

MEMORANDUM

To: CLPHA
From: Reno & Cavanaugh, PLLC
Date: December 11, 2020
Re: Summary of HUD Interim Final Rule Implementing Executive Order Regarding Agency Documents

Introduction

On November 10, 2020, the U.S. Department of Housing and Urban Development (“HUD”) published an interim final rule titled “Implementing Executive Order 13891; Promoting the Rule of Law Through Improved Agency Guidance Documents” (the “Interim Final Rule”).

Executive Order 13891 requires, among other things, that federal agencies establish regulations governing the processes and procedures by which they issue guidance documents. The Interim Final Rule implements the executive order by creating a new Part 11 to Title 24 of the Code of Federal Regulations “that outlines HUD policy on guidance documents and how HUD designates guidance documents.” The Interim Final Rule has an effective date of December 10, 2020. Comments to the Interim Final Rule are due on January 11, 2021, post-dating the effective date by thirty (30) days.

HUD published the Interim Final Rule without engaging in notice and comment rulemaking. While HUD acknowledges that it generally “publishes a rule for public comment before issuing a rule,” HUD further states that 24 C.F.R. Part 10 “provides for exceptions from that general rule where the Department finds good cause to omit advance notice and public participation.” HUD “finds that good cause exists to publish this interim rule” without advance notice and public participation because it implements Executive Order 13891. HUD further justifies omitting notice and comment rulemaking because the Interim Final Rule “do[es] not impose on members of the public new requirements that have the force and effect of law.”

Summary

The new Part 11 provides, in pertinent part, that:

1. HUD-issued guidance documents “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 by contract” (*see* new Section 11.1(a));
2. The public will have at least thirty (30) days to submit comments to significant guidance documents unless HUD “finds for good cause that notice and public comment are impracticable, unnecessary, or contrary to the public interest” (*see* new Section 11.1(b) and Section 11.8);

3. HUD will “make available a comprehensive set of guidance documents on a single, searchable, indexed website” and documents not posted on this website “shall no longer have effect and shall not be cited except to establish historical fact” (*see* new Section 11.1(c));
4. “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” (*see* new Section 11.2(a));
5. HUD guidance documents do **not** include:
 - a. Rules promulgated through notice and comment rulemaking;
 - b. “Rules of agency organization, procedure, or practice;”
 - c. Agency adjudication decisions;
 - d. Internal guidance “not intended to have substantial future effect on the substantive behavior of regulated parties;”
 - e. “Internal executive branch legal advice or legal opinions addressed to executive branch officials;”
 - f. “Legal briefs, charges, and other court filings intended to persuade a court, or administrative or arbitral authority;”
 - g. Research papers or studies; and
 - h. Notices of Funding Availability.

(*see* new Section 11.2(a)).
6. A “significant guidance document” is “a guidance document that may reasonably be anticipated to:”
 - a. “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;”
 - b. “create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;”
 - c. “materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof;” or

- d. “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.’” (*see* new Section 11.2(d)).
7. Guidance documents may be rescinded or modified by HUD or by petition to HUD of any interested person. (*see* new Section 11.6).

Analysis and Questions

For many years, CLPHA, R&C, and other public housing practitioners have encouraged HUD to follow applicable requirements of the Administrative Procedure Act in establishing program requirements and to refrain from making rules by notice and other sub-regulatory guidance. Rather, we have commented in numerous contexts that such guidance may only be explanatory and interpretive and may not be used as a substitute for applicable rulemaking requirements. Thus, at a conceptual level, the Interim Final Rule is responsive to those long-standing concerns. At the same time, we see a number of implementation challenges given the December 10, 2020 effective date, including:

- Capacity Issues – it is unclear if HUD has the capacity to establish the “single, searchable, indexed website” required under new Section 11.1(c) by the December 10, 2020, effective date. Additionally, it is unclear what, if anything, HUD intends to do with the guidance documents not posted on this new guidance website. Whether HUD will provide such documents in a separate, publically accessible archive contemporaneous to the new guidance website is unclear.
- Reliance Issues – it is unclear whether HUD will provide a preview list of which guidance documents will continue to be enforceable and which will “no longer have effect.” Without advance notice, PHAs and other public housing practitioners cannot reasonably rely on any guidance documents thereby jeopardizing closed developments, developments currently under negotiation, and housing operations in general.
- Ambiguity Regarding Significant Guidance Documents – HUD’s definition of “significant guidance document” under new Section 11.2(d) is problematic as it is highly susceptible to variance depending on many factors – the economy, Congress, the White House, other executive agencies, etc. The general public therefore has no baseline to determine what constitutes a significant guidance document that would trigger the 30-day comment period under new Section 11.1(b) and Section 11.8.
- Issues of Process and Transparency – while significant guidance documents are subject to a 30-day comment period, it is unclear how such documents will be noticed since the new Part 10 does not specify what constitutes proper notice. Will the notice process provide

that proposed new significant guidance documents be published in the Federal Register or will HUD simply post an open letter addressed to all PHA Executive Directors on the HUD website? Also, while new Section 11.6 provides the process for public petition for removal or modification of guidance documents, it is silent on the process for HUD. It is unclear whether HUD will be required to provide prior notice or explanation to the public for the removal or modification of guidance documents.