(2) All final rules issued by the Department will—

(i) Be written in plain language;

(ii) Be based on data and evidence to the extent possible;

(iii) Be based on a reasonable and well-founded interpretation of relevant statutory text; and

(iv) Not be unnecessarily inconsistent or incompatible with, or unnecessarily duplicative of, other Federal regulations.

(k) *Reports to Congress and GAO.* For each final rule adopted by the Department, DRS will submit the reports to Congress and GAO and comply with the procedures specified by 5 U.S.C. 801 (commonly known as the Congressional Review Act).

(1) *Negotiated rulemaking.* (1) The Department will conduct negotiated rulemaking in accordance with section 492 of the Higher Education Act of 1965, 20 U.S.C. 1098a; 5 U.S.C. 561-571, commonly known as the Negotiated Rulemaking Act, as applicable; section 1601(b) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 6571(b); and any other applicable negotiated rulemaking requirements, as well as the Federal Advisory Committee Act, 5 U.S.C. App., as applicable.

(2) Before initiating a negotiated rulemaking not required by law, the

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POC considering the use of negotiated rulemaking should—

(i) Assess whether using negotiated rulemaking for the proposed rule is in the public interest, in accordance with 5 U.S.C. 563(a), and present these findings to the Leadership Council;

(ii) Consult with DRS on the appropriateness of negotiated rulemaking; and

(iii) Receive the approval of the Leadership Council for the use of negotiated rulemaking.

(3) Unless otherwise approved by the General Counsel, all Department negotiated rulemakings should involve the assistance of at least one facilitator, as provided in 5 U.S.C. 561–567, commonly known as the Negotiated Rulemaking Act, 5 U.S.C. 566.

(4) Any charters, membership, FEDERAL REGISTER notices, and operating procedures (or bylaws) for negotiated rulemaking committees must be approved by OGC.

### §9.10 Special procedures for economically significant rules and high-impact rules.

(a) *Definitions.* (1) *Economically significant rule* means a significant rule that is likely to impose a total annual cost on the U.S. economy (without regard to estimated benefits) 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) *High-impact rule* means a significant rule that is likely to impose—

(i) A total annual cost on the U.S. economy (without regard to estimated benefits) of \$500 million or more; or

(ii) A total net loss of at least 250,000 full-time jobs in the U.S. over the 5 years following the effective date of the rule (not counting any jobs relating to new regulatory compliance).

(b) *Additional requirements for NPRMs.*

(1) In addition to the requirements set forth in §9.9(g), an NPRM for an economically significant rule or a high-impact rule will include a discussion explaining an achievable objective for the rule and the metrics by which the POC will measure progress toward that objective.

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(2) Absent unusual circumstances and unless approved by the RRTF (in consultation with OMB), the comment period for an economically significant rule will be at least 60 calendar days and for a high-impact rule will be at least 90 calendar days. If a rule is determined to be an economically significant rule or a high-impact rule after the publication of the NPRM, the responsible POC will consider publishing notification in the FEDERAL REGISTER informing the public of the change in classification and extending or reopening the comment period by at least 30 calendar days and allowing further public comment as appropriate, including comment on the change in classification.

(c) *Procedures for formal hearings—*(1) *Petitions for hearings.* Following publication of an NPRM for an economically significant rule or a high-impact rule that has not gone through negotiated rulemaking, and before the close of the comment period, any interested party may file in the docket designated for formal hearing petitions a petition asking the Department to hold a formal hearing on the proposed rule in accordance with this paragraph (c).

(2) *Mandatory hearing for high-impact rule.* In the case of a proposed high-impact rule, the Department will grant the petition for a formal hearing if the petition makes a plausible *prima facie* showing that—

(i) The proposed rule depends on conclusions concerning one or more specific scientific, technical, economic, or other complex factual issues that are genuinely in dispute or that may not satisfy the requirements of the Information Quality Act;

(ii) The ordinary public comment process, including any additional procedures such as negotiated rulemaking, is unlikely to provide the POC with an adequate examination of the issues to permit a fully informed judgment on the dispute; and

(iii) The resolution of the disputed factual issues would likely have a material effect on the costs and benefits of the proposed rule or on whether the proposed rule would achieve the statutory purpose.

(3) *Authority to deny hearing for economically significant rule.* In the case of

a proposed economically significant rule, the Department may deny a petition for a formal hearing that includes the showing described in paragraph (c)(2) of this section but only if the Department reasonably determines that—

- (i) The requested hearing would not advance the consideration of the proposed rule and the responsible POC's ability to make the rulemaking determinations required under this part; or
- (ii) The hearing would unreasonably delay completion of the rulemaking in light of a compelling need or a statutory mandate for prompt regulatory action.

