



**U.S. Department of  
Transportation**

Office of the Secretary  
of Transportation

GENERAL COUNSEL

1200 New Jersey Avenue, S.E.  
Washington, D.C. 20590

December 20, 2018

**MEMORANDUM FOR SECRETARIAL OFFICERS AND HEADS OF  
OPERATING ADMINISTRATIONS**

**From:** Steven G. Bradbury  
General Counsel

**Subject:** Review and Clearance of Guidance Documents

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This memorandum and its attachments clarify and update the Department's process for the review and clearance of guidance documents. The procedures set forth herein are designed to ensure that DOT guidance remains lawful, reasonable, consistent with Administration policy, understandable, and readily accessible to the public. Subject to the qualifications and exemptions described below and in the accompanying Appendix A, these procedures apply to all guidance documents issued by all components of the Department after the date of this memorandum. This memorandum supplements and qualifies prior DOT directives on guidance practices.<sup>1</sup>

1. *Definition of "guidance document."* For purposes of this memorandum—

(a) The term "guidance document" includes any statement of agency policy or interpretation concerning a statute, regulation, or technical matter within the jurisdiction of the agency that is intended to have general applicability and future effect, but which is not intended to have the force or effect of law in its own right and is not otherwise required by statute to satisfy the rulemaking procedures specified in section 553 or section 556 of title 5, United States Code. The term is not confined to formal written documents; guidance may come in a variety of forms, including (but not limited to) letters, memoranda, circulars, bulletins,

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<sup>1</sup> See, e.g., DOT, "Guidance on Guidance" (Sept. 2007); Mem. for Heads of DOT Operating Administrations and Secretarial Officers from D.J. Gribbin, General Counsel, re Guidance on Guidance (Sept. 6, 2007).

advisories, and may include video, audio, and Web-based formats. *See* OMB Bulletin 07–02, “Agency Good Guidance Practices,” 72 Fed. Reg. 3,432, 3434, 3439 (Jan. 25, 2007) (“OMB’s Good Guidance Bulletin”).

(b) The term “guidance document” as used herein does not include legal advisory opinions for use within the Executive Branch; briefs and other positions taken in litigation or enforcement actions; speeches and individual presentations, editorials, media interviews, press materials, congressional testimony, or congressional correspondence; guidance pertaining to military or foreign affairs functions; grant solicitations and awards; contract solicitations and awards; warning letters; case or investigatory letters responding to complaints or other matters involving fact-specific determinations; purely internal agency policies or guidance directed solely to DOT employees or contractors or to other Federal agencies; or guidance pertaining to the use, operation, or control of a government facility or property.<sup>2</sup>

2. *Review and clearance by Chief Counsels and the Office of the General Counsel.* All DOT guidance documents as defined in paragraph 1 require review and clearance in accordance with this memorandum.

(a) Guidance proposed to be issued by an operating administration (OA) of the Department must be reviewed and cleared by the OA’s Office of Chief Counsel. In addition, as provided below, some OA guidance documents will require review and clearance by the Office of the General Counsel (OGC).

(b) Guidance proposed to be issued by a component of the Office of the Secretary (OST) must be reviewed and cleared by OGC.

3. *Requirements for clearance.* DOT’s review and clearance of guidance shall ensure that each guidance document proposed to be issued by an OA or component of OST satisfies the following requirements:

(a) The guidance document complies with all relevant statutes and regulations (including any statutory deadlines for agency action);

(b) The guidance document identifies or includes (i) the term “guidance” or its functional equivalent; (ii) the issuing OA or component of OST, (iii) a unique identifier, including, at a minimum, the date of issuance and title of the document

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<sup>2</sup> *See* OMB’s Good Guidance Bulletin § I(4)(b), 72 Fed. Reg. at 3439.

and its Z-RIN, if applicable, (iv) the activity or entities to which the guidance applies, (v) citations to applicable statutes and regulations, and (vi) a statement noting whether the guidance is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance<sup>3</sup>;

