EXECUTIVE ORDER (EO) 13891 PROMOTING THE RULE OF LAW THROUGH IMPROVED AGENCY GUIDANCE DOCUMENTS

1. REASON FOR ISSUE. To establish VA policy for complying with EO 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents.

2. SUMMARY OF CONTENTS/MAJOR CHANGES. This directive establishes criteria for identifying guidance documents and VA procedures consistent with its responsibility for complying with EO 13891. The President issued EO 13891 on October 9, 2019. The EO is intended “to ensure that Americans are subject to only those binding rules imposed through duly enacted statutes or through regulations lawfully promulgated under them, and that Americans have fair notice of their obligations.” The EO requires VA to:
   a. Identify all guidance documents;
   b. Establish on its website a single, searchable, indexed database that contains links to all VA guidance documents in effect; and
   c. Establish procedures for sustainment.

3. RESPONSIBLE OFFICE. Office of Enterprise Integration (008), Office of Policy and Interagency Collaboration (008D).

4. RELATED HANDBOOK/DIRECTIVE. None

5. RESCISSION. None.

CERTIFIED BY: 

/s/ Karen L. Brazell
Principal Executive Director, Office of Acquisition, Logistics and Construction and Chief Acquisition Officer, Performing the Delegable Duties of the Assistant Secretary for Enterprise Integration

BY DIRECTION OF THE SECRETARY OF VETERANS AFFAIRS:

/s/ Karen L. Brazell
Principal Executive Director, Office of Acquisition, Logistics and Construction and Chief Acquisition Officer, Performing the Delegable Duties of the Assistant Secretary for Enterprise Integration

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EXECUTIVE ORDER (EO) 13891 GUIDANCE DOCUMENTS

1. PURPOSE. This directive establishes Department-wide policy for compliance and sustainment of EO 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents in the Department of Veterans Affairs (VA).

2. POLICY

   a. VA will fully comply with EO 13891 to ensure that VA stakeholders are subject to only those binding rules imposed through duly enacted statutes or through regulations lawfully promulgated under them.

   b. To ensure VA is compliant with EO 13891, Program Offices (PO) in each Administration and Staff Office will review and assess Department documents to determine whether they are “guidance documents” or “significant guidance documents” as defined by EO 13891, and/or meet other EO criteria. The steps, processes and information outlined in this directive apply to all memos, directives, pamphlets, notices or other VA documents, whether intended for internal or external dissemination. These steps are necessary to ensure VA is compliant with the EO. This directive and other resource information pertaining to the requirements of EO 13891 are also available on the VA Guidance Document website.

   c. The Office of Management and Budget (OMB)/Office of Information and Regulatory Affairs (OIRA) has identified the documents outlined below as “guidance documents” that should be processed in accordance to this directive. POs should use APPENDIX A - EXECUTIVE ORDER 13891 GUIDANCE DOCUMENT CHECKLIST to assist them in identifying other “guidance documents”, as well as determining whether or not the “guidance document” are “significant guidance”.

   (1) VA Wide OMB/OIRA Criteria:

      (a) Any agency statement of future effect and general applicability that impacts eligibility for any program or benefit administered by VA.

      (b) All documents that will be published in the Federal Register with the following exceptions:

         i. Documents already submitted to OIRA under other processes (e.g., rules, System of Records Notices and Information Collection Request Notices).

         ii. Notices of meetings, solicitation of nominees for advisory committees, and similar documents related to the Federal Advisory Committee Act.
iii. Routine publications related to internal human resource functions, such as notices of appointment of members to the Performance Review Board.

(2) OMB/OIRA National Cemetery Administration (NCA) Specific Criteria (in addition to the VA wide Criteria):

(a) Any agency statement of future effect and general applicability in any format that impacts eligibility for any program or benefit administered by NCA.

(b) Any agency statement of future effect and general applicability in any format that seeks to prescribe behavior of visitors to national cemeteries.

(3) OMB/OIRA Veterans Benefits Administration Specific Criteria (in addition to the VA wide Criteria):

(a) Any agency statement of future effect and general applicability that impacts any VA benefits program, including housing, pension, education and insurance programs. For education, this includes educational institution’s eligibility to participate in educational benefits (including the Principles of Excellence program), with the exception of statements directed at specific parties that are not intended or anticipated to impact the behavior of other educational institutions.

