

Introduction to the Federal Regulatory Process

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When Congress changes an existing law or creates a new one, federal agencies like HUD must implement the changes or the new law by modifying an existing regulation or by creating a new one. Federal agencies also sometimes review existing regulations and amend them even when there are no changes to the underlying law. Both the creation of a new regulation and the modification of an existing regulation provide advocates with an opportunity to shape policy.

Congress passes legislation and the president, by signing that legislation, turns it into a law. Usually, these laws spell out the general intent of Congress but do not include all technical details essential to putting Congress' wishes into practice. Regulations add those details and usually present the law's requirements in language that is easier to understand.

Two publications are key to the federal regulatory process. The *Federal Register* is a daily publication that contains proposed regulations, final rules, and other official notices, presidential documents, and other items. All final regulations published in the *Federal Register* are eventually gathered together ("codified") in the Code of Federal Regulations (CFR). The HUD-related rules in the CFR are usually updated each April. The federal government uses the words "regulation" and "rule" interchangeably; however, technically HUD defines a "rule" as a document published in the *Federal Register* and a "regulation" as a rule that is codified in the CFR.

SUMMARY OF THE REGULATORY PROCESS

Proposed Regulations

In order to carry out laws, Congress gives federal agencies, like HUD, the power to interpret laws, write rules based on that interpretation, and

enforce the rules. When housing law is created or modified, HUD will draft suggested regulations that specify how the law is to be carried out. These are "proposed" regulations.

Before publishing proposed regulations, HUD must send them to the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs (OIRA), which theoretically has up to 90 days to review the regulations' consistency with Executive Order 12866, "Regulatory Planning and Review" (although OIRA has been known to hold on to proposed regulations for more than 90 days). Rules under review by OIRA and their status are listed on the EO 12866 Regulatory Review site. If OIRA judges the proposed regulations to be inconsistent, they are sent back to HUD "for further consideration." However, technically, HUD has authority from Congress to issue the rules.

Once cleared by OIRA, HUD must publish a "notice of proposed rulemaking" (NPRM) in the *Federal Register* that contains the proposed language of the regulations. The public must have an opportunity to submit written comments and is generally given a 60-day period to comment.

Final Regulations

Once the comment period on a proposed rule is closed, HUD must consider all comments and may make changes based upon them. Once those changes are complete, and after another review by OIRA, HUD publishes a final rule in the *Federal Register*.

In the introduction, or preamble, to the final rule, HUD must discuss all meaningful comments received and explain why each was accepted or rejected. In addition to the actual text of the changed or new regulations, the final rule must state a date when it will go into effect, generally 30 or 60 days in the future. However, before the final regulations go into effect, they are sent to the Congressional subcommittee responsible for the

subject matter for at least 15 days to ensure that all rules meet, but do not overstep, Congressional intent. In practice, this 15-day Congressional review seems to simply be a courtesy; Congress seldom weighs in.

It is not unusual for more than a year to pass between publication of a proposed rule and final implementation. It is even possible for proposed rules to be withdrawn. For example, during the Obama Administration, proposed changes to the public housing demolition regulations and to the Section 3 employment opportunities regulations were not acted on by the Obama Administration for several years and were subsequently removed by the Trump Administration before they could be made final.

Other Regulatory Options

In addition to proposed and final rules, the regulatory process can occasionally include:

- **Advanced Notice of Proposed Rulemaking (ANPR).** HUD can ask for information from the public to help it think about issues before developing proposed regulations. For instance, in the second year of the Trump Administration, HUD issued an ANPR regarding streamlining the affirmatively furthering fair housing (AFFH) rule and an ANPR regarding streamlining the fair housing disparate impact rule.
- **Interim Final Rules.** HUD can issue regulations that are to be followed as if they are final, but ask for continued public comment on some parts of the rules. Subsequent final rules can include changes based on any additional public comment. For example, the National Housing Trust Fund (HTF) program was implemented by an interim rule in 2015. HUD's intention was to allow states and developers have experience using the new program and then seek input regarding suggested changes before implementing a final rule. On April 26, 2021, HUD requested comments about the HTF Interim Final Rule; as of the date this *Advocates' Guide* article was written, a final rule was not published but will likely

be published sometime in 2023. More recently, HUD under the Biden Administration issued an Interim Final Rule on June 10, 2021, restoring the statutory definition of "affirmatively furthering fair housing" and some "certifications" that were removed from the 2015 AFFH rule by the previous Administration; it also offered the public 30 days to comment on the Interim Final Rule. In the preamble to the Interim Final Rule, HUD stated that it anticipated issuing a NPRM proposing provisions that would build on and improve process in the 2015 AFFH rule.