(c) The guidance document avoids using mandatory language, such as “shall,” “must,” “required,” or “requirement,” unless the language is describing an established statutory or regulatory requirement or is addressed to DOT staff and will not foreclose the Department’s consideration of positions advanced by affected private parties<sup>4</sup>;

(d) The guidance document is written in plain and understandable English; and

(e) If it purports to describe, approve, or recommend specific conduct or actions by regulated entities that go beyond what is set forth in the text of relevant statutes and regulations, or if it is determined to be a “significant guidance document” within the meaning of paragraph 7 of this memorandum, the guidance document includes clear and prominent statements declaring (i) that the guidance is not legally binding in its own right and will not be relied upon by the Department as a separate basis for affirmative enforcement action or other administrative penalty, and (ii) that conformity with the guidance document (as distinct from existing statutes and regulations) is voluntary only, and nonconformity will not affect rights and obligations under existing statutes and regulations.<sup>5</sup>

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<sup>3</sup> See OMB’s Good Guidance Bulletin, § II(2)(a)-(g), 72 Fed. Reg. at 3440 (OMB’s required standard elements of “significant” guidance documents). As set forth in paragraph 3 of this memorandum, it is DOT’s policy to require these standard elements for all DOT guidance documents to which this memorandum applies, not just those identified as “significant” for OMB purposes.

<sup>4</sup> See OMB’s Good Guidance Bulletin, § II(2)(h), 72 Fed. Reg. at 3440. See footnote 3 above.

<sup>5</sup> See Mem. for All Components from the Attorney General, re Prohibition on Improper Guidance Documents, at 2 (Nov. 16, 2017). Because guidance documents are not regulations promulgated in accordance with the requirements of the Administrative Procedure Act, they cannot set forth binding obligations that limit the legal rights or augment the legal duties of parties outside the Executive Branch. Consistent with that general principle, the Department of Justice (DOJ) has advised that DOJ’s litigators will not use noncompliance with any Executive Branch department or agency’s guidance document as a basis for proving violations of applicable law in affirmative civil enforcement cases. See Mem. for Heads of Civil Litigating Components and U.S. Attorneys from the Associate Attorney General, re Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (Jan. 25, 2018).

4. *Public access to guidance documents.* Each OA and component of OST responsible for issuing guidance documents shall—

(a) Maintain on its DOT Web site an electronic list identifying each of its guidance documents by a unique identifier, including, at a minimum, the document's title and date of issuance or date of revision and its Z-RIN, if applicable;

(b) Ensure that all its guidance documents are readily accessible to the public in electronic form, including by hyperlinks from the current list maintained on the DOT Web site;

(c) Maintain and advertise on its Web site a means for the public to comment electronically on any guidance documents that are subject to the notice-and-comment procedures described in paragraph 8 of this memorandum and to submit requests electronically for issuance, reconsideration, modification, or rescission of guidance documents; and

(d) Designate an office to receive and address complaints from the public that the OA or OST component is not following the requirements of OMB's Good Guidance Bulletin or is improperly treating a guidance document as a binding requirement.<sup>6</sup>

5. *Good faith cost estimates.* Even though not legally binding, some agency guidance may result in a substantial economic impact. For example, the issuance of agency guidance may induce private parties to alter their conduct to conform to recommended standards or practices, thereby incurring costs beyond the costs of complying with existing statutes and regulations. While it may be difficult to predict with precision the economic impact of voluntary guidance, whenever the OA or component of OST responsible for proposed guidance has reason to believe that issuance of the guidance may result in substantial costs (or cost savings) for parties outside the Department or may otherwise have a substantial cost impact on the U.S. economy or an important sector of the economy, the proposing OA or component of OST shall, to the extent practicable, make a good faith effort to estimate the likely economic cost impact of the guidance document. Wherever possible, this good faith estimate should specifically include an approximation of

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<sup>6</sup> See *id.* § III, 72 Fed. Reg. at 3440 (OMB requirements of public access and feedback for significant guidance documents). It is DOT's policy to make all guidance documents readily accessible to the public, not just "significant" guidance documents.

the total costs (or cost reductions) likely to be incurred (or realized) by parties outside the Department in altering their conduct to conform to the proposed guidance—for example, based on the estimated average per-entity cost of conformity multiplied by the estimated number of affected entities.