(b) Any agency statement of future effect and general applicability that impact financial institutions or third-party service providers (including appraisers), with the exception of statements directed at specific parties that are not intended or anticipated to impact the behavior of other financial institutions.

(c) Any agency statement of future effect and general applicability that impacts a Veteran’s eligibility for disability compensation, including evidence or documentation that will be accepted during the disability compensation application and adjudication process. This does not include statements directed at specific parties that are not intended or anticipated to impact the behavior of other Veterans or applicants. However, this includes statements, handbooks, etc. that might otherwise be considered rules of agency organization or practice (and thus not ordinarily be covered by EO 13891), if they are likely to change the behavior of Veteran applicants and/or non-VA health care providers, such as by publicly stating types of evidence VA accepts or considers in making disability compensation determinations.

(4) OMB/OIRA Veterans Health Administration (VHA) Criteria (in addition to the VA wide Criteria):
(a) Any agency statement of future effect and general applicability that impacts non-VA health care providers, including billing and recordkeeping policies.

(b) Any agency statement of future effect and general applicability that impacts Veteran eligibility for programs administered by VHA (including, but not limited to, community care, the Caregivers program and the VA patient enrollment system).

(c) Any agency statement of future effect and general applicability that financially impacts Veteran participation in programs administered by VHA (including, but not limited to, health care co-payments).

(d) Any agency statement of future effect and general applicability that is intended to prescribe the behavior of patients or visitors at a substantial number of VHA facilities.

3. PROCESSES. For VA documents determined to be “guidance documents” in accordance with the OMB/OIRA criteria or the checklist, the PO must follow the procedures in paragraph 3.a. For VA documents determined to be “significant guidance documents”, the PO must follow the procedures in paragraph 3.b. For VA documents determined not to be “guidance documents” under EO 13891 or under OMB/OIRA’s additional criteria, the PO should process the document under VA concurrence process.

a. Guidance Documents.

(1) PO obtains internal concurrences and authorized signature/approval on the “guidance document”.

(2) PO submits the guidance document through the formal VA concurrence process (currently VIEWS) to the Office of General Counsel (OGC) for OGC’s review/concurrence and confirmation of the EO 13891 designation.

(3) If the “guidance document” is a notice intended for publication in the Federal Register (FR), the PO submits the document to Office of the Executive Secretariat (001B) for Chief of Staff (COSVA) signature/approval.

(4) If the “guidance document” is not an FR notice, the PO submits the “guidance document” to the appropriate organizational authorized signer.

(5) Once the “guidance document” is approved, the PO submits the document to the Office of Regulation Policy and Management (00REG) via email: vaco00REG@va.gov.

(6) 00REG submits the document to OMB/OIRA for review and approval. 00REG will notify the PO of OMB/OIRA’s comments and/or approval.
(7) If the VA document is an FR notice and approved by OMB/OIRA, 00REG will publish the notice in the FR and notify the PO.

(8) If the VA document is anything other than an FR notice and approved by OMB/OIRA, the PO will submit the document, in accordance with Appendix B, to the Office of Enterprise Integration (OEI) at OEDMO@va.gov. OEI will upload the "guidance document" on VA’s Guidance Document website.

b. Significant Guidance Documents. A “significant guidance document” is defined in accordance by EO 13891 as 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 EO 12866.

(5) Any VA document meeting one or more of the criteria in paragraph 3b (1-4) must go through following process:

(a) PO drafts an FR notice which details the content of the significant “guidance document”. The notice must include a 30-day public notice and comment period.

(b) PO obtains internal concurrences and authorized signature/approval on the significant “guidance document”.

(c) PO submits the “guidance document” through the formal VA concurrence process (currently VIEWS) to the OGC for its review/concurrence and confirmation of the EO 13891 designation.

(d) PO submits the FR notice document to Office of the Executive Secretariat (001B) (001B) for approval by the Secretary of Veterans Affairs (SECVA).

