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To: Clients and Friends

From: David F. Dulock

Subject: HUD Publishes Regulations Establishing Processes and Procedures for Issuing Guidance Documents

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In the November 10, 2020, issue of the Federal Register (85 FR 71537, [click here](#)) HUD published an interim final rule that creates a new part 11 in title 24 of the Code of Federal Regulations that sets forth policy and procedures for issuing guidance documents that generally apply to all HUD programs.

The interim final rule is effective on December 10, 2020. However, interested persons may submit comments on the interim final rule by either of the following methods:

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410-0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov.

Comments must refer to Docket No. FR-6192-I-01 and the title of the rule “Implementing Executive Order 13891; Promoting the Rule of Law Through Improved Agency Guidance Documents.” Comments must be received by HUD on or before January 11, 2021,

New 24 CFR Part 11 comprises six sections, which are reprinted below:

PART 11—GUIDANCE DOCUMENTS: POLICY AND PROCEDURES

§11.1 Policy.

(a) *Non-binding effect of guidance documents.* The Department of Housing and Urban Development issues guidance documents that help explain its programs and policies or communicate other important information to members of the public. These statements of general applicability include interpreting existing law and regulation, clarifying existing program obligations, or otherwise providing information that assists members of the public subject to HUD’s statutes and regulations comply with statutory and regulatory reporting requirements. The Department’s policy is that guidance documents issued by HUD shall be treated as non-binding and will not impose on members of the public new requirements that have the force and effect of law, except as authorized by statute or regulation or incorporated into a contract. Consistent with this policy, each of the Department’s guidance documents will clearly state that it does not have the force and effect of law, except as authorized by law or as incorporated into a contract.

(6 pages)

(b) *Public participation in development of significant guidance.* The Department recognizes the benefit of providing members of the public the opportunity to participate in the development of significant guidance documents, as defined in §11.2(d). Public participation can provide the Department more comprehensive data, facts, and information on which to base its decisions. It is, therefore, the policy of the Department that its significant guidance documents will afford the public not less than thirty days for the submission of comments, except when the Department finds for good cause that notice and public comment are impracticable, unnecessary, or contrary to the public interest (and incorporates such finding and a brief statement of the reasons into the guidance document). The Department may employ various methods of providing public participation, including publishing a request for information or notice in the **Federal Register** inviting public comments or publishing a request on its website.

(c) *Single searchable website; procedure to request withdrawal.* The Department is committed to facilitating access to guidance documents by regulated entities and the public. It is, therefore, the policy of the Department to make available a comprehensive set of guidance documents on a single, searchable, indexed website that contains or links to all guidance documents currently in effect. Guidance documents not posted on the Department's guidance website shall no longer have effect and shall not be cited except to establish historical fact. In addition, the Department establishes a procedure, as provided in §11.6, for the public to request the withdrawal or modification of a particular guidance document.

§11.2 Definitions.

(a) *Guidance document* means a statement of general applicability, designed to shape or 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. HUD guidance documents include, but are not limited to, handbooks, policy statements, policy directives, notices of general applicability, compliance documents, bulletins, documents addressing frequently asked questions, and other direct notices issued by HUD program offices, but do not include:

(1) Rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code (as codified at 24 CFR part 10), or similar statutory provisions;

(2) Rules exempt from rulemaking requirements under section 553(a) of title 5, United States Code;

(3) Rules of agency organization, procedure, or practice, provided such rules do not alter substantive obligations for parties outside the Department;

(4) Decisions of agency adjudications under section 554 of title 5, United States Code, or similar statutory provisions;

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

(6) Internal executive branch legal advice or legal opinions addressed to executive branch officials, or directed to particular parties about circumstance-specific questions;

(7) Legal briefs, charges, and other court filings intended to persuade a court, or administrative or arbitral authority;

(8) Notices regarding particular locations or facilities;

(9) Research papers and studies;

(10) Notices of Funding Availability, and correspondence and communications with individual persons or entities not intended to set general policy, including grant agreements with individual program participants and other communications regarding program administration, enforcement actions, and notices of violation, or congressional correspondence.

(b) *Guidance portal* means the single, publicly accessible, searchable website where HUD posts or links to all guidance documents that are in effect.

(c) *OIRA* means the Office of Information and Regulatory Affairs at the Office of Management and Budget.

(d) *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, "Regulatory Planning and Review."

§11.3 Applicability.

(a) This part governs HUD's issuance of guidance documents.

(b) HUD and the Administrator of OIRA may jointly determine that a guidance document is exempt from some or all of the requirements of this part for exigency, safety, health, or other compelling cause.

(c) This part is not applicable to any guidance document that is authorized by law or contemplated by or incorporated into a contract, including:

(1) Handbooks and mortgagee letters issued by the Federal Housing Administration; and

(2) All Participant Memoranda and Multiclass Participant Memoranda issued by the Government National Mortgage Association.

§11.4 Published guidance documents.