(4) *Denial of petition.* If the Department denies a petition for a formal hearing under this section, in whole or in part, the Department will include a detailed explanation of the factual basis for the denial in the rulemaking record, including findings on each of the relevant factors identified in paragraph (c)(2) or (3) of this section, and inform the requester of the decision. The Department will only deny a good faith petition for a formal hearing based on the factors identified in paragraph (c)(2) or (3) of this section.

(5) *Notice and scope of hearing.* If the Department grants a petition, in whole or in part, for a formal hearing under this section, the Department will publish notification of the hearing in the FEDERAL REGISTER at least 30 calendar days before the date of the hearing. The notification will specify the proposed rule at issue and the specific factual issues to be considered in the hearing. The scope of the hearing will be limited to the factual issues specified in the notification.

(6) *Hearing process.* A formal hearing for purposes of this section will be conducted using the procedures specified in 34 CFR 81.1 through 81.20. The hearing official may allow for virtual hearings.

(7) *Actions following hearing.* (i) Following completion of the formal hearing process, the responsible POC will consider the record of the hearing and, subject to the approval of the RRTF (in consultation with OMB), make a reasoned determination whether to—

- (A) Terminate the rulemaking;
- (B) Proceed with the rulemaking as proposed; or

(C) Modify the proposed rule.

(ii) If the decision is made to terminate the rulemaking, the responsible POC will publish notification in the FEDERAL REGISTER announcing the decision and explaining the reasons for it.

(iii) If the decision is made to finalize the proposed rule without material modifications, the responsible POC will explain the reasons for its decision and its responses to the hearing record in the preamble to the final rule, in accordance with paragraph (d) of this section.

(iv) If the decision is made to modify the proposed rule in a manner that is not a logical outgrowth of the NPRM, the responsible POC will, subject to the approval of the RRTF (in consultation with OMB), publish a new or supplemental NPRM in the FEDERAL REGISTER explaining the POC's responses to, and analysis of, the hearing record, setting forth the modifications to the proposed rule, and providing an additional reasonable opportunity for public comment on the proposed modified rule.

(8) *Relationship to interagency process.* The formal hearing procedures under this paragraph (c) will not impede or interfere with the OMB interagency review process for the proposed rulemaking.

(d) *Additional requirements for final rules.* (1) In addition to the requirements set forth in § 9.9(j), the preamble to a final economically significant rule or a final high-impact rule will include—

(i) A discussion explaining the POC's reasoned final determination that the rule as adopted is necessary to achieve the objective identified in the NPRM in light of the full administrative record and does not deviate from the metrics previously identified by the POC for measuring progress toward that objective; and

(ii) In accordance with paragraph (c)(7)(iii) of this section, the POC's responses to and analysis of the record of any formal hearing held under paragraph (c) of this section.

(2) Absent exceptional circumstances and unless approved by the Secretary or the Leadership Council (in consultation with OMB), the POC will adopt as a final economically significant rule or

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final high-impact rule the regulatory alternative that maximizes net benefits and achieves the relevant objectives.

(e) *Additional requirements for retrospective reviews.* For each economically significant rule or high-impact rule, the responsible POC will conduct a retrospective review, and publish a regulatory impact report in the FEDERAL REGISTER every 5 years after the effective date of the rule while the rule remains in effect. The regulatory impact report will include, at a minimum—

(1) An assessment of the impacts, including any costs, of the rule on regulated entities;

(2) A determination of how the actual costs and benefits of the rule have varied from those anticipated when the rule was issued; and

(3) An assessment of the effectiveness, benefits, and unintended consequences of the rule in producing the regulatory objectives it was adopted to achieve.

(f) *Waiver and modification.* The procedures required by this section may be waived or modified as necessary with the approval of the RRO or the Secretary.

### §9.11 Public contacts in informal rulemaking.

(a) *Informal rulemakings conducted in accordance with the APA.* (1) After the issuance of an NPRM and pending completion of the related final rule, Department personnel will not give persons outside the executive branch information regarding the rulemaking that is not generally available to the public.

(2) If, after the close of the comment period for the proposed rule, the Department receives a comment from the public that provides information that was not available prior to the deadline for submitting public comments concerning the proposed rule and that forms the basis of a critical decision in the final rule (such as newly available, reliable studies or data), the Department should reopen the comment period to give the public an opportunity to comment on the newly available information, unless the new information merely reinforces the information from the proposed rule or previously avail-

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able in the public docket. If the new information is likely to result in a change to the rule that is not a logical outgrowth of the proposed rule, the POC must issue a supplemental NPRM to ensure that the final rule represents a logical outgrowth of the Department's proposal.