(e) Once the notice is approved/signed by SECVA, the PO submits the signed PDF version and a matching Word version of the Notice to the Office of Regulation Policy and Management (00REG) via email: vaco00REG@va.gov.
(f) 00REG submits the notice to OMB/OIRA for review and approval. 00REG will notify the PO of OMB/OIRA’s comments and/or approval.

(g) Once the FR notice is approved by OMB/OIRA, 00REG will publish the notice in the FR and notify the PO. The notice and comments must comply with the applicable requirements for regulations or rules set forth in Executive Orders 12866, 13563, 13609, 13771 and 13777.

(h) After the 30-day comment period, the PO must:

i. Provide a response to any public comments that raise major concerns through another FR notice, except when VA finds good cause that response to the public comments is impracticable, unnecessary or contrary to the public interest.

ii. If there are no major concerns raised in the public comments, then the PO drafts the significant “guidance document” and repeats the process and actions in 3.a. (1 through 8), with the exception of 3.a.(3) in which that SECVA must sign/approve the significant “guidance document” versus the COSVA.

4. RESPONSIBILITIES.Secretary of Veterans Affairs shall approve “guidance documents” designated as “significant guidance documents” in accordance with this directive.

b. Under Secretaries, Assistant Secretaries, and Other Key Officials shall ensure that all new documents that will be issued under their authority to the general public or non-government organizations are:

(1) Evaluated to determine whether they qualify as “guidance documents” in accordance with the criteria outlined in this document, and;

(2) Ensure all qualifying documents and attachments are processed in accordance with processes and checklists outlined in this directive.

c. Assistant Secretary for Enterprise Integration (AS/OEI) shall in addition to duties in paragraph 4.b:

(1) Provide oversight for the EO 13891 guidance document process.

(2) Assign responsibility to the Executive Director, Office of Policy and Interagency Collaboration (OPIC) to develop and implement processes to identify, validate and publicly post guidance and significant documents in accordance with EO 13891 and this directive.

d. The General Counsel (OGC) shall:
(1) Assign responsibility to a business line leader to review and validate submitted guidance and significant “guidance documents” by Administrations, Staff Offices and Key Officials.

(2) Provide legal advice concerning the “guidance document” review process.

e. Assistant Secretary for Public and Intergovernmental Affairs (OPIA) shall: Post vetted guidance and significant “guidance documents” provided by OEI to VA’s Guidance Documents website.

f. Director, Office of Regulation Policy and Management shall: Assist Administrations and Staff Offices with the processing of guidance and “significant guidance documents”, as defined in this directive.

(2) Coordinate “guidance” and “significant guidance document” with OMB/OIRA.

(3) Assist Administrations and Staff Offices by publishing guidance and significant guidance Notices in the Federal Register.

g. OEI Executive Director, Office of Policy and Interagency Collaboration (OPIC) shall:

(1) Receive and review qualifying documents from Administrations and Staff Offices and Key Officials.

(2) Ensure approved “guidance and significant guidance documents” approved by OMB/OIRA are posted on VA's Guidance Documents website.

h. Benefits Law Group, OGC shall: Review submitted documents to determine and validate the appropriate EO designation submitted by Administrations, Staff Offices and Key Officials.

i. Administrations, Staff Offices, or Key Officials of Policy and Program Offices shall: Determine if VA documents should be classified as “guidance or significant guidance documents” under EO 13891 using the checklist in Appendix A.

(2) Process “guidance documents” in accordance with this directive.

5. REFERENCES

a. Executive Order 13891, Promoting the Rule of Law through Improved Agency Guidance Documents, October 9, 2019.

c. Executive Order 12866, Regulatory Planning and Review, September 30, 1993

d. Executive Order 13563, Improving Regulation and Regulatory Review, January 18, 2011

e. Executive Order 13609, Promoting International Regulatory Cooperation, May 1, 2012

f. Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, January 30, 2017

g. Executive Order 13777, Enforcing the Regulatory Reform Agenda, March 1, 2017
APPENDIX A - EXECUTIVE ORDER 13891 GUIDANCE DOCUMENT CHECKLIST

Instructions: Please use the checklist to review your organizational documents that apply to the general public or non-government organizations. If the response to any of the questions 1-4 is NO, then the document is not a “guidance document”. If the response to all questions is YES, check to determine if any of the exceptions in question 5 applies. If the document is a “guidance document” proceed to question 6 to determine if it qualifies as a “significant guidance document”.