6. *Approval procedures for guidance documents identified as “significant” or “otherwise of importance to the Department’s interests.”*

(a) For guidance proposed to be issued by an OA, if there is a reasonable possibility the guidance may be considered “significant” or “otherwise of importance to the Department’s interests” within the meaning of paragraph 7 or if the OA is uncertain whether the guidance may qualify as such, the OA should email a copy of the proposed guidance document (or a summary of it) to OGC’s Office of Regulation (C-50) for review and further direction before issuance. Unless exempt under Appendix A to this memorandum, each proposed DOT guidance document determined to be significant or otherwise of importance to the Department’s interests must be approved by the Secretary before issuance. In such instances, C-50 will request that the proposing OA or component of OST obtain a Z-RIN for departmental review and clearance through the Regulatory Management System (RMS), and OGC will coordinate submission of the proposed guidance document to the Secretary for approval.

(b) As with significant regulations, OGC will submit significant DOT guidance documents to OMB for coordinated review. In addition, OGC may determine that it is appropriate to coordinate with OMB in the review of guidance documents that are otherwise of importance to the Department’s interests.

(c) If the guidance document is determined not to be either significant or otherwise of importance to the Department’s interests within the meaning of paragraph 7, C-50 will advise the proposing OA or component of OST to proceed with issuance of the guidance either through the Controlled Correspondence Management System (CCMS) (for *Federal Register* notices) or through its standard clearance process. For each guidance document coordinated through CCMS, the issuing OA or component of OST should include a statement in the action memorandum indicating that the guidance document has been reviewed and cleared in accordance with this process.

7. *Definitions of “significant guidance document” and guidance documents that are “otherwise of importance to the Department’s interests.”* For purposes of this memorandum—

(a) The term “significant guidance document” means a guidance document that will be disseminated to regulated entities or the general public and that may reasonably be anticipated (i) to lead to annual costs in the U.S. of \$100 million or more (without regard to estimated benefits) or adversely affect in a material way the U.S. economy or an important sector of the U.S. economy; (ii) to create serious inconsistency or otherwise interfere with the actions of another Federal agency; (iii) to alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) to raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866, as further amended.<sup>7</sup>

(b) The term “significant guidance document” does not include the categories of documents excluded by paragraph 1(b) of this memorandum or any other category of guidance documents exempted in writing by OGC in consultation with OMB’s Office of Information and Regulatory Affairs (OIRA).<sup>8</sup>

(c) Even if not “significant,” a guidance document will be considered “otherwise of importance to the Department’s interests” within the meaning of this paragraph if it may reasonably be anticipated (i) to relate to a major program, policy, or activity of the Department or a high-profile issue pending for decision before the Department; (ii) to involve one of the Secretary’s top policy priorities; (iii) to garner significant press or congressional attention; or (iv) to raise significant questions or concerns from constituencies of importance to the Department, such as Committees of Congress, States or Indian tribes, the White House or other departments of the Executive Branch, courts, consumer or public interest groups, or leading representatives of industry.

8. *Notice-and-comment procedures.*

(a) Except as provided in subparagraph (b) of this paragraph, all proposed DOT guidance documents determined to be a “significant guidance document” within the meaning of paragraph 7 of this memorandum shall be subject to the following informal notice-and-comment procedures. The issuing OA or component of OST

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<sup>7</sup> See *id.* § I(4), 72 Fed. Reg. at 3439 (OMB definition of “significant guidance document”).

<sup>8</sup> See *id.* § I(4)(b), 72 Fed. Reg. at 3439.

shall publish a notice in the *Federal Register* announcing that a draft of the proposed guidance document is publicly available, shall post the draft guidance document on its Web site, shall invite public comment on the draft document, and, if substantive or otherwise notable and relevant comments are received, shall prepare and post responses to such public comments, as appropriate, on its Web site, either before or when the guidance document is finalized and issued.<sup>9</sup>

(b) The requirements of subparagraph (a) will not apply to any significant guidance document or categories of significant guidance documents for which OGC determines, in consultation with OIRA, the proposing OA or component of OST, and the Secretary, that such notice-and-comment procedures are not feasible or appropriate.<sup>10</sup> Unless OGC advises otherwise in writing, the categories of guidance documents listed in Appendix A will be exempt from the requirements of subparagraph (a).

