



September 24, 2020

GENERAL NEWS

HUD Publishes Final Rule on Disparate Impact

On September 10, we reported that HUD released a prepublication copy of a final rule amending its interpretation of the Fair Housing Act’s disparate impact standard. Today HUD has officially published the final rule in the Federal Register.

The rule, which incorporates comments following the proposed rule issued in August 2019, amends HUD’s 2013 final rule on disparate impact to better reflect the 2015 U.S. Supreme Court ruling in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc. As you recall, in May 2018, HUD announced that it would seek public comments on whether the 2013 final rule was consistent with such ruling. The final rule also amends the 2016 supplement to HUD’s responses to certain insurance industry comments made during the rulemaking.

The 2013 disparate impact final rule provided a framework for establishing legal liability for facially neutral practices that have discriminatory effects on classes of persons protected under the Fair Housing Act. Today’s final rule would, in general, create a higher bar for proving discriminatory outcomes by expanding available defenses and rebuttals to allegations of discriminatory effect. That is, a charging party must now “sufficiently plead facts” to support a variety of criteria set out under the rule and prove by the preponderance of evidence that these criteria are met. While prominent organizations have spoken out against the proposed rule, and multiple comments expressed concern that the final rule may not be compliant with supreme court rulings or fair housing protections more broadly, HUD states that the final rule “provides greater clarity of the law for individuals, litigants, regulators, and industry professionals.”

The effective date of the final rule is October 26, 2020. Further details, including HUD’s response to public comments received from the proposed rule, can be found in the final rule.

PH PROGRAM NEWS

PIH Posts Explanation, Letters, and Detailed Calculation Reports for October and November Obligations

HUD’s Office of Public and Indian Housing (PIH) has posted a document explaining public housing operating fund obligations for October and November 2020. According to the document, October and November obligations are based on the actual eligibility as identified in the 2020 operating subsidy forms, which PHAs may view in the operating fund web portal. All operating subsidy obligations are cumulative, meaning that public housing projects are provided funding in the amount of ninth twelfths of prorated eligibility. As such, to the extent that excess amounts were cumulatively obligated to a project previously, its current obligation will reflect a relative decrease. To the extent that insufficient amounts were cumulatively obligated to a project previously, its current obligation will reflect a relative increase.

The document also states that the Department undertakes a conservative methodology in determining proration levels prior to a determination of final eligibility. Because the CARES Act specified that supplemental operating funds would be added to normally appropriated operating funds, the CARES Act funds are included in the proration rate calculation. For the three months of funding, the Department considered 2020 interim eligibility to provide for an interim proration level of approximately 111.16%. The final proration will reflect the difference in the amount of the actual eligibility for final approved PHA subsidy requests and the normal 2020 Appropriation Act and the CARES Act.

HUD plans to make this round of funding available through eLOCCS no later than October 1, 2020. The next round of funding is expected to be available in eLOCCS by December 1, 2020.

**There appears to be some inconsistencies in the “Interim Proration Levels” section of the document. We are quoting it directly.*

PIH has also posted the public housing operating subsidy obligation letters and detailed calculation reports for October and November. As usual, the letters to all PHAs in the same state are combined in a single file, which you can access through the map on this webpage. The calculations are presented in the same format as obligation letters—the calculations are organized with all PHAs in the same state combined in a single file, which you can access through a map here. You’ll find links to the explanation, letters, and calculations reports on the 2020 operating fund grant processing page at the operating fund website.



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