<table>
<thead>
<tr>
<th>#</th>
<th>CHECKLIST</th>
<th>YES</th>
<th>NO</th>
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<tbody>
<tr>
<td>1.</td>
<td>Does the document apply generally, i.e., does it apply to more than just one person, event or transaction?</td>
<td></td>
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<tr>
<td></td>
<td>a. If the document is addressed to more than a single person or entity, you should check YES.</td>
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<td></td>
<td>b. Even if the document is addressed to an individual person or entity, if it is intended or reasonably anticipated to apply not just to a specific case but to any case involving the subject of the document, you should check YES.</td>
<td></td>
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<tr>
<td></td>
<td>c. If the document is issued to an individual person or entity and not anticipated to guide the conduct of others similarly situated, you should check NO.</td>
<td></td>
<td></td>
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<tr>
<td>2.</td>
<td>Is the document intended to have future effect?</td>
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<td></td>
<td>a. If the document is intended to affect behavior or actions going forward, you should check YES.</td>
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<td>b. If the document will not affect future behavior, you should check NO.</td>
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<td>3.</td>
<td>Is the document intended to have an effect on non-VA persons or entities?</td>
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<td></td>
<td>a. If the document is intended to guide or impact the behavior of non-VA persons or entities, you should check YES.</td>
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<td></td>
<td>b. If the document is issued only to VA or other Federal Government organizations, and not anticipated to have a substantial effect on the behavior of the public, you should check NO.</td>
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4. Does the document set forth a policy on a statutory, regulatory or technical issue or an interpretation of a statute or regulation?
   a. If the document sets forth a position or interpretation taken by VA or is intended to provide clarity regarding existing requirements under the law or VA policies, you should check YES.
   b. If the document affects the rights or obligations of the public, affects eligibility criteria or is treated as binding on the public, you should check YES.
   c. If the document merely communicates information or news updates about the agency, you should check NO.

5. If the responses to questions 1-4 are all “Yes,” the document is a guidance document unless it meets one of the following exceptions:
   a. Rules promulgated pursuant to notice and comment procedures
   b. Rules exempt from rulemaking requirements under the APA
   c. Decisions in formal adjudication in particular matters
   d. Internal legal advice and legal briefs and other court filings

6. If the document is determined to be a guidance document and meets the following definition it should be highlighted in BOLD as a significant guidance document when submitted to OEI in the template in Appendix B:

   “Significant guidance document” is defined by the EO as a guidance document that may reasonably be anticipated to:
   a. 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,
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<td>public health or safety or State, local, or tribal governments or communities;</td>
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<tr>
<td>b.</td>
<td>create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;</td>
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<tr>
<td>c.</td>
<td>materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or</td>
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<tr>
<td>d.</td>
<td>raise novel legal or policy issues arising out of legal mandates, the President’s priorities or the principles of EO 12866.</td>
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APPENDIX B – GUIDANCE DOCUMENT SUBMISSION TEMPLATE

This appendix outlines the process for submitting the final published guidance or “significant guidance document”. OMB has detailed the public information required for “guidance documents” which include:

a. A concise name for the guidance document.

b. The date on which the guidance document was issued.

c. A hyperlink to the guidance document.

d. The general topic addressed by the guidance document (e.g. pensions, health care)

e. A brief summary of the document’s content (1-2 sentences).

This information should be submitted to OEI at OEIDMO@va.gov in Microsoft Excel using the template below. This information will be published externally at VA Guidance Document website.

ORGANIZATION NAME:

<table>
<thead>
<tr>
<th>Document Name</th>
<th>Issue Date</th>
<th>Hyperlink</th>
<th>General Topic</th>
<th>Document Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(BOLD=SIGNIFICANT DOCUMENT as defined in Appendix A, step 6)</strong></td>
<td>Year-Month-Day</td>
<td>(Note: Document must be 508 compliant and include a screen tip IAW)</td>
<td>The general topic addressed by the guidance document (e.g. pensions, health care)</td>
<td>A brief summary of the document’s content (1-2 sentences)</td>
</tr>
</tbody>
</table>