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Implementing SBREFA

HUD'S PROGRAM FOR IMPLEMENTING THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996

I. THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT OF 1996 (SBREFA).

The Small Business Regulatory
Enforcement Fairness Act of 1996
(SBREFA), signed into law on March
29, 1996, provides, among other
things, for: (1) judicial review of the
Regulatory Flexibility Act; (2)
preparation by Federal agencies of
"plain English" c ompliance guides to

assist small entities in their efforts to comply with Federal regulations: (3) an Ombudsman to be established by the Small Business Administration (SBA) who will receive comments and complaints from small businesses concerning their experiences in dealing with Federal regulatory agencies; and (4) Regional Small Business Regulatory Fairness Boards, also to be established by the Small Business Administration, to review comments on Federal agency enforcement practices and make recommendations to the SBA Administrator and the head of affected agencies concerning those practices.

Although HUD is not generally regarded as a "regulatory agency", HUD has the following important regulatory responsibilities: oversight and enforcement of the Federal Fair Housing Act, the Real Estate Settlement Procedures Act (RESPA) and the Interstate Land Sales Full Disclosure Act; oversight over certain activities of government-sponsored enterprises (GSEs); and the establishment and enforcement of lead-based paint standards and manufactured housing standards.

HUD has long had in place a systematic process for determining whether newly developed rules are likely to have a significant economic impact on a substantial number of small entities. The typical HUD rule implements statutory directions for the administration of grant

programs. Rules of this type are intended to reflect Congressional mandates that, by their nature, have universal applicability to the portion of the public affected by the rule. These rules do not lend themselves to the provision of special procedures, or exemptions from requirements, applicable to small entities. This observation notwithstanding, HUD has developed a process intended to introduce additional scrutiny to existing procedures for safeguarding the interests of small entities during development and following implementation of regulations.

II. HUD'S PROCESS FOR ENSURING COMPLIANCE WITH THE SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT.

To ensure that there is a meaningful assessment of HUD rules to determine which rules, if any, will have an impact on small businesses, HUD proposes to (1) target regulations that may impact small businesses at the earliest opportunity in the development process; (2) assign oversight responsibility to the Office of Small and Disadvantaged Business Utilization (OSDBU) to review (i) the analysis of economic impact required before the agency head certifies no impact, (ii) the program office's assessment and disposition of all alternative rule implementation strategies submitted by small entities, and (iii) the compliance guides prepared by the

program offices where applicable;
and (3) maintain the requirements of the SBREFA and Regulatory Flexibility Act on the HUD web site with instructions to small entities on the OSDBU role as small business Ombudsman, as well as copies of compliance guides, names of HUD staff with familiarity in HUD programs that may impact small businesses, to answer questions, and a users forum where representatives of small entities can ask questions on a specific rule as a means of providing a fast means of clarifying issues.

Specific applicability of this process to each of the subparts of the SBREFA follows:

Subtitle A--Regulatory Compliance Simplification

The first step is to ensure early identification of rules that may potentially impact small entities. Toward this end, HUD will emphasize existing processes and add one additional intercept point:

1. Maintain and Emphasize HUD Regulatory Form. HUD already tracks the "Small Entity Impact" category on its own internal regulatory clearance form (this form must be completed by all program offices initiating regulatory actions). All program offices are required to complete this category. The OSDBU will establish a working

relationship with all program offices which intend to develop rules that may impact small entities to ensure participation in and the timely review of required regulatory flexibility analysis.

2. Maintain and Emphasize the OMB Regulatory Form. The "Regulatory Information Data Form" that must be completed by all Federal agencies for each new regulatory action and that is submitted to OMB for the semiannual agenda, includes a "Small Entity Impact" category. All Federal agencies are required to complete this category. Certain regulations, those identified as having the potential to impact small entities (small entity impact) will be tracked and program offices developing small entity impact regulations will be monitored closely. The review of potential small entity impact rules by OSDBU, while these rules are in early development, is designed to promote accuracy in identifying small entity impact rules.