(b) *Contacts during OMB review.* (1) Executive Orders 12866 and 13563 describe the procedures for review of significant regulations by OMB, which include a process for members of the public to request meetings with OMB regarding rules under OMB review. In accordance with Executive Order 12866, OMB invites the Department to attend these meetings. DRS will forward these invitations to the appropriate regulatory contacts in the Department.

(2) The responsible POC and DRS will determine who will participate in the meeting. Participation may occur by phone, by videoconference, or in person. These OMB meetings are listening sessions for the Department.

(3) The attending Department personnel should refrain from debating particular points regarding the rulemaking and should avoid disclosing the contents of a document or proposed regulatory action that has not yet been disclosed to the public, but may answer questions of fact regarding a public document.

## Subpart C—Guidance Document Procedures

### §9.12 Policy.

Guidance documents and significant guidance documents do not have the force or effect of law on parties outside the Department, and it is the policy of the Department to disfavor them except in special circumstances.

### §9.13 Guidance documents.

(a) *Guidance document* means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation. The term is not confined to formal written documents, as guidance may come in a variety of written formats,

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including letters, memoranda, circulars, bulletins, advisories, electronic announcements, “Dear Colleague” letters, and handbooks. Guidance documents do not include the following:

(1) Rules promulgated pursuant to notice and comment 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 Department organization, procedure, or practice, provided such rules do not alter substantive obligations for parties outside the Department.

(4) Decisions of Department adjudications under 5 U.S.C. 554 or similar statutory provisions.

(5) Internal guidance directed to the Department or other agencies that is not intended to have substantial future effect on the behavior of regulated parties.

(6) Internal executive branch legal advice or legal opinions addressed to executive branch officials.

(7) Legal briefs, other court filings, or positions taken in litigation or determinations in enforcement actions.

(8) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, such as those speeches, editorials, media interviews, press materials, or congressional testimonies that do not set forth for the first time a new policy.

(9) Agency statements of specific, rather than general, applicability. This includes responses or information provided by a POC designed to answer specific questions from a grant recipient or other stakeholder; advisory opinions directed to particular parties about circumstance-specific questions; notices regarding particular locations or facilities; and correspondence with individual persons or entities, including congressional correspondence or notices of violation. A document, including correspondence, directed to a particular party that provides an agency interpretation of statutes, regulations, or guidance or that is designed to guide the conduct of the broader regulated public is guidance.

(10) Grant solicitations and awards, including instructions related to the

submission of applications or State Plans for formula and discretionary grant programs and award amendments.

(11) Contract solicitations and awards, contracts, and memoranda of understanding.

(12) Categories of documents that the OMB Administrator (Administrator) identifies as excepted from the requirements of Executive Order 13891.

(13) Documents prepared in connection with or responding to audits or other engagements conducted by the Office of Inspector General (OIG) or the Government Accountability Office (GAO) and to oversight by congressional committees.

(b) Each guidance document will, at a minimum—

(1) Include the term “guidance”;

(2) Identify that it is issued by the Department or a component of the Department;

(3) Identify the activities and entities to which, and the persons to whom, the document applies;

(4) Include the date of issuance;

(5) Note if it is a revision to a previously issued guidance document and, if so, identify the guidance document that it revises;

(6) Provide the title of the guidance;

(7) Have a unique document identification number;

(8) Include the citation to the statutory provision or regulation to which it applies or that it interprets;

(9) Include a short summary of the subject matter covered in the guidance document at the top of the document as appropriate; and

(10) Include the following disclaimer, prominently displayed: *Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.*

(c) All guidance documents require review, clearance, and written authorization by the General Counsel of the Department or his or her designee. To obtain such authorization, the POC must demonstrate the following:

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(1) A compelling operational need to issue the guidance document; and

(2) The guidance document complies with OMB's "Final Bulletin on Agency Good Guidance" (Jan. 25, 2007) and Executive Order 13891.

(d) The General Counsel will consult with the RRO prior to clearing significant guidance documents.

(e) All active guidance documents will be accessible through the Department's guidance portal. Documents that are not available through this portal are not considered to be in effect (and may only be used for historical purposes).

### § 9.14 Significant guidance documents.

(a) *Significant guidance document* means a guidance document that may reasonably 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;

(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.

