



OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

26 JUL 2007

ADMINISTRATION AND
MANAGEMENT

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Rulemaking Approval under Executive Orders (EO) 13422 and 12866

On January 18, 2007, the President issued EO 13422, "Further Amendment to Executive Order 12866 on Regulatory Planning and Review." This EO, at attachment 1, mandates increased visibility and oversight of the Department's Regulatory Program with the intent to further minimize federal regulations that unduly burden the public. Regulations or rules are the primary means by which DoD implements laws and policies, which in turn affect business enterprise, the environment, our national infrastructure, our communities, and our personal privacy. Rulemaking actions are substantive and are normally published in the *Federal Register*.

To ensure appropriate accountability and review of rulemaking, section 5 of the EO requires that each agency head designate a Regulatory Policy Officer (RPO). Implementing guidance from the Office of Management and Budget (OMB) has recently specified that the RPO be a Presidential Appointee, Senate Confirmed. Therefore, the Deputy Secretary has assumed RPO responsibilities and is well positioned to understand the President's regulatory priorities. In managing this responsibility, the DA&M remains the functional proponent for the DoD Regulatory Program under the RPO.

Policy. This directive-type memorandum establishes DoD policy and guidance for specific actions required to obtain approval for rulemaking action by the Department's RPO. Under the EO, the RPO must personally approve all stages in the rulemaking process and the inclusion of rulemaking in the DoD Regulatory Plan.

Applicability. This directive-type memorandum applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereinafter referred collectively as the "DoD Components").

OSD 12207-07



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The guidance and procedures apply to all DoD regulatory entities engaged in rulemaking activities. Major rulemaking entities include:

- Office of the Secretary
- Defense Acquisition Regulations System Directorate (for acquisition regulations)
- Department of the Army
- Army Corps of Engineers
- Department of the Navy
- Department of the Air Force.

Responsibilities. The Deputy Secretary of Defense, as DoD RPO, is responsible for monitoring regulatory activities within DoD to ensure uniform compliance with the implementation of executive and legislative requirements and priorities, to include the specific requirements of EO 12866 as amended by EO 13422. All rulemaking will be approved by the RPO prior to any review by OMB.

The DA&M is the functional proponent for the Regulatory Program and shall manage the operational requirements of the rule approval process. The Chief, Information Management Division (IMD), Executive Services Directorate, Washington Headquarters Services, will administer the program on behalf of the DA&M. IMD will process, review, and forward the rule submission package through the DA&M to the RPO and will monitor all DoD rulemaking under consideration at OMB.

The Principal Staff Assistants (PSA) (or comparable signature level within the Military Departments) shall monitor the regulatory activities in their functional areas and shall ensure that rulemaking actions are necessary and consistent with applicable law, the President's priorities, and the principles set forth in EO 12866 and EO 13422. Rulemaking actions must be approved by the RPO before submission to OMB. RPO approval will include:

- Approval of all stages of the rulemaking process
- Approval of rulemaking to be included in the DoD Regulatory Plan

The PSAs, with coordination from the Office of General Counsel of the Department of Defense (or comparable legal review by the Military Departments), shall certify that the rule complies with executive and legislative requirements prior to submission through IMD to the RPO for approval.

Procedures. The rulemaking approval process consists of specific certification requirements and the composition of rule packages is specified.

- Certification requirements: (See certification memorandum format at attachment 2.)
 - PSA certifies that the rule complies with executive and legislative requirements. These requirements include, but are not limited to:
 - Executive Order 12866, "Regulatory Planning and Review"
 - Chapter 25 of title 2, United States Code (USC), "Unfunded Mandates Reform Act"
 - Section 601 of title 5, USC, "Regulatory Flexibility Act"
 - Section 3501 of title 44, USC, "Paperwork Reduction Act"
 - Executive Order 13132, "Federalism"
 - Certification coordinated with the General Counsel for all rules

- Certification coordinated with the Legislative Affairs Office if an interim or final rule
- Rule package: (See format for required information at attachment 3.)
 - Brief description or concise general statement of the rule and its intention
 - Summary of the legal basis for the rule with the specific citation for the statute, order, or other legal authority for each planned rule, and the legal deadline for implementation
 - Identification of alternatives considered
 - Preliminary estimates of the anticipated costs and benefits of the rule
 - The risk reduction to be realized by this rulemaking
 - Statement addressing the specific market failure or other specific problem that the rule intends to address that warrants new agency action
 - The text of the rule

This guidance is effective immediately and will be incorporated into a DoD issuance within 180 days. My point of contact for this action is Mr. Robert Cushing, Chief, Information Management Division, Executive Services Directorate, at 703-696-5282.


