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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### 24 CFR Part 11

[Docket No. FR-6192-I-01]

RIN 2501-AD93

### Implementing Executive Order 13891; Promoting the Rule of Law Through Improved Agency Guidance Documents

**AGENCY:** Office of General Counsel, HUD.

**ACTION:** Interim final rule.

**SUMMARY:** This interim rule implements Executive Order (E.O.) 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents.” This E.O. requires Federal agencies to publish regulations that establish processes and procedures for issuing guidance documents. The interim rule would create a new part 11 in title 24 of the Code of Federal Regulations (CFR) that outlines HUD policy on guidance documents and how HUD designates guidance documents. The interim rule would also establish a procedure by which the public may petition HUD for the withdrawal or modification of guidance documents, and the process for the public to make comments on certain significant guidance documents.

**DATES:** Effective Date: **[Insert date 30 days from the date of publication in the Federal Register].**

Comment Due Date: **[Insert date 60 days from the date of publication in the Federal Register].**

**ADDRESSES:** Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500. All submissions

must refer to the above docket number and title. There are two methods for submitting public comments.

**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](http://www.regulations.gov). HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the [www.regulations.gov](http://www.regulations.gov) website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

*Note:* To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

*No Facsimile Comments.* Facsimile (fax) comments are not acceptable.

**Public Inspection of Public Comments.** All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m., weekdays, at the above address. Due to security measures at the HUD Headquarters building, an appointment to review the public comments must be scheduled in advance by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the

Federal Relay Service at 800-877-8339 (this is a toll-free number). Copies of all comments submitted are available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Aaron Santa Anna, Associate General Counsel, Office of Legislation and Regulation, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10282, Washington, D.C. 20410; telephone number 202-708-1793 (this is not a toll-free number). Individuals with hearing or speech impediments may access this number via TTY by calling the Federal Relay Service during working hours at 1-800-877-8339 (this is a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. The Purpose of HUD Guidance Documents*

The Department of Housing and Urban Development issues guidance documents that are statements of general applicability and future effect that set forth policy on statutory, regulatory, or technical issues or interpret statute or regulation. HUD guidance generally clarifies existing regulatory or statutory requirements that pertain to HUD programs or operations. HUD's guidance documents do not have the force and effect of law, except when restating statutory or regulatory authority or as incorporated into a contract. HUD guidance documents are not used to impose new requirements on the public except as expressly authorized by law.<sup>1</sup>

*B. Executive Order 13891 on Promoting the Rule of Law Through Improved Agency Guidance Documents*

On October 9, 2019 (84 FR 55235), the President issued E.O. 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents." E.O. 13891 recognizes that the

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<sup>1</sup> See, e.g., Reverse Mortgage Stabilization Act of 2013 (Pub. L. 113-29, approved August 9, 2013) and the Housing and Economic Recovery Act of 2008 (Pub. L. 110-289, approved July 30, 2008).

Administrative Procedure Act (5 U.S.C. 551-559) (APA) exempts from the notice and comment requirements for rule making “interpretive rules, general statements of policy, or rules of agency organization, procedure or practice,” except when required by statute except when it is required by statute. 5 U.S.C. 553(b). E.O. 13891 provides, however, that agencies have sometimes used this authority to regulate the public without following the notice and comment rulemaking procedures of the APA. As a result, E.O. 13891 reaffirms Executive Branch policy that, consistent with applicable law and except as authorized by law or incorporated into a contract, Federal agencies treat guidance documents as non-binding both in law and practice.

To further this policy, E.O. 13891 requires that each Federal agency take certain actions to ensure the transparent availability and use of guidance documents; to treat guidance documents as non-binding in law and practice, to the extent consistent with applicable law; and to take public input into account when appropriate in formulating or modifying significant guidance documents. Pursuant to section 6 of E.O. 13891, the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA) on October 31, 2019, issued memorandum M-20-02 entitled, “Guidance Implementing Executive Order 13891, Titled ‘Promoting the Rule of Law Through Improved Agency Guidance Documents’” (OMB Guidance)<sup>2</sup> instructing Federal agencies regarding compliance with requirements of E.O. 13891. Among other things, E.O. 13891 requires that Federal agencies make their guidance documents available at a single, searchable, indexed website, and that the website include a statement that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract. Federal agencies must also review their guidance documents,

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<sup>2</sup> OMB memorandum M-20-02 of October 31, 2019, is available at <https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf>.

rescind guidance documents that it determines should no longer be in effect, and inform the public of these actions by *Federal Register* notice.