3. HUD Statutory Implementation Guides. When new HUD legislation is enacted, the Office of General Counsel prepares an implementation guide that provides guidance to the

program offices of regulatory action or other type of guidance or notice that is required by the statutory provisions. In future implementation guides, the Office of General Counsel, in consultation and cooperation with the OSDBU, will identify legislation provisions that require regulatory action and that appear to potentially impact small entities.

If a rule or group of related rules issued by HUD is determined to have a significant economic impact on a substantial number of small entities, and consequently determined to require a regulatory flexibility analysis, the HUD program office with responsibility for implementation and enforcement of the regulation will undertake the following: (1) solicit and review for feasibility alternative strategies for rule implementation which may mitigate impacts on small entities; and (2) prepare a compliance guide to assist small entities in complying with the rule. Additionally, the program offices will continue to be responsible for answering inquiries by small entities concerning information on, and advice about, compliance with applicable statutes and regulations. HUD proposes to

maintain a specific users forum on the Internet where small entities may review the rule and the compliance guide, and engage in an online dialogue with program experts to seek clarification and guidance on the rule.

The OSDBU, as HUD's Ombudsman for small business, will monitor and assist the program offices throughout the development and implementation process and act as an honest broker for small businesses seeking additional information or who express concerns during development and implementation.

Subtitle B--Regulatory Enforcement Reforms

Subtitle B provides for the SBA Administrator to designate a Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. This subtitle is primarily directed at the SBA. This subtitle, however, also provides that "each agency regulating the activities of small entities shall establish a policy or program within 1 year of enactment of this section to provide for the reduction, and under appropriate circumstances for the waiver of civil penalties for violations of a statutory or regulatory requirement by a small entity."

Subtitle B provides that under appropriate circumstances an agency may consider ability to pay in determining penalty assessments on small entities. HUD notes that the ability to pay is a legislative directive for many programs under the Department of Housing and Urban Development Reform Act of 1989, Pub.L. 101-235, approved December 15, 1989. Additionally, as HUD stated in its June 15, 1995 Report to President Clinton on the President's Regulatory Reform Initiatives, HUD has authority to issue civil money penalties for violations of requirements governing its grant, mortgage insurance, and regulatory programs. HUD's policy to date has been to assist regulated entities in achieving compliance with requirements in order to avoid any penalty process.

Where penalties are determined appropriate, HUD's policy is to take into consideration the resources of the regulated entity. It is not HUD's intent to put any individual or entity out of business by the penalties or settlement amounts paid to the Federal Government. HUD will continue to follow this practice, which is consistent with President Clinton's April 24, 1995 memorandum to Federal agencies, and which is consistent with SBREFA.

Subtitle C--Equal Access to Justice Act Amendments.

This subtitle provides, among other things, that if, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

Subtitle D--Regulatory Flexibility Act Amendments.

This subtitle, among other things, identifies the information that must be included in a final regulatory flexibility analysis, provides for judicial review, and, for rules that do not have a significant economic impact on a substantial number of small entities, requires that the rules include a certification by the head of the agency to this effect. HUD's rules are in compliance with the requirements of subtitle D. As discussed under subtitle A, HUD has established a process of enhanced review for small entity impact which should further ensure compliance. The Office of General Counsel and the OSDBU will review the certification for rules that do not have a significant

economic impact on a substantial number of small entities prior to signature by the head of the agency. Federal Register notices and information on the Internet will stipulate the role of the OSDBU in assisting small entities in obtaining information and seeking clarifications the small entities believe have not been forthcoming.

Subtitle D also provides that prior to publication of an initial regulatory flexibility analysis, an agency is to notify the Chief Counsel for Advocacy of the SBA and to provide the Chief Counsel with information on the potential impacts of the proposed rule on small entities and the type of small entities that have been affected. The HUD OSDBU will perform this role.

Agency

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