DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 10

[Docket No. FR–3292–P–04]

RIN 2501–AB43

Rulemaking Policies and Procedures; Proposed Removal of Part 10

AGENCY: Office of the Secretary, HUD.

ACTION: Proposed rule.

SUMMARY: Part 10 of HUD's regulations, commonly known as HUD's ''Rule on Rules,'' contains HUD's policies and procedures for the promulgation and issuance of rules, including the use of public participation in the rulemaking process. This rule proposes to remove part 10 and replace this part with an uncodified policy statement, published in the Federal Register, that would advise the public of HUD's policies and procedures regarding rulemaking. This rule also proposes to revise HUD's rulemaking policies by removing the commitment to undertake notice and comment rulemaking for those matters that are exempt from notice and comment rulemaking under the Administrative Procedure Act. HUD's proposed statement of regulatory policies and procedures is part of this notice of proposed rulemaking.

DATES: Comments Due Date: October 15, 1996.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Office of the General Counsel, Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410–0500. Communications should refer to the above docket number and title and to the specific sections in the regulation. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying during regular business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Camille E. Acevedo, Assistant General Counsel for Regulations, Office of General Counsel; Room 10276; U.S. Department of Housing and Urban Development; 451 Seventh Street, SW; Washington, DC 20410–0500; telephone (202) 708–3055. Hearing or speech-impaired individuals may call HUD's TTY number 1–800–877–8399 (Federal Information Relay Service). (The ''800'' number is a toll-free number, the ''708'' number is not toll-free.)

SUPPLEMENTARY INFORMATION:

I. Background

Part 10 establishes HUD's policy of affording public participation in the Department's rulemakings, gives notice of the location of HUD's Rules Docket, and sets forth procedures for HUD rulemakings, including the public's right to petition for rulemaking. In promulgating part 10, HUD, along with several other Federal agencies during this same time period, responded to public sentiment to the effect that agencies administering loan and grant programs, which are exempt from notice and comment rulemaking under 5 U.S.C. 553 (the Administrative Procedure Act, (APA)), should not exclude themselves from comparable limitations on their authority to promulgate regulations.[1]

There were two recent efforts by HUD to amend the policies and procedures in part 10.

November 14, 1991 Proposed Rule. On November 14, 1991 (56 FR 57869), HUD published a proposed rule entitled ''Rulemaking Policies and Procedures—Public Comment Periods.'' Through this rule, HUD proposed to reduce the 60-day public comment period it required for all rules under part 10. The November 14, 1991 proposed rule would have permitted HUD discretion in establishing the period for public comment on rules in a manner similar to that permitted by the APA. The rule would continue to provide for 60-day public comment period as the norm for HUD rulemaking, but would allow for a minimum of 30 days upon a finding of good cause. HUD received 21 public comments on this rule. The majority of the commenters opposed the rule.

October 14, 1992 Proposed Rule. On October 14, 1992 (57 FR 47166), HUD published a proposed rule entitled, ''Rulemaking Policies and Procedures—Expediting Rulemaking and Policy Implementation''. Relying on the exemption from notice and comment rulemaking in the APA for matters involving public property, loans, grants, benefits or contracts (the ''proprietary'' exemption), the October 14, 1992 proposed rule would have amended part 10 to dispense with notice and comment rulemaking, except where required by statute.

The October 14, 1992 proposed rule provided two discretionary grounds for employing advance notice and comment to the public: (1) where HUD determined it to be ''essential for the formulation of the rule,'' or (2) necessary to ''enhance'' the rulemaking where ''time is not of the essence.'' HUD received 77 comments on the proposed rule. The majority of the commenters opposed the rule's attempt to curtail the use of advance notice and opportunity for comment. The reasons for objecting to curtailing notice and comment rulemaking varied, but the overwhelming reason was that the commenters believe that public input makes for a better rule.

The 1991 and 1992 proposed rules are withdrawn by this proposed rule.

II. This Proposed Rule

This rule proposes to remove part 10 from HUD's regulations, and replace part 10 with an uncodified policy statement, published in the Federal Register, that would advise the public of HUD's policies and procedures regarding regulations. This rule also proposes to remove from HUD's rulemaking policies its commitment to undertake notice and comment rulemaking for matters that are exempt from notice and comment rulemaking under the APA.