(a) HUD makes available to the public a comprehensive set of guidance documents through a guidance portal that can be accessed from the Department's public website. Unless exempt pursuant to paragraph (c) of §11.3 or a waiver is granted under paragraph (c) of this section, HUD will publish or link to each guidance document that is in effect on its guidance portal.

(b) Each guidance document issued pursuant to this part shall:

- (1) Be in a user-searchable, machine readable format;
- (2) Provide the document title, and identify what, if any, previous document the new guidance document revises or replaces;
- (3) Identify the issuing office or division;
- (4) Indicate the date of issuance and the unique document identification number;
- (5) Identify the applicable legal authority or authorities for issuance of the guidance, and provide a brief summary of the subject matter the document covers;
- (6) Describe the document contents as guidance, pursuant to §11.2(a);
- (7) Identify the activities to which and the persons to whom the document applies;
- (8) State that the guidance document, if meeting the definition thereof, lacks the force and effect of binding law; and
- (9) For significant guidance documents, comply with the applicable requirement for regulations or rules including significant regulatory actions, set forth in Executive Orders 12866, 13563 (Improving Regulation and Regulatory Review), 13609 (Promoting International Regulatory Cooperation), 13771 (Reducing Regulation and Controlling Regulatory Costs), and 13777 (Enforcing the Regulatory Reform Agenda).

(c) A senior policy official may request a waiver of the requirement to post a guidance document or a category of guidance documents. Such a request should be submitted through OIRA for review. A request for a waiver should clearly explain the purpose of the document(s) and why making the document(s) publicly available on an agency website would cause specific harm or otherwise interfere with the agency's mission.

§11.6 Removal or modification of documents.

(a) The Department may rescind, remove from its public website or modify published guidance documents on its own initiative, or in the response to the petition of any interested person.

(b) *Public petition.* Any interested person may petition the applicable program office head for the modification or withdrawal of a guidance document. Each petition shall:

- (1) Be directed to the applicable program office head with a copy to the Office of General Counsel, Office of Legislation and Regulations, Department of Housing and Urban Development, Washington, DC 20410;
- (2) Identify with specificity the guidance document sought to be withdrawn or modified and, if applicable, set forth the text or substance of the interim modification;
- (3) Explain the interest of the petitioner in the action sought; and
- (4) Set forth any data and arguments available to the petitioner in support of the action sought.

(c) The Department shall respond to all petitions for the removal or modification of guidance documents no later than 90 days after receipt of the petitioner's request unless the Secretary makes an extension for good cause or consideration is deferred pursuant to paragraph (e) of this section.

(d) The Department will post a copy of requests for withdrawal or modification and responses on its website.

(e) The Department will consolidate multiple requests for the same guidance document and need not consider a single guidance document more than once each calendar year.

(f) If the program office head or the person with delegated authority finds that the petition contains substantial justification, the guidance document will be withdrawn or, consistent with the requirements of this part, modified as appropriate. If the program office head or person with delegated authority finds that the petition does not contain substantial justification, or based on other considerations such official deems relevant, the petition will be denied by letter or other notice, with a brief statement of the ground for denial.

§11.8 Issuance of significant guidance documents.

(a) *Determination of significance.* Consistent with E.O. 12866 and E.O. 13891, HUD will make an initial determination of significance and OIRA, with the advice of the Department, will make a final determination.

(b) *Notice of a significant guidance document.* Except as provided by paragraph (d) of this section, HUD will afford the public not less than thirty days for the submission of comments prior to issuing a significant guidance document and will publicly respond to major categories of, or the most significant, concerns raised in comments. The Department may employ various methods of providing for public participation in the development of a significant guidance documents [*sic*] including publishing a notice in the **Federal Register** announcing the availability of a significant guidance document which includes:

(1) The substance or terms of the interim guidance or a description of the subject matter and issues involved;

(2) Direction on how to access the draft guidance document available on the Department's website; and

(3) The citation to the statutory provision or regulation (in Code of Federal Regulations format) to which the guidance document applies or which it interprets.

(c) Each draft guidance document announced in the **Federal Register** shall be available on the HUD website, concurrent with the publication of public notice and comment period.

(d) *Exception.* The Department may omit the public participation requirement of this section if it for good cause determines that public notice and comment is impracticable, unnecessary, or contrary to the public interest. The Department shall incorporate a brief statement of the reasons for its determination to omit public participation into its guidance document.

(e) *Review and approval.* (1) Unless excepted under paragraph (c) [*sic*] of this section, the issuance of a significant guidance document will follow review by OIRA under Executive Order 12866, which may run in whole or part, concurrently with the public comment process in paragraph (a) [*sic*] or [*sic*] this section.

(2) Approval of significant guidance documents shall be by signature of the Secretary, Deputy Secretary, General Counsel, or Assistant Secretary or equivalent, or by an official who is serving in an acting capacity in any of the foregoing positions.

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