

## Questions Corner

**Q:** I am writing a motion to dismiss an eviction case for a client who's been accused of committing fraud (she lives in a Project-based Section 8 unit) because of some inconsistencies in reported income information, and I cite heavily to the HUD Handbook 4350.3 in the motion. How much weight will a court give to statements in the Handbook?

**A:** To answer this question, we must first evaluate whether the statement that you rely upon has a statutory or regulatory antecedent. Language in a handbook or other sub-regulatory directive is entitled to deference if it interprets an existing statute or regulation, and the degree of deference will depend on whether the agency is interpreting a statute or its own regulation. Otherwise, if the rule is not anchored to either a statutory or regulatory provision, the handbook provision may instead be a procedurally improper legislative rule that will not be given any effect. Of course, there may be situations where a court will nevertheless give effect to such a provision because it represents the agency's position, especially if its validity is not challenged. Each provision in the Handbook must be evaluated individually to determine what weight a court will give the Secretary's interpretation.

### Degree of Deference When Handbook Interprets a Statute or Regulation

If the Handbook provision directly interprets the statute, the Handbook receives *Skidmore* deference.<sup>1</sup> This means that the weight given to the agency's interpretation will "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements."<sup>2</sup>

On the other hand, when the Handbook interprets the agency's own regulation rather than the statute, it is entitled to greater deference under *Auer*

*v. Robbins*.<sup>3</sup> Under *Auer*, the agency's interpretation of its own ambiguous regulation must be upheld by the court unless the interpretation is "plainly erroneous or inconsistent with the regulation."<sup>4</sup>

Sometimes a handbook or a notice would interpret both the statute and the corresponding regulation. In that case, the court will generally treat the handbook language to interpret the regulation and apply the more deferential *Auer* standard unless the regulation only parrots the statutory language.<sup>5</sup> Under this anti-parroting canon, interpretation contained in a sub-regulatory directive will receive only *Skidmore* deference if the regulation simply repeats the language of the statute without further elaboration.<sup>6</sup>

### No Deference for Procedurally Improper Legislative Rules

While handbooks may interpret the law, they do not have the force of law and may not create new binding rules. Under the Administrative Procedure Act, an agency may not issue binding rules unless the agency provides a notice and comment rulemaking process.<sup>7</sup> Because handbooks are not published for comment in the Federal Register, rules announced in handbooks that create new obligations for third parties are invalid and will not be given any weight.<sup>8</sup>

It should be noted that older cases often recognized the binding effect of sub-regulatory directives from HUD such as circulars. For example, in *Thorpe v. Durham Housing Authority*, the Supreme Court assumed that HUD circulars are binding upon housing authorities even though HUD did not employ notice and comment

<sup>1</sup>See, e.g., *Park Vill. Tenants Assoc. v. Mortimer Howard Trust*, 636 F.3d 1150 (9th Cir. 2011) (giving HUD Renewal Policy deference under *Skidmore*); *Massie v. HUD*, 620 F.3d 340, 350 n.8 (3d Cir. 2010) (HUD memorandum was akin to agency manual and thus was only entitled to *Skidmore*, not *Chevron*, deference); *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197 (9th Cir. 2009) (*Skidmore* deference for HUD's interpretation of "other good cause" issued in notice); *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343 (10th Cir. 1987) (*Skidmore* deference given to Handbook's interpretation).

<sup>2</sup>*Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>3</sup>See, e.g., *Horizon Homes of Davenport v. Nunn*, 684 N.W.2d 221 (Iowa 2004) (applying *Auer* deference to HUD Handbook 4350.3); *Impac Assocs. Redevel. Co. v. Robinson*, 805 N.Y.S.2d 253 (Civ. Ct. 2005) (same).

<sup>4</sup>*Auer v. Robbins*, 519 U.S. 452, 461 (1997). See, e.g., *Miller v. McCormick*, 605 F. Supp. 2d 296, 311 (D. Me. 2009) (applying *Auer* deference to but declining to adopt interpretation stated in a HUD form because it contradicted plain language of the regulation).

<sup>5</sup