A. Proposed Removal of Part 10

On March 4, 1995, President Clinton issued a directive to all Federal agencies to eliminate obsolete and unnecessary regulations and to streamline the remaining regulations to ensure that they are ''smart'' rules, rules that are sensible, understandable, cost-effective, customer friendly, and minimally burdensome. In response to the President's directive, HUD conducted a line-by-line review of its regulations, and submitted two reports to the President outlining the Department's strategy for achieving the President's regulatory objectives. One of the principles of this review was that only matters that were required to be promulgated by regulation would be codified. To the maximum extent possible, HUD would find alternative, legally permissible means of informing

[1] Part 10 was initially issued on December 22, 1971 (36 FR 24423), and underwent several revisions. Part 10, as currently codified, was promulgated on January 5, 1979 (44 FR 1606). With respect to similar rules and policies of other agencies, see the notice of the Department of Agriculture, published on July 24, 1971 (36 FR 13804); the notice of the Department of Health and Human Services, published on February 5, 1971 (36 FR 2532); the notice of the Department of the Interior, published on May 5, 1971 (36 FR 8336); the notice of the Small Business Administration, published on August 25, 1971 (36 FR 16716); the rule of the Department of Defense, published on February 3, 1975 (40 FR 4911, redesignated at 41 FR 27074 on July 1, 1976, and redesignated and amended at 56 FR 64482 on December 10, 1991, see 32 CFR part 336); the notice of the Department of Transportation, published on February 26, 1979 (44 FR 11034); and the rule of the Department of Labor, published on January 2, 1981 (46 FR 35) concerning 29 CFR part 2.

the public of its policies and procedures.

In furtherance of the President's directive, HUD proposes to remove part 10 from its codified regulations, and to include HUD's rulemaking policies and procedures in a statement of policy to be published in the Federal Register. Several agencies have set forth their rulemaking policies and procedures in uncodified Federal Register documents, and through this document HUD proposes to do the same. (See footnote 1 in this preamble, and also see the more recently issued notice of the Farm Credit Administration on its rulemaking policies, published on May 16, 1995, 60 FR 26034.) HUD's ''Statement of Regulatory Policies and Procedures'' will be published in the Federal Register after taking into consideration the public comments received on this proposed rule, and the proposed Statement of Regulatory Policies and Procedures, contained in Section III of this preamble.

B. Proposed Removal of Commitment to Undertake Notice and Comment Rulemaking in All Matters

With the exception of the removal of the commitment to undertake notice and comment rulemaking in all matters, HUD is not proposing to make significant changes in its rulemaking policies and procedures. On the matter of notice and comment rulemaking, HUD would continue to be governed by the two general statutory authorities that currently govern HUD rulemakings: (1) section 552 of the APA (5 U.S.C. 552); and (2) section 553 of the APA (5 U.S.C. 553). Additionally, HUD, along with the other Federal agencies, must adhere to any regulatory principles and procedures adopted by the President through executive order or other Presidential document (such as Presidential memorandum).

1. Authorities Governing Rulemaking

Section 552. Section 552(a)(1) of the APA, the public information section of the APA, requires each Federal agency to publish in the Federal Register several types of documents, including ''substantive rules of general applicability'' and ''statements of policy.'' Failure to publish a rule may result in its being unenforceable against the public. Section 552 requires HUD to have a regulatory structure based on regular publication of rules and policies in the Federal Register. The publication requirements of section 552 apply to all rules, even those subject to the ''proprietary'' exemption from advance public participation set forth in section 553.

Section 553. Section 553, the APA's informal rulemaking provision, specifies the situations in which the public must be given advance notice and an opportunity to comment on proposed regulations. Section 553(a)(1) contains an exception to this requirement for matters relating to ''public property, loans, grants, benefits, or contracts''—the so-called ''proprietary'' exemption. Rules that do not qualify for the ''proprietary'' exemption or other section 553 exemptions must provide for advance notice and opportunity to comment, unless notice and comment are ''impracticable, unnecessary, or contrary to the public interest.''

Many HUD programs are grant, loan and benefit programs (such as HUD's Federal Housing Administration programs, Government National Mortgage Association programs, Community Development Block Grant programs, and public and Indian housing programs) and fit within the proprietary exemption. However, other HUD programs or other HUD responsibilities do not qualify for the ''proprietary'' exemption. These include such ''regulatory'' authorities as the Real Estate Settlement Procedures Act (RESPA), Manufactured Home Standards, Interstate Land Sales, Lead-Based Paint Abatement, and possibly certain authorities under the Fair Housing Act.