Michael B. Donley
Director

Attachments:
As stated

Presidential Documents

Title 3—

Executive Order 13422 of January 18, 2007

The President

Further Amendment to Executive Order 12866 on Regulatory Planning and Review

By the authority vested in me as President by the Constitution and laws of the United States of America, it is hereby ordered that Executive Order 12866 of September 30, 1993, as amended, is further amended as follows:

Section 1. Section 1 is amended as follows:

(a) Section 1(b)(1) is amended to read as follows:

“(1) Each agency shall identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted.”

(b) by inserting in section 1(b)(7) after “regulation” the words “or guidance document”.

(c) by inserting in section 1(b)(10) in both places after “regulations” the words “and guidance documents”.

(d) by inserting in section 1(b)(11) after “its regulations” the words “and guidance documents”.

(e) by inserting in section 1(b)(12) after “regulations” the words “and guidance documents”.

Sec. 2. Section 2 is amended as follows:

(a) by inserting in section 2(a) in both places after “regulations” the words “and guidance documents”.

(b) by inserting in section 2(b) in both places after “regulations” the words “and guidance documents”.

Sec. 3. Section 3 is amended as follows:

(a) by striking in section 3(d) “or ‘rule’ ” after “‘Regulation’ ”;

(b) by striking in section 3(d)(1) “or rules” after “Regulations”;

(c) by striking in section 3(d)(2) “or rules” after “Regulations”;

(d) by striking in section 3(d)(3) “or rules” after “Regulations”;

(e) by striking in section 3(e) “rule or” from “final rule or regulation”;

(f) by striking in section 3(f) “rule or” from “rule or regulation”;

(g) by inserting after section 3(f) the following:

“(g) “Guidance document” means an agency statement of general applicability and future effect, other than a regulatory action, that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.

(h) “Significant guidance document” —

(1) Means a guidance document disseminated to regulated entities or the general public that, for purposes of this order, may reasonably be anticipated to:

- (A) Lead to an annual effect 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;
- (B) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (C) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or
- (D) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order; and (2) Does not include:
 - (A) Guidance documents on regulations issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;
 - (B) Guidance documents that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;
 - (C) Guidance documents on regulations that are limited to agency organization, management, or personnel matters; or
 - (D) Any other category of guidance documents exempted by the Administrator of OIRA."

Sec. 4. Section 4 is amended as follows:

- (a) Section 4(a) is amended to read as follows: "The Director may convene a meeting of agency heads and other government personnel as appropriate to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year."
- (b) The last sentence of section 4(c)(1) is amended to read as follows: "Unless specifically authorized by the head of the agency, no rulemaking shall commence nor be included on the Plan without the approval of the agency's Regulatory Policy Office, and the Plan shall contain at a minimum:"
- (c) Section 4(c)(1)(B) is amended by inserting "of each rule as well as the agency's best estimate of the combined aggregate costs and benefits of all its regulations planned for that calendar year to assist with the identification of priorities" after "of the anticipated costs and benefits".
- (d) Section 4(c)(1)(C) is amended by inserting ", and specific citation to such statute, order, or other legal authority" after "court order".

Sec. 5. Section 6 is amended as follows:

- (a) by inserting in section 6(a)(1) "In consultation with OIRA, each agency may also consider whether to utilize formal rulemaking procedures under 5 U.S.C. 556 and 557 for the resolution of complex determinations" after "comment period of not less than 60 days."
- (b) by amending the first sentence of section 6(a)(2) to read as follows: "Within 60 days of the date of this Executive order, each agency head shall designate one of the agency's Presidential Appointees to be its Regulatory Policy Officer, advise OMB of such designation, and annually update OMB on the status of this designation."

Sec. 6. Sections 9–11 are redesignated respectively as sections 10–12.