(c) Where appropriate, OGC or the proposing OA or component of OST may recommend to the Secretary that a particular guidance document that is otherwise of importance to the Department's interests shall also be subject to the informal notice-and-comment procedures described in subparagraph (a).

9. *Exigent circumstances.* In emergency situations or when the issuing OA or component of OST is required by statutory deadline or court order to act more quickly than normal review procedures allow, the issuing OA or component of OST shall coordinate with OGC to notify OIRA as soon as possible and, to the extent practicable, shall comply with the requirements of this memorandum at the earliest opportunity. Wherever practicable, the issuing OA or component of OST should schedule its proceedings to permit sufficient time to comply with the procedures set forth in this memorandum.<sup>11</sup>

10. *Reports to Congress.* Unless otherwise determined in writing by OGC, it is the policy of the Department that upon issuing a guidance document determined to

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<sup>9</sup> See *id.* § IV, 72 Fed. Reg. at 3440 (notice-and-comment procedures required by OMB for “economically significant” guidance documents). OMB defines a guidance document as “economically significant” if it “may reasonably be anticipated to lead to an annual effect on the economy of \$100 million or more [in costs] or adversely affect in a material way the economy or a sector of the economy, except that economically significant guidance documents do not include guidance documents on Federal expenditures and receipts.” *Id.* § 1(5), 72 Fed. Reg. at 3439. As set forth in paragraph 8 of this memorandum, it is DOT’s policy to require the informal notice-and-comment procedures described in paragraph 8(a) for all DOT guidance documents determined to be “significant” within the meaning of paragraph 7, subject to the exemptions and qualifications described herein.

<sup>10</sup> See *id.* § IV(2), 72 Fed. Reg. at 3440 (exemptions from OMB’s notice-and-comment requirements).

<sup>11</sup> See *id.* § V, 72 Fed. Reg. at 3440.

be “significant” within the meaning of paragraph 7, the issuing OA or component of OST will submit a report to Congress in accordance with the procedures described in section 801 of title 5, United States Code (the “Congressional Review Act”).

11. *No judicial review or enforceable rights.* This memorandum is intended to improve the internal management of the Department of Transportation. As such, it is for the use of DOT personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

The accompanying flowchart provides an abbreviated illustration of the procedures set forth in this memorandum. Any questions concerning the implementation of this memorandum should be directed to the Assistant General Counsel for Regulation (Jonathan Moss) or the C-50 attorney assigned to your regulatory actions.



## APPENDIX A

### **Guidance Documents Generally Exempt from Secretarial Approval**

Unless they present novel issues, significant risks, interagency considerations, unusual circumstances, or other reasons that they should be communicated in advance to the Secretary, the categories of guidance documents identified below are generally eligible for promulgation without prior approval of the Secretary. However, before deciding to issue the guidance on that basis, the responsible modal or OST decision makers must, in each instance, ensure that there are no considerations involved that would warrant further review by the Secretary.

#### *A. Department-Wide Exemptions for Guidance Documents*

- a. Safety Advisories – These documents call attention to potential safety issues for relevant operators, but do not require any specific action by regulated entities.
- b. General information announcements – Informational alerts and other purely informational or factual pronouncements that do not set or announce policy.
- c. Waiver/Exemption/Special Permit or Authorization Requests – Through established procedures for granting waivers, exemptions, and special permits or authorizations, components of DOT may receive requests for such actions, may publish the requests that they receive and seek comment on them, and may issue and publish decisions on the requests. This process allows for individualized regulatory compliance decisions and innovative variations in the application of regulatory requirements where and as permitted by existing statutes and regulations.

#### *B. Unique Operating Administration Exemptions*

- a. FAA
  - i. Operational Advisories – Operational safety advisories, notices to airmen (NOTAMs), and similar safety-related announcements

provide information on aviation safety matters and specify safe operation of aircraft in particular circumstances or in and around particular locations.

