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Description of document: Department of Housing and Urban Development (HUD) Office of General Counsel (OGC) document: General Pointers to Assist in Determining When Rulemaking is Necessary, Guidance is Appropriate, and Federal Register Publication is Required, (undated)

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Office of the Executive Secretariat
U.S. Department of Housing and Urban Development
451 7th St., SW, Room 10139
Washington, DC 20410
[HUD Online FOIA Portal](#)

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U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-3000

OFFICE OF ADMINISTRATION

June 19, 2019

RE: Freedom of Information Act Request
FOIA Control No.: 17-FI-HQ-00855

This letter is in response to your Freedom of Information Act (FOIA) request dated February 15, 2017. Your request was received on March 15, 2017, and you asked for a digital/electronic copy of the Department of Housing and Urban Development's Office of General Counsel's discussion of the difference between rules and guidance.

Your request is granted in full at no cost to you. Enclosed is a copy of an Office of General Counsel document titled "General Pointers to Assist in Determining When Rulemaking is Necessary, Guidance is Appropriate, and Federal Register Publication is Required."

I am the official responsible for this determination based on information provided by the Department's Office of General Counsel. You may appeal this determination within 90 days from the date of this letter. If you decide to appeal, your appeal should include copies of your original request and this response, as well as a discussion of the reasons supporting the appeal. The envelope should be plainly marked to indicate that it contains a FOIA appeal and should be addressed to:

U.S. Department of Housing and Urban Development
Attention: FOIA Appeals
Office of Ethics and Appeals Law Division
Office of General Counsel
451 Seventh Street, SW, Suite 2130
Washington, DC 20410

Telephone: (202) 708-3815

You may also submit your appeal online at:

http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/foia/foiaappeals.

In addition, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001

Telephone: 202-741-5770; toll free at 1-877-684-6448
FAX: 202-741-5769
Email: ogis@nara.gov

For your information, your FOIA request, including your identity and any information made available, is releasable to the public under subsequent FOIA requests. In responding to these requests, the Department does not release personal information, such as home address, telephone number, or Social Security number, all of which are protected from disclosure under FOIA Exemption 6.

If you have questions regarding your request, please contact me at (202) 402-3450. Thank you for your interest in the Department's programs and policies.

Sincerely,

Ethan Bodell

Ethan G. Bodell, Esq.
Government Information Specialist
FOIA Branch
Office of the Executive Secretariat

Enclosure

**OFFICE OF GENERAL COUNSEL
GENERAL POINTERS TO ASSIST IN DETERMINING
WHEN RULEMAKING IS NECESSARY, GUIDANCE IS APPROPRIATE, AND FEDERAL
REGISTER PUBLICATION IS REQUIRED**

I. What Is a Rule?

- A Rule Establishes Generally Applicable Legally Binding and Enforceable Requirements. The Administrative Procedure Act (APA)¹ establishes, among other requirements, the basic framework for the issuance of rules by federal agencies. The type of rule that is the focus of this document and that raises the most questions for HUD staff is referred to as a “legislative” rule. A legislative rule is legally binding on members of the public and entitled to deference and enforcement by courts, *provided* the rule (1) was issued in accordance with APA or agency-created procedural requirements (typically publication in the Federal Register for notice and comment), (2) was issued pursuant to statutory authority, and (3) does not violate other law (for example, the Constitution or other federal laws).
- HUD’s Rule on Rules (24 CFR Part 10). As a federal agency, HUD is subject to the APA definitions of “rule” and “rulemaking.” The APA exempts certain subject matters from proposed and final rulemaking (also referred to as “notice and comment rulemaking”). HUD’s regulations in 24 CFR part 10 (HUD’s “Rule on Rules”) were promulgated primarily to establish notice and comment rulemaking for these exempt matters. The matters that are exempt from notice and comment under the APA, but subject to notice and comment under 24 CFR part 10 are those that relate to loans, grants, benefits or contracts. Program officials whose programs are exempt from the APA notice and comment rulemaking requirements should consult with OGC to determine the extent to which, in any given instance, the notice and comment rulemaking requirements of 24 CFR part 10 may apply.