Sec. 7. After section 8, a new section 9 is inserted as follows:

"**Sec. 9. Significant Guidance Documents.** Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with advance notification of any significant guidance documents. Each agency shall take such steps as are necessary for its Regulatory Policy Officer to ensure the agency's compliance with the requirements of this section. Upon the request of the Administrator, for each matter identified as, or determined by the Administrator to be, a significant guidance document, the issuing agency shall provide to

OIRA the content of the draft guidance document, together with a brief explanation of the need for the guidance document and how it will meet that need. The OIRA Administrator shall notify the agency when additional consultation will be required before the issuance of the significant guidance document.”

Sec. 8. Newly designated section 10 is amended to read as follows:

“**Sec. 10. *Preservation of Agency Authority.*** Nothing in this order shall be construed to impair or otherwise affect the authority vested by law in an agency or the head thereof, including the authority of the Attorney General relating to litigation.”



THE WHITE HOUSE,
January 18, 2007.

[FR Doc. 07-293
Filed 1-22-07; 8:45 am]
Billing code 3195-01-P

SAMPLE OF CERTIFICATION MEMORANDUM

The following sample of a certification must be used and typed on letterhead and coordinated with the General Counsel and Legislative Affairs (for Interim and Final Rules):

(Use PSA or Service Secretary Letterhead)

(date)

MEMORANDUM FOR DEPUTY SECRETARY OF DEFENSE

SUBJECT: Certification of Rule Compliance with Executive and Legislative Requirements

Request the attached rule be published in the Federal Register. Certifications follow:

Executive Order 12866, "Regulatory Planning and Review"

It has been determined that 32 CFR part *[insert part number]* is not a significant regulatory action. The rule does not:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section 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 set forth in this Executive Order.

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104-4)

It has been certified that this rule does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. *[Insert a succinct statement explaining the reason for such certification.]*

Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that this rule does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

or

It has been certified that this rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. The reporting and recordkeeping requirements have been submitted to OMB for review.

Executive Order 13132, "Federalism"

It has been certified that this rule does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

- (1) The States;
- (2) The relationship between the National Government and the States; or
- (3) The distribution of power and responsibilities among the various levels of Government.

[Signature of PSA or Service Secretary]

[GC Coordination]

*[LA Coordination if an
Interim or Final Rule]*

RULE DATA

TITLE: *[Cite the title of the rule]*

RIN: *[Cite the OMB identifier assigned to the rule]*

STATEMENT OF NEED: This is a description of the need for the regulatory action (sec. 4(c)(1)(D) of E.O. 12866).

SUMMARY OF THE LEGAL BASIS (include specific citation for the statute, order, or other legal authority): This should include a description of the legal basis for the action and whether any aspect of the action is required by statute or court order (sec. 4(c)(1)(C) of E.O. 12866).

ALTERNATIVES: This should describe, to the extent possible, the alternatives the agency has considered or will consider for analysis (sec. 4(c)(1)(B) of E.O. 12866).

ANTICIPATED COST AND BENEFITS: This should include "preliminary estimates of the anticipated costs and benefits" of the regulatory action (sec. 4(c)(1)(B) of E.O. 12866). Consistent with previous guidance provided concerning the implementation of E.O. 12866, the description of costs should include both capital (upfront) costs and annual (recurring) costs. If the benefits are difficult to quantify, we encourage you, to the extent possible, to use nominal units (for example, health effects or injuries avoided) for benefits. Avoid the misclassification of transfer payments as costs or benefits. You should appropriately discount both costs and benefits. To the extent that you cannot quantify costs and benefits, you should describe them in narrative form.

RISKS: This should include, if applicable, "how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency" (sec. 4(c)(1)(D) of E.O. 12866). You should include a description of the magnitude of the risk the action addresses, the amount by which the agency expects the action to reduce this risk, and the relation of the risk reduction effort to other risks and risk reduction efforts within the agency's jurisdiction.

MARKET FAILURE STATEMENT: Include a statement addressing the specific market failure (such as externalities, market power, lack of information) or other specific problem that the rule intends to address (including, where applicable, the failures of public institutions) that warrants new agency action (sec. 1(a)(1) of E.O. 13422).