- ii. Handbooks and Manuals – FAA Handbooks and Manuals provide information to pilots, aircraft owners and operators, and aviation professionals on best practices in aviation and aircraft operation and maintenance.
- iii. Enforcement Directives and Notices – FAA enforcement directives and notices are instructions addressed to FAA’s enforcement staff describing specific policies and procedures for overseeing compliance with the statutes and regulations enforced by FAA. While these documents are directed internally to FAA employees only, they often get disclosed externally and are circulated widely in the aviation industry.

b. FMCSA

Electronic Field Operations Training Manual – FMCSA’s e-FOTM (and its non-electronic predecessor, the FOTM) is used to provide direction and instructions to FMCSA field employees on how and when to perform safety investigations of motor carriers, including, among other things, how to schedule on-site visits, when and who to interview, what questions to ask, what documents to review, and when to conduct inspections of parked vehicles.

c. FRA

- i. Notices of Update to State Rail Planning Guidance – Statutorily required notice that provides information to States.
- ii. Notices of FRA-Approved Test Program – The Administrator may temporarily suspend compliance with a regulation for purposes of conducting a test program designed to evaluate new technology or operational approach or in furtherance of proposed rulemaking. We basically handle these through the waiver process. Must have

a hearing when required by statute and publish notice in the *Federal Register* for public comment. And issue suspension explaining the test program if granted.

- iii. Notices of Informal Safety Inquiries – These notices tell the public that FRA is conducting an informal safety inquiry, which is often accompanied by a notice of an upcoming technical conference regarding the safety inquiry. These types of inquiries are typically regarding a new or different technology or practice than what is currently used or required by regulation, to aid FRA in determining the safety and economic impacts of the new or different technology or practice.