Of significance to this interim rule, E.O. 13891 requires that each Federal agency codify procedures for issuing guidance documents by amending an existing regulation or adopting a new regulation, pursuant to the OMB Guidance. E.O. 13891 and the OMB Guidance require that the agency regulation on guidance incorporate specific elements. These elements include:

- Requiring that each guidance document clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract;
- Establishing procedures for the public to petition for withdrawal or modification of a particular guidance document; and
- Establishing procedures for the issuance of significant guidance documents unless the OIRA Administrator and the agency agree that exigency, safety, health, or other compelling cause warrants an exemption from some or all of requirements. These procedures include: affording the public not less than 30 days for the submission of comments, unless the agency for good cause finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest; requiring the approval of an agency head or component head appointed by the President; and requiring OIRA review of the guidance under E.O. 12866 (Regulatory Planning and Review).

Significant guidance documents must also comply with the applicable requirements 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).

## **II. This Interim Rule**

This interim rule implements E.O. 13891 by establishing a new part 11 in title 24, CFR, that sets forth the Department's policy and procedures for issuing guidance documents. Part 11 would be codified in Subtitle A of HUD's title of the CFR and establish requirements that generally apply to all HUD programs. It supplements part 10 in the same title which establishes the policy and procedures for promulgating regulations.

Section 11.1 states HUD's policy regarding the issuance of guidance documents and reflects the requirements of E.O. 13891. HUD's policy regarding the issuance of guidance documents is based on three core principles. First, as reflected in § 11.1(a), HUD provides that guidance documents will 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 law or regulation, or as incorporated into a contract. Consistent with this principle, this paragraph provides that 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.

Second, § 11.1(b) reflects the principle of seeking public participation in the development of significant guidance documents. Toward this goal, paragraph (b) of this section provides that HUD will seek public participation in the development of significant guidance documents and 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. HUD may use various methods to obtain public participation including by publishing a notice in the *Federal Register* announcing the availability of significant guidance documents for comment.

Finally, § 11.1(c) reflects the principle that agency guidance should be transparent and made readily available to the public. Toward this end, paragraph (c) of this section provides that HUD will make available guidance documents on a single, searchable, indexed public website. Section 11.1(c) makes clear that 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. Finally, § 11.1(c) provides that in furtherance of its policy of transparency and encouraging public participation, the Department is establishing a procedure at § 11.6 for the public to request the withdrawal or modification of a particular guidance document.

Section 11.2 of the interim rule provides definitions of "guidance document," "guidance portal," "OIRA," and "significant guidance document." "Guidance document" is defined as 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. Consistent with E.O. 13891, the definition lists several types of documents that are not guidance documents. These include rules promulgated under section 553 of the APA (5 U.S.C. 553)(APA), rules exempt from rulemaking requirements under the APA, notices of funding availability, grant agreements, cooperative agreements, or contracts entered into with program participants in accordance with statutory and regulatory requirements, agency adjudicatory decisions, internal guidance that is not intended to have a substantial effect on regulated parties, legal opinions, legal briefs, and court filings, notices regarding particular locations and facilities, research papers and studies, and correspondence and communications with individual persons or entities not intended to set policy, including communications regarding program administration, enforcement actions, and notices of violation, or Congressional correspondence. These issuances are not statements of "general

applicability, intended to have future effect on the behavior of regulated parties,” as stated in the E.O. Rather, these issuances only affect single entities based on their specific circumstances. As such, they are not within the definition of “guidance document” in the E.O.