Executive Order 12866. In addition to the APA, HUD would continue to be governed by President Clinton's Executive Order 12866 on Regulatory Planning and Review (issued September 30, 1993, and published on October 4, 1993, 58 FR 51735). Section 6(a)(1) of the Executive Order contains the following guidance on public participation in rulemaking:

> Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation .... In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.

The Executive Order imposes a clear and affirmative obligation on Federal agencies to ensure the public's meaningful participation in the development of agency rules. Specifically, the Executive Order encourages public participation before agencies' issuance of a notice of proposed rulemaking, where appropriate.

In response to this provision in the Executive Order, HUD has conducted a number of meetings with members of the public, formal and informal, to solicit public guidance early in the rulemaking process. HUD's Fiscal Year 1995 Regulatory Plan, published on November 14, 1994 (59 FR 57087), contains several examples of rules in which HUD sought the input of affected members, through informal meetings or public meetings, before a proposed rule was published. These examples included HUD's Consolidated Plan rule, the Section 3 (Economic Opportunities for Low- and Very Low-Income Persons) rule, the Indian Housing Consolidation Regulation rule, the Noncitizens rule, and the Public Housing Management Assessment rule. Additional examples of rules in which HUD solicited public comment before issuance of the rule, that have occurred since publication of the November 1994 Regulatory Plan, include HUD's Significant Facilities and Services rule (four public meetings were held), the Occupancy Standards rule (three informal meetings were held), and the Mortgagee Review Board regulation.

In addition, under President Clinton's Executive Order, HUD has published one rule developed through the negotiated rulemaking process and is currently involved in its second negotiated rulemaking. HUD's first negotiated rulemaking entitled ''Low-Income Public and Indian Housing—Vacancy Rule'' was published as a proposed rule on July 19, 1995 (60 FR 37294), and the final rule was published on February 28, 1996 (61 FR 7586). HUD's second negotiated rulemaking addresses the subject of the treatment of certain fees received by mortgage brokers and other retail lenders under the Real Estate Settlement Procedures Act (RESPA), and the Negotiated Rulemaking Advisory Committee has been formed and is meeting regularly to address the issues involved in this rulemaking.

Negotiated rulemaking is a process that brings together all the interests affected by a rule and seeks to reach a consensus policy, and is strongly encouraged by this Administration. HUD anticipates increased use of this effective mechanism for ensuring early and meaningful public participation.

2. Limitations on Notice and Comment Rulemaking

In adopting the proprietary exemption in section 553 of the APA, the Congress recognized from the outset the additional time that notice and

comment rulemaking in the areas of public property, loans, grants, benefits and contracts would involve, and that given the subject areas involved, agencies have a legitimate and recognizable need to make loans, grants or other benefits available to the affected public more quickly than notice and comment rulemaking allows (even under the most efficient rulemaking procedures). In adopting the proprietary exemption in section 553, the Congress found that agencies were justified in proceeding without notice and comment rulemaking in proprietary matters and that no further justification on the part of the agency is required for dispensing with notice and comment rulemaking on proprietary matters.

HUD believes that the removal of its commitment to undertake advance notice and comment rulemaking in all matters would not result in a significant diminution of public participation in HUD rulemakings. HUD's use of notice and comment rulemaking has become more targeted over the years, more focused on situations in which public participation is most valuable. Concomitantly, HUD also has focused on situations in which advance notice should be waived for good cause. Working within the existing part 10 over the years, HUD has identified several ''good cause'' exceptions to part 10's advance participation requirements, and these are as follows:

a. Rules involving little or no discretion. Notice and comment rulemaking is not required where implementation of the applicable statutory provision allows for minimal, if any, agency discretion. This includes so-called ''self-executing'' laws. The rationale is that public comment is only of value where there is a significant amount of discretion involved in the rulemaking. Typically, matters falling into this category are implemented by informal means (such as handbooks and HUD notices), followed by a conforming final rule, if a rule is required to be published by section 552 of the APA or part 10.

b. ''Temporary programs.'' Notice and comment rulemaking is not required for demonstrations, pilot programs, and similar temporary programs. The rationale is that demonstrations and other temporary programs are presumed not to contemplate the delay inherent in notice and comment rulemaking, and because they are temporary programs, they are not intended to be permanently codified. These types of programs are typically implemented by non-regulatory means, such as a notice of funding availability (NOFA) or, if sufficiently directed, a contract with the recipient.