- **Supplemental Notice of Rulemaking.** HUD may seek additional comment on a proposed rule in order to further focus consideration before issuing a final rule.
- **Direct Final Rules.** HUD can issue regulations thought to be minor and uncontroversial but must withdraw them if negative comments are submitted.
- **Negotiated Rulemaking.** This is a seldom-used approach that engages knowledgeable people to discuss an issue and negotiate the language of a proposed regulation, which is then submitted to the *Federal Register*. When HUD sought to change the public housing Operating Fund rule, it engaged in negotiated rule making with public housing agencies and a handful of public housing leaders.
- **Petition for Rulemaking.** This is a process through which anyone can submit suggested regulations along with supporting data and arguments in support of the suggestions. If HUD agrees, it will publish proposed rules; if HUD denies the petition, the denial must be in writing and include the basis for denial. For example, advocates thought the Obama Administration was not moving on improvements regarding lead-based paint hazards, so used the petition for rulemaking process. Although not officially in response to the petition, HUD did move on proposed changes.
- **Informal Meetings.** HUD has the authority to gather information from people using

informal hearings or other forms of oral presentations such as “listening sessions.” The transcript or minutes of such meetings are on file in the Rules Docket. For example, after the Trump Administration effectively suspended implementation of the affirmatively furthering fair housing rule, it conducted five invitation-only listening sessions. More positively, the Biden Administration held several listening sessions about restoring the affirmatively furthering fair housing rule.

WHAT IS HUD’S PLAN FOR FUTURE REGULATORY ACTION?

On the OIRA website, <https://www.reginfo.gov/public>, there is a menu item at the top called “Unified Agenda.” Select “Current Unified Agenda and Regulatory Plan,” where you will find “Spring (or Fall) 2022 Unified Agenda of Regulatory and Deregulatory Actions.” Where it says “Select Agency” choose “Department of Housing and Urban Development,” which provides a long list of regulations in proposed and final stages. Clicking on the “RIN” link will indicate an anticipated date of action on the regulation. However, these dates are not solid – they are aspirational. For example, according to the RIN, a proposed AFFH rule is indicated as June 2022, however as of the date this *Advocates’ Guide* article was written a proposed rule has not been published.

THE ROLE OF CONGRESS

Before HUD can publish a rule for comment or publish an interim rule, the rule must be submitted to HUD’s congressional authorizing committees for a review period of 15 calendar days (which does not depend on Congress being in session). Congressional review seems to simply be a courtesy; Congress seldom weighs in.

The “Congressional Review Act” (CRA) requires all federal agencies to submit final rules to Congress and the Government Accountability Office (GAO). The CRA provides an expedited legislative process that allows Congress to overturn a rule if both houses pass a “resolution of disapproval” and the president signs the joint

resolution of disapproval. Senate rules have a timetable for this expedited process of 60 days during which the Senate is in session. The Trump Administration made extensive use of the CRA. More information about the “Congressional Review Act” can be found in *The Congressional Review Act: Frequently Asked Questions*.

HOW TO FIND PROPOSED AND FINAL REGULATIONS IN THE FEDERAL REGISTER

The Government Printing Office (GPO) publishes the *Federal Register* and the Code of Federal Regulations (CFR).

- The current day’s *Federal Register* and links to browse back issues are at <https://bit.ly/32BpASX>.
- A preview of the next day’s *Federal Register* is at <http://bit.ly/2iVERG4>.
- *Federal Register* notices for both proposed and final rules can be tracked by subscribing to a daily email of the table of contents of the *Federal Register* at <http://bit.ly/2iNz1sY>.

The public can read and copy comments made by others at HUD headquarters or at <https://www.regulations.gov>, which also provides all rules open for comment and enables electronic submission of comments.

HOW TO READ THE FEDERAL REGISTER

Both proposed and final rules are standard features in the *Federal Register*. The opening heading will look like this (with different numbers and topics):

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 990

[Docket No. FR-4874-F-08]

RIN 2577-AC51

Revisions to the Public Housing Operating Fund Program

AGENCY: Office of the Assistant Secretary

for Public and Indian Housing, HUD

ACTION: Final rule

Below the heading will be the following categories:

SUMMARY: This is a short presentation of what is proposed or implemented and what the related issues and rulemaking objectives are.

DATES: Here is either: “*Comment due date*,” the date by which comments to proposed rules are due; or “*Effective Date*,” the date the final rule will go into effect.

ADDRESSES: For proposed regulations only, this section provides the room number and street address for sending written comments, although it is now preferable to submit comments electronically at www.regulations.gov

FOR FURTHER INFORMATION CONTACT: The name of a HUD staff person responsible for the issue is presented, along with a phone number and office address.

SUPPLEMENTARY INFORMATION: This section is often called the “preamble” and can go on for many pages. It contains a detailed discussion of the issues and the rule-making objectives. The law or sections of a law that give legal authority for the regulations are generally mentioned. With final rules, there must also be a discussion of all of the significant public comments submitted, along with HUD’s reasons for accepting or rejecting them.

LIST OF SUBJECTS IN *nn* CFR PART *nnn*: The actual changes (or new provisions) begin at this heading. Key words are presented here.

Next there is a sentence that says “Accordingly, for the reasons described in the preamble, HUD revises [or proposes to revise] *nn* CFR Part *nnn* to read as follows:”

The sections of the regulations subject to change (or that are new) then follow in numerical order.

At the very end the document is dated and “signed” by the appropriate HUD official.