II. What is Guidance?

- Guidance Provides Non-Legally Binding Interpretations or Information that Assists with Compliance with Laws. Guidance documents are typically non-legally binding interpretations of agency regulations or statutes that are directed to assisting those subject to the statutes or regulations comply with the law, and therefore are not subject to a notice and comment process.
- HUD’s Guidance on Guidance. The HUD Directives System governs the clearance and issuance of HUD guidance. The Office of Administration manages the HUD Directives System, in accordance with the policies contained in HUD Handbook 000.2 Rev-2 (entitled “HUD Directives System,” issued April 18, 2001). The handbook provides that the purpose of HUD guidance is to “supplement statutes, regulations, and other Federal Register documents.” In supplementing statutes, guidance documents may alert regulated parties to laws recently enacted, statutory provisions that may be immediately applicable, and any plans by the agency to undertake rulemaking to implement statutory provisions. In supplementing regulations, guidance documents may provide sample or model documents to comply with regulatory reporting requirements.

¹ 5 U.S.C. 551-559, 701-706, 1305, 3105, 3344, 5372, and 7521.

- Types of Guidance Documents. Guidance documents come in many forms such as policy statements, policy directives, compliance directives, opinion letters, bulletins, and documents responding to frequently asked questions. For HUD, guidance documents include handbooks and direct notices issued by the program offices. What all of these documents have in common, however, and what makes them guidance is that, as a general rule, they do not impose requirements on members of the public that courts will regard as having the force of law.
- References to Legally Binding Requirements in Guidance Documents. Guidance documents may contain legally binding requirements but, as a general rule, the inclusion of such requirements in guidance documents should be a reference to or description of existing statutory or regulatory requirements, and not the establishment, through the guidance document, of new legally binding requirements.

III. When Is a Rule Required?

- Proposed and Final Rulemaking Is Triggered by the Imposition of Generally Applicable Requirements. The APA generally requires a rule to be issued through proposed and final rulemaking when an agency wants to establish requirements that are generally applicable and legally binding and do more than merely interpret or repeat a statutory provision. HUD has adopted the same approach in implementing its regulations in 24 CFR part 10. Proposed and final rulemaking is a two-stage rulemaking process in which a rule is published in proposed form in the Federal Register and subject to public comment for a stated period of time, followed by publication of the rule in final form, accompanied by a preamble that summarizes the public comments and explains any changes to the proposed rule as a result of public comment.
- Proposed and Final Rulemaking Can Be Triggered by Statutory Direction. Rulemaking is also required where directed by statute. In some cases, the statute may specify the type of rulemaking that the agency must undertake. For example, the statute may require that the proposed rule be developed using negotiated rulemaking, or direct the agency to omit prior notice and comment and proceed directly to issuance of a final or interim rule for effect.

Some statutes contain prescriptive requirements that do not allow for the exercise of any discretion by an agency. These statutory requirements are generally categorized as self-executing laws that do not require regulations for “implementation”. The statutory requirements and any conforming changes, however, will often be codified in the agency’s regulations so that the agency’s regulations will contain all of the legal requirements of which members of the public need to be aware with regard to a program or other matter.

- When a Rule Is Necessary, What Type of Rule Must Be Issued? The OGC Regulations Division can provide further information on the type of rule that must be issued when rulemaking is determined necessary. In most cases, however, a proposed rule will be required as the first step in the rulemaking process.

V. When Is Publication in the Federal Register Required?

- Federal Register Publication Requirements. Section 552 of the APA requires that agencies must publish certain information in the Federal Register. This information includes rules (as defined in Section I above), descriptions of agency organization (e.g., delegations of authority) and procedure (e.g., who may accept service of process on behalf of HUD), and statements of general agency policy or interpretations of general applicability (e.g. a policy statement regarding HUD's hiring practices in light of federal antidiscrimination laws). Section 552 also provides that a person may not be required to follow, or be adversely affected by, information that the agency is required to publish in the Federal Register but that was not published, unless the person receives actual and timely notice of the information. This provision does not excuse an agency from the publication requirement; however, the provision also does not allow a person with actual and timely notice to ignore the information.
- Non-Rule Documents Subject to Federal Register Publication by Virtue of Statutory Requirement. There are several categories of non-rule documents where a statute other than the APA requires publication in the Federal Register. These include:
 - Paperwork Reduction Act Notices. The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520) requires publication of information collection notices. The PRA establishes a two-step publication process for information collection approval, along the lines of proposed and final rulemaking.
 - HUD Reform Act Publications. The HUD Reform Act requires certain non-rulemaking documents to be published in the Federal Register. They are notices of funding availability (NOFA), notices of award winners, and notices summarizing waivers of regulations granted for a calendar quarter. Note that even if the HUD Reform Act did not require publication of a NOFA in the Federal Register, publication would be required under the APA because it is a description of agency procedure.