c. Provisions in appropriations acts. Notice and comment rulemaking is not required for new programs or amendments that are included in appropriations acts and that apply for one year only (the statutory directives are only applicable for one year) or are tied to specific appropriation funds. The rationale is that by tying these authorities to specific time periods and appropriation funds, the Congress can be presumed to have intended their immediate implementation, without the delay attendant to notice and comment rulemaking. These provisions are typically implemented by informal means, such as notices of funding availability (NOFAs) and other notices.

d. Authorizing legislation with funding. Notice and comment rulemaking is not required for recently enacted authorizing legislation that requires a rulemaking to implement the legislative authority, and that has funding for the first time. The assumption is that by funding such a program, the Congress intends the program to be up and running as soon as possible, and does not envision a two-stage rulemaking process that could unduly delay funding distribution, even under the most efficient rulemaking processes. These programs can be implemented in a variety of ways, including by interim rule or by NOFA accompanied by a proposed rule.

e. Statutory deadlines. With increasing frequency, HUD authorizing statutes contain specific deadlines for the issuance of implementing regulations. Where compliance with a deadline does not permit use of two-stage rulemaking, implementation is permitted by interim rulemaking to ensure that the rule takes effect within the prescribed deadline.

f. Statutory rulemaking directives. Over the years, the Congress has become increasingly directional about the use of public participation in HUD rulemakings. In some cases, Congress has mandated notice and comment rulemaking for specific provisions or entire titles or subtitles of authorizing statutes.[2] In other cases, the Congress has provided for implementation by interim rule, with public participation after rule effectiveness.[3] In still other cases, the Congress has provided for implementation by non-regulatory means.[4] Finally, the Congress has increasingly called for the effectiveness of statutory provisions without regard to HUD rulemaking.[5]

Because of HUD's interpretation of part 10 and the increasing incidence of Congressional direction of regulatory policy, the areas subject to HUD's use of notice and comment rulemaking under part 10 have considerably narrowed over the years. The Department recognizes the importance of public participation in the remaining situations, and is committed to ensuring the public is given meaningful participation in those matters as required by the APA.

The Department believes that the commitment to undertake notice and comment rulemaking in all matters, even those exempt by the APA from advance notice and comment, is not necessary and, as shown by the preceding discussion, is not always practicable. Additionally, the Department believes that its policies regarding rulemaking need not be codified in the Code of Federal Regulations. These policies may be set forth by notice that is published in the Federal Register, as several other agencies have done.

III. HUD's Proposed Statement of Regulatory Policies and Procedures

The following sets forth HUD's proposed Statement of Regulatory Policies and Procedures.

Statement of Regulatory Policies and Procedures

A. Policy

The Department of Housing and Urban Development will develop regulations consistent with the Administrative Procedure Act (APA), the Department of Housing and Urban Development Act, and any other statute, executive order, or Administration directive that contains specific rulemaking directions applicable to

[2] See, for example, the following provisions of: (1) the Housing and Community Development Act of 1992 (Pub.L. 102–550, approved October 28, 1992): sec. 191 (title I), sec. 222 (title II), sec. 332 (title III), and sec. 685 (title VI); and (2) sec. 103(h) of the Multifamily Housing Property Disposition Reform Act of 1994 (Pub.L. 103–233, approved April 11, 1994) (notice/proposed rule for alternative uses for prevention of mortgage defaults).

[3] See, for example, sec. 101(f) of the Multifamily Housing Property Disposition Reform Act of 1994 (Pub. L. 103–233) (interim rule to implement property disposition reforms) and sec. 332 of the Housing and Community Development Act of 1992 (Pub. L. 102–550) (interim rule for title III).

[4] See, for example, the following provisions of the HUD Demonstration Act of 1993 (Pub. L. 103–120): sec. 2(c)(6) (noncompetitive selection in innovative homeless program) and secs. 4(d) and 6(e) (notices to implement the NCDI and pension fund initiatives).

[5] See, for example, sec. 2 of the Housing and Community Development Act of 1992 (Pub. L. 102–550) and sec. 113 of H.R. 2046 (104th Cong., 1st Sess.), the United States Housing Act of 1995.

HUD. HUD will promulgate regulations where required by statute, or necessary to interpret the law, or to promote the objectives of the agency. To achieve its objective, HUD will:

1. Strive to ensure that each regulation has a well-defined objective.

2. Promulgate regulations that, to the extent feasible, specify performance criteria and objectives rather than command and control requirements.