“Guidance portal” is defined at § 11.2(b) as the single, publicly accessible, searchable website where HUD posts or links to all guidance documents that are in effect. “OIRA” is defined at § 11.2(c) to mean the Office of Information and Regulatory Affairs at OMB.

“Significant guidance document,” is defined at § 11.2(d), and reflects section 3(f) of E.O. 12866. Specifically, significant guidance documents mean guidance documents that have 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; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in E.O. 12866. Consistent with E.O. 12866 and E.O. 13891, HUD will make an initial determination of whether a guidance document is significant and OIRA will make a final determination.

Section 11.3 describes the applicability of part 11. It provides that part 11 applies to the issuance of guidance documents covered by E.O. 13891. It also provides that HUD and OIRA may jointly determine that a guidance document is exempt from some or all of the requirements of this part due to exigency, safety, health, or other compelling cause. It should be noted that there are cases where specific aspects of part 11 may not apply. For example, this rule contains

the same good cause exemption from notice and comment as exists for regulations under section 553(b) of the Administrative Procedure Act.

Section 11.3(c) also reflects the exemption provided by E.O. 13891 for guidance documents “as authorized by law<sup>[3]</sup> or as incorporated into a contract.” For example, this part does not apply to handbooks and mortgagee letters issued by the Federal Housing Administration (FHA). HUD’s FHA program provides mortgage insurance on loans made by FHA-approved lenders. Participants in HUD’s insured mortgage programs have a contractual relationship with HUD. HUD has no obligation to insure any mortgage, and so can set the terms and conditions under which a mortgage is insured. A mortgagee likewise has no obligation to insure a mortgage with FHA; a mortgagee who chooses to accept the conditions and participate in the mortgage insurance program assents to these terms and conditions. In addition, the participation of mortgagee’s in FHA programs is governed by statutes such as the National Housing Act and HUD’s regulations. Mortgagee letters either reflect these statutes and regulations or are essentially contractual in nature.

The exception for guidance documents “as authorized by law or as incorporated into a contract” also applies to Participant Memoranda and Multiclass Participant Memoranda issued by the Government National Mortgage Association (Ginnie Mae). Ginnie Mae, through its Mortgage-Backed Securities (MBS) Programs, guarantees securities that are backed by pools of mortgages and issued by mortgage lenders (Issuers) approved by Ginnie Mae. Participant Memoranda announce policy and Mortgage Backed Securities Guide changes accessed by

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<sup>3</sup> Examples of publications authorized by law include Fair Market Rents, under Section 8(c)(1) of the United States Housing Act of 1937 (USHA), as amended by the Housing Opportunities Through Modernization Act of 2016 (HOTMA); Qualified Census Tract and Difficult Development Area designations, under Internal Revenue Code (IRC) Section 42, as enacted by the Tax Reform Act of 1986; Annual Adjustment Factors under the United States Housing Act of 1937; Section 8 Annual Inflation Factors for Public Housing under HUD’s annual appropriations acts.

Issuers, Document Custodians and other participants in Ginnie Mae programs. They are part of the agreement to participate in Ginnie Mae programs, which is voluntary, and so essentially contractual requirements.

Section 11.4(a) requires that all guidance documents be published and posted on HUD's guidance portal unless it is guidance under § 11.3(c) or the requirement is waived under the procedures in § 11.4(c). Section 11.4(b) also requires that each document be in a searchable, machine readable format and have certain information, including a title, an identification of any previous document that it revises or replaces, the issuing office, the date of issuance, document identification number, the applicable legal authority or authorities, a brief summary, the persons to whom the guidance applies, and a statement that the guidance document lacks the force and effect of binding law, except as authorized by statute, regulation or as incorporated into a contract. For significant guidance documents, § 11.4(b)(9) provides that HUD's guidance documents will 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).

Section 11.4(c) provides that a senior policy official may request a waiver from posting a document or category of documents on the HUD guidance portal. Such a request will be submitted to OIRA for review.

Section 11.6 sets forth the procedure for members of the public to request the withdrawal or removal of a particular guidance document. Under this section, any member of the public can direct their petition to the applicable program office head with a copy to the Office of General

Counsel, setting forth all data and arguments available to the petitioner supporting the action sought. Under paragraph (c) of this section, 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.