d. MARAD

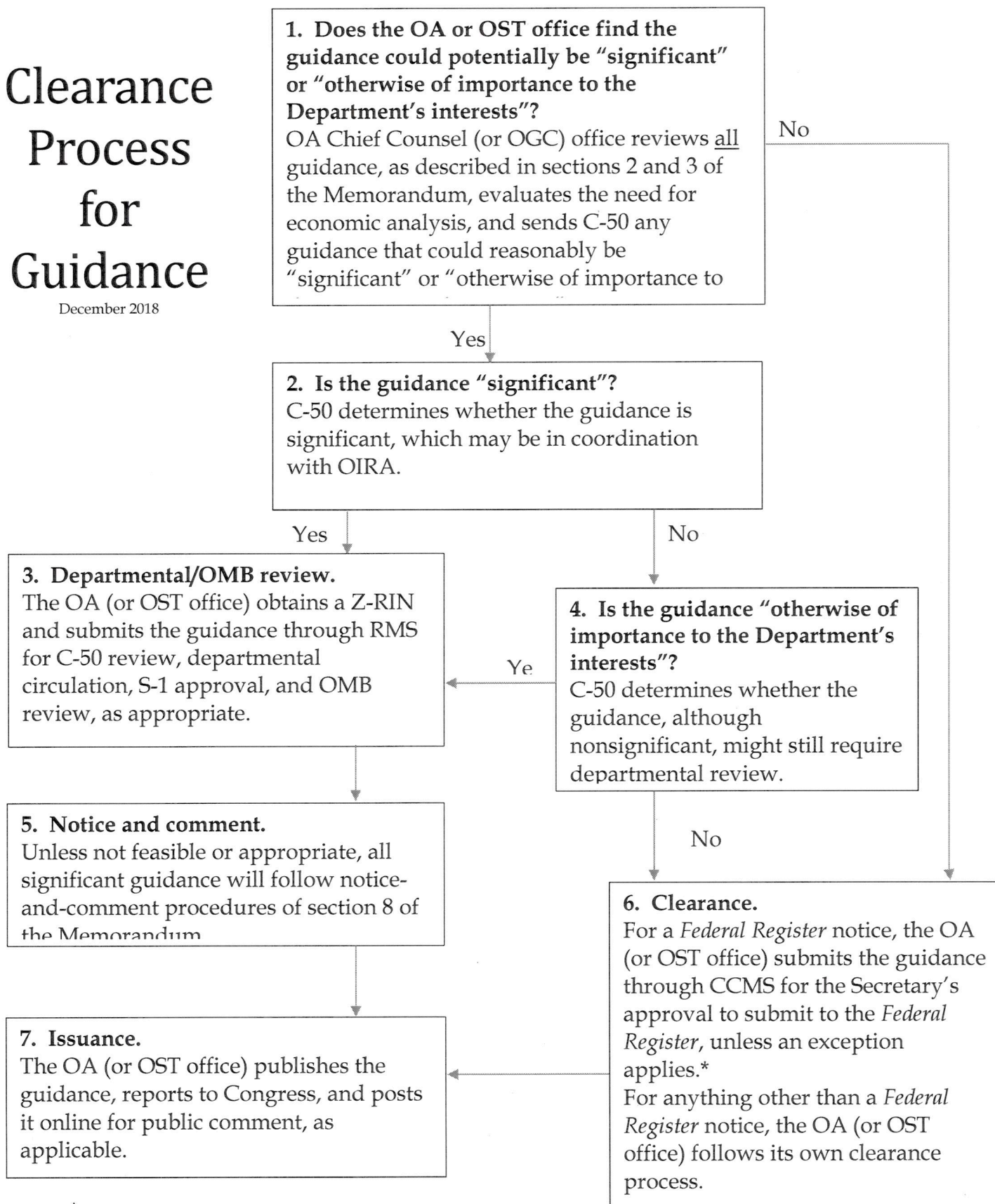
- i. Small Vessel Passenger Waivers – MARAD routinely publishes notices to identify requests made by small vessel owners for administrative waivers of coastwise trade laws in accordance with 46 CFR Part 388. These waivers are limited to vessels carrying no more than 12 passengers for hire and are usually related to small businesses such as sailing and fishing charters or small vessel rental.
- ii. Aquaculture Waivers – MARAD issues waivers allowing documented vessels with only registry endorsements or foreign flag vessels to be used in operations that treat aquaculture fish or protect aquaculture fish from disease, parasitic infestation, or other threats to their health when suitable vessels of the United States are not available that could perform those services. In order to survey the industry and determine whether a U.S.-flag vessel operator is available to carry out the required operation, MARAD publishes the waiver requests in the *Federal Register*. These waivers have been limited to the aquaculture operations of a single private company off the coast of Maine and are usually requested annually. In the past, no U.S.-flag vessels have been available and

the waiver has been granted in accordance with 46 U.S.C. 12102(d)(1) and 46 CFR 388.

- iii. Voluntary Intermodal Sealift Agreement (VISA) Open Season Announcements – These notices invite interested, qualified U.S.-flag vessel operators that are not currently enrolled in the VISA program to apply. Carriers enrolled in the VISA program provide DOD with assured access to their services during contingencies. In return for their VISA commitment, DOD gives VISA participants priority for carriage of peacetime cargos. The federal government does not provide any other financial inducements, or preferences to VISA participants. The Open Season notice is published once a year to ensure the availability of services for the following fiscal year.
- iv. Maritime Security Program Application Period Announcements – In the event that one or more Operating Agreements of the number limited to sixty become available in the Maritime Security Program (MSP), it is a routine matter to publish in the FR a notice informing interested parties that eligible vessels may apply. The MSP establishes a fleet of active, commercially viable, privately owned vessels to meet national defense and other security requirements and to maintain a United States presence in international commercial shipping. Requests for applications provide, among other things, application criteria and a deadline for submitting applications for potential vessel enrollment in the MSP. Currently, there are 60 ships in the MSP; MARAD would not publish a notice unless and until an operator pulled out of an existing Operating Agreement.
- v. Deepwater Port Notifications – During a deepwater port license application process, MARAD routinely issues notices announcing applications received, environmental actions, and actions on the applications.

# Clearance Process for Guidance

December 2018



\* See Appendix A