SENDING COMMENTS ABOUT PROPOSED REGULATIONS

Your Comment Letter

Be sure to follow the guidance provided in the “ADDRESSES” section of the proposed rule. For example, regarding proposed changes to the Consolidated Plan rules, one would have addressed comments to:

Regulations Division, Office of General Counsel
Room 10276
Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410-0500

RE: Docket No. FR-4923-P-01; HUD 2004-0028
Revisions and Updates to Consolidated Plan

It is very important to indicate the docket number and it is helpful to include the subject title as it appears in the heading of the proposed rule. There is no set format for writing comments, although HUD’s “How do I prepare effective comments?” (<http://bit.ly/2jjqVcg>) is a useful guide. It is best to indicate which of the proposed rules are of concern by citing them and commenting on them individually. For example:

ABC Tenant Organization thinks that there are problems with proposed section 91.315(k)(3) because...

We strongly endorse proposed section 91.205(b)(1) because...

Advocates should rely on their experiences to explicitly state why they agree or disagree. When there is disagreement, suggest words that address the concern. Don’t just write about the problems; be sure to tell HUD what is beneficial. Declaring support for key provisions is often essential to counterbalance negative comments from those in opposition.

How to Submit Comments via Regulations.gov

It is best to submit comments electronically at www.regulations.gov. There you will see a big blue box that says, “Make a difference. Submit your comments and let your voice be heard,” and within the blue box is a white search box that reads “SEARCH for dockets and documents on agency actions.”

In the search line, type in either the docket number, the registrant identification number (RIN), or the title of the rule, such as “Affirmatively Furthering Fair Housing.” By hitting “Search” that should provide the rule open for comment. If you are submitting a comment on the day comments are due, you can also try, under “Comments Due Soon” – “Today” located at the right column.

Next, below the link for the proposed rule there is a small box to the left with “Comment” in blue letters. Select “Comment.” Under “Write a Comment,” assuming you have written at least a page of text, it is suggested that you **do not** type in your comment where it says “Start typing here...” Instead, it is recommended that you scroll down a little to where it says “Attach Files.” In the box created by dashed lines where it says “Drop files here or Browse,” click on Browse. There you will have to click on “Choose files.” That will open your own computer files. Go to your appropriate folder and select your comment letter (as a PDF). Then choose “open” on your system. That should attach your comment letter in the regulations.gov system.

Enter your email address and opt to receive an email confirmation. Next where it says “Tell us about yourself! I am...*” click on one of the three icons that describes you; probably “An Organization.” Under “Your Organization Information” select the type from the dropdown menu; probably simply “Organization” and type in your organization’s name.

Finally check the reCAPTCHA box to confirm that you are not a robot. Hit “Submit Comment” in the little blue box. Sent!

THE CODE OF FEDERAL REGULATIONS

All final rules published in the *Federal Register* are eventually collected and placed in the CFR and “codified.” To look up a rule that has not changed in the past year, turn to the CFR, which is generally updated each April for HUD-related rules. All titles updated through 2021 are available at <https://bit.ly/2EqaJ3w>.

The CFR has 50 “titles”, each representing a broad topic. HUD-related regulations are in Title 24. Each title is divided into “parts” that cover specific program areas. For example, within Title 24, Part 93 covers the national Housing Trust Fund rules and Part 982 lays out the Housing Choice Voucher program rules.

In addition, the GPO provides the Electronic Code of Federal Regulations (e-CFR). Although it is not an official legal edition of the CFR, it is an editorial compilation of CFR material and *Federal Register* amendments that is updated daily. Access the e-CFR at <http://bit.ly/YlVWrv>. On the e-CFR home page select Title 24 from the dropdown box and a list of HUD-related “parts” will appear.

TALKING ABOUT REGULATIONS

Two levels of regulatory citation have already been mentioned, the “title” and the “part.” Below that comes the “section” that covers one provision of a program rule and then a “paragraph” that provides specific requirements.

For example, the Public Housing Authority Plan regulations are in Title 24 at Part 903, written as 24 CFR 903. Resident Advisory Boards (RABs) and their role in developing the annual PHA Plan are presented in Section 13, cited as 24 CFR 903.13. “Paragraph” (c) specifies that PHAs must consider the recommendations made by the RAB and “subparagraph” (c)(1) goes into more detail by requiring PHAs to include a copy of the RAB’s recommendations with the PHA Plan. This is written as 24 CFR 903.13(c)(1).

FOR MORE INFORMATION

National Low Income Housing Coalition, 202-662-1530, www.nlihc.org.

National Archives and Records Administration has a good online tutorial at <http://bit.ly/2ijLMIo>.

Office of the *Federal Register*, <http://bit.ly/2jbBM3I>.

HUD's Office of General Counsel has an Overview of HUD's Rulemaking Process at <http://bit.ly/2hYyekB>.

Rules that might be at OIRA, or that have recently cleared OIRA, are at <https://bit.ly/2SFpUZw>.

The Code of Federal Regulations (CFR) is at <https://bit.ly/31MHCV1>.

The Office of Information and Regulatory Affairs (OIRA) is at <https://bit.ly/3H5NQ2p>.

The EO 12866 Regulatory Review site is at <https://bit.ly/3bWsUwq>.