Section 11.8 provides for public participation in the formulation of significant guidance documents through at least a 30-day public notice and comment period. Paragraph (a) of this section provides that OIRA, consistent with E.O. 12866 and with the advice of the Department, shall identify or determine which guidance documents are significant. Section 11.8 provides that the Department may employ various methods of providing for public participation in the development of significant guidance documents and may publish a notice in the *Federal Register* announcing the availability of a significant guidance document. This section also outlines certain actions the Department will take before the final issuance of a significant guidance document, including responding to major issues raised in the comments, OIRA review, and non-delegable approval by a Presidentially appointed official.

### **III. Justification for Interim Rulemaking**

In general, HUD publishes a rule for public comment before issuing a rule for effect in accordance with its own regulations on rulemaking, 24 CFR part 10. Part 10, however, provides for exceptions from that general rule where the Department finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when the prior public comment procedure is “impracticable, unnecessary, or contrary to the public interest.”

The Department finds that good cause exists to publish this interim rule. This interim rule implements E.O. 13891, which directs that HUD take certain actions to ensure the transparent availability and use of guidance documents; to treat guidance documents as non-

binding in law and practice, to the extent consistent with applicable law and except authorized by law or incorporated into a contract; to take public input into account when appropriate in formulating or modifying significant guidance documents and provide a procedure for the public to petition for the withdrawal or modification of a particular guidance document. While this interim rule does exercise some discretion on the part of HUD, the exercise relies on E.O. 13891's mandates for HUD to initiate actions on matters of internal procedure. Further, the internal procedures established by this rule do not impose on members of the public new requirements that have the force and effect of law.

Although HUD has determined that good cause exists to publish this rule for effect without prior solicitation of public comment, HUD recognizes the value and importance of public input in the rulemaking process. Accordingly, HUD is issuing these regulatory amendments on an interim basis and providing a 60-day public comment period.

#### **IV. Findings and Certifications**

##### Regulatory Review – Executive Orders 12866 and 13563

Under E.O. 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. E.O. 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” E.O. 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.

This interim rule has been determined not to be a “significant regulatory action,” under section 3(f) of E.O. 12866 and therefore was not reviewed by OMB. The Office of Information and Regulatory Affairs (OIRA) has designated this rule not as a major rule under the Congressional Review Act (5 U.S.C. 801 et seq.).

#### Environmental Impact

The interim rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this interim rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

#### Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and on the private sector. This rule does not impose a Federal mandate on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule requires HUD to follow certain procedures in issuing guidance documents. These procedures include establishing a single agency website where the public can find all HUD guidance in effect; OMB review to

determine whether guidance is significant, and OMB review of significant guidance; public comment on significant guidance; and a procedure for the public to request withdrawal or modification of a guidance document. These revisions impose no significant economic impact on a substantial number of small entities. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Notwithstanding HUD's view that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

#### Executive Order 13132, Federalism

E.O. 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either: (1) imposes substantial direct compliance costs on State and local governments and is not required by statute, or (2) preempts State law, unless the agency meets the consultation and funding requirements of Section 6 of the E.O. This interim rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments nor preempt state law within the meaning of the E.O.

#### **List of Subjects**

##### **24 CFR Part 11**

Administrative practice and procedure.

For the reasons described in the preamble, the Department of Housing and Urban Development adds 24 CFR part 11 as set forth below:

#### **PART 11— GUIDANCE DOCUMENTS: POLICY AND PROCEDURES**

Sec.

11.1 Policy.

11.2 Definitions.

11.3 Applicability.

11.4 Published guidance documents.

11.6 Withdrawal or modification of documents.

11.8 Issuance of significant guidance documents.

**Authority:** 42 U.S.C. 3535(d); E.O. 13891, 84 FR 55235, October 9, 2019.

## **§ 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.

(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 C.F.R. 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 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) 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) or 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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Benjamin S. Carson, Sr.  
Secretary.

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