(b) Before a POC may proceed to develop a significant guidance document, the POC head must consult with DRS and consider the regulatory philosophy and principles set forth in Executive Order 13891 and the policies set forth in §§ 9.4 and 9.12. If the POC head determines that a significant guidance document is warranted, consistent with those policies and principles, the POC may prepare a Significant Guidance Document Initiation Request to the Working Group of the RRTF.

(c) The Significant Guidance Document Initiation Request should specifically state or describe—

(1) A proposed title for the document;

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(2) The need for the document, including a description of the relevant statutes and regulations;

(3) The legal authority for the document;

(4) A description of the economic impact associated with the document;

(5) The tentative target date for completion of the significant guidance document; and

(6) Whether there is a statutory or judicial deadline, or some other urgency, associated with the significant guidance document.

(d) The POC head submits the Significant Guidance Document Initiation Request to the Assistant General Counsel for DRS and the RPO, together with any other documents that may assist in the RRTF's consideration of the request.

(e) DRS includes the Significant Guidance Document Initiation Request on the agenda for consideration at the next RRTF Working Group meeting.

(f) The Working Group forwards the Significant Guidance Document Initiation Request to the Leadership Council and provides the Leadership Council with a recommendation.

(g) The Department will seek significance determinations from OIRA for certain guidance documents, as appropriate, in the same manner as for rulemakings. Prior to publishing these guidance documents, and with sufficient time to allow OIRA to review the document in the event that a significance determination is made, Department should provide OIRA with an opportunity to review the designation request or the guidance document, if requested, to determine if it meets the definition of "significant" or "economically significant" under Executive Order 13891.

(h) Unless the Department and the Administrator agree that exigency, safety, health, or other compelling cause warrants an exemption from some or all requirements, upon approval of the Leadership Council, the Department will issue the significant guidance document only after completing the following requirements:

(1) A period of public notice and comment of at least 30 calendar days before issuance of the final significant guidance document, and a public response

from the Department to significant comments, except when the Department, for good cause, finds (and incorporates such finding and a brief statement of the reasons into the significant guidance document) that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest, according to the same standards applicable to agency rules under 5 U.S.C. 553(b)(B).

(2) Approval by the Secretary and signature by the Secretary or the component head or by an official who is serving in an acting capacity as either of the foregoing before issuance.

(3) Review by OMB under Executive Order 12866.

(4) Compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in Executive Orders 12866, 13563, 13771, and 13777, and any Executive orders that supersede such orders, for such time as they are in effect.

**§ 9.15 Request for withdrawal or modification of guidance documents and significant guidance documents.**

(a) Members of the public may request the withdrawal or modification of an existing guidance document or significant guidance document in the manner indicated on the Department's guidance portal at <https://www2.ed.gov/policy/gen/guid/types-of-guidance-documents.html>.

(b) The Department will respond to all requests in a timely manner, but no later than 90 calendar days after receipt of the request, to the extent practicable.

**§ 9.16 Rescinded significant guidance documents.**

(a) To rescind a significant guidance document, the Department will—

(1) In consultation with OIRA, provide a period of public notice and comment of at least 30 calendar days with respect to the rescission, unless the rescission reflects statutory or regulatory changes or some other reason that does not involve an independent exercise of the Department's policy-making discretion;

(2) Submit the proposed rescission to OMB for review; and

(3) Publish a notice in the FEDERAL REGISTER announcing the rescission.

(b) The Department and its components may not cite, use, or rely on rescinded guidance documents or rescinded significant guidance documents, except to establish historical facts.

**Subpart D—Miscellaneous Provisions**

**§ 9.17 Policy updates and revisions.**

This part will be reviewed periodically to reflect improvements in the rulemaking process or changes in Administration policy. If Congress revises applicable laws or if the executive branch issues new Executive orders, Presidential memoranda, guidance, or implementing instructions governing Federal agency rulemaking, those changes will also be part of this review.

**§ 9.18 Disclaimer.**

This part is intended to improve the internal management of the Department. It 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, officers, or employees; or any other person. In addition, this part shall not be construed to create any right to judicial review involving the compliance or noncompliance with this part by the Department, its POCs, its officers or employees, or any other person.

**PART 12—DISPOSAL AND UTILIZATION OF SURPLUS FEDERAL REAL PROPERTY FOR EDUCATIONAL PURPOSES**

**Subpart A—General**

Sec.

12.1 What is the scope of this part?

12.2 What definitions apply?

12.3 What other regulations apply to this program?

**Subpart B—Distribution of Surplus Federal Real Property**

12.4 How does the Secretary provide notice of availability of surplus Federal real property?