3. Issue regulations that are clear and easy to understand to all who may be affected by the regulation, and that are as brief and uncomplicated as possible.

4. Issue regulations that have been developed giving adequate consideration to regulatory alternatives, and that have been developed based on a reasoned determination of the costs and benefits involved in the regulation.

5. Coordinate its rulemaking with other agencies to eliminate or minimize unnecessary duplication of regulations or inconsistency.

6. Provide for public participation in the rulemaking consistent with the APA and all other applicable statutes and executive orders, and provide meaningful public participation in the development of the rule at the earliest stage possible.

HUD will consider these principles as it develops new regulations and as it reviews existing regulations to determine whether the regulations continue to be necessary and effective.

B. Rules Docket

1. All Federal Register documents and records of published documents are maintained in the Office of the Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410.

2. All public comments on Federal Register documents should refer to the docket number appearing in the heading of the rule, and should be addressed to the Rules Docket Clerk.

3. Federal Register documents are public records. After a docket is established, any person may examine docketed materials, including public comments, at any time during regular business hours, and may obtain a copy of any docketed material.

C. Petitions for Rulemaking

1. Any interested person may petition the Secretary for the issuance, amendment, or repeal of a rule. Each petition shall:

a. Be submitted to the Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, Washington, DC 20410.

b. Set forth the text or substance of the rule or amendment proposed or specify the rule sought to be repealed;

c. Explain the interest of the petitioner in the action sought; and

d. Set forth all data and arguments available to the petitioner in support of the action sought.

2. No public procedures will be held directly on the petition before its disposition. If the Secretary finds that the petition contains adequate justification, a rulemaking proceeding will be initiated or a final rule will be issued, as appropriate. If the Secretary finds that the petition does not contain adequate justification, the petition will be denied by letter or other notice, with a brief statement of the ground for denial. The Secretary may consider new evidence at any time; however, repetitious petitions for rulemaking will not be considered.

D. Additional Rulemaking Proceedings

The Secretary may invite interested persons to present oral arguments, appear at informal hearings, or participate in any other procedure affording opportunity for oral presentation of views. The transcripts or minutes of such meetings, as appropriate, will be kept and filed in the Rules Docket.

E. Hearings

1. The provisions of 5 U.S.C. 556 and 557, which govern formal hearings in adjudicatory proceedings, do not apply to informal rulemaking proceedings described in this part. When opportunity is afforded for oral presentation, such informal hearing is a nonadversary, fact-finding proceeding. Any rule issued in a proceeding under this part in which a hearing is held is not based exclusively on the record of such hearing.

2. When a hearing is provided, the Secretary will designate a representative to conduct the hearing, and if the presence of a legal officer is desirable, the General Counsel will designate a staff attorney to serve as the officer.

F. Adoption of a Final Rule

All timely comments are considered in taking final action on a proposed rule. Each preamble to a final rule will contain a short analysis and evaluation of the relevant significant issues set forth in the comments submitted, and a clear concise statement of the basis and purpose of the rule.

G. Petitions for Reconsideration

Petitions for reconsideration of a final rule will not be considered. Such petitions, if filed, will be treated as petitions for rulemaking in accordance with section C of this notice.

IV. Other Matters

Environmental impact. A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implements section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA). This Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development Room 10276, 451 Seventh Street, SW, Washington, DC 20410.

Impact on small entities. The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this proposed rule before publication and, by approving it, certifies that the proposed rule will not have a significant impact on a substantial number of small entities. The proposed rule is procedural only, and would not have a substantive effect on small entities.

Executive Order 12606, the Family. The General Counsel, as the Designated Official under Executive Order 12606, *The Family*, has determined that this proposed rule is procedural only, and would not have potential for significant impact on family-formation, maintenance, and general well-being, and thus is not subject to review under the Order.

Executive Order 12612, Federalism. The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that this proposed rule is procedural only, and would not have substantial, direct effects on States, on their political subdivisions, or on their relationship with the Federal government, or on the distribution of power and responsibilities among the various levels of government.

List of Subjects in 24 CFR Part 10

Administrative practice and procedure.

Accordingly, under the authority of 42 U.S.C. 3535(d), part 10 is proposed to be removed from title 24 of the Code of Federal Regulations.

Dated: July 18, 1996.

Henry G. Cisneros,

Secretary.

[FR Doc. 96–20697 Filed 8–15–96; 8:45 am]

BILLING CODE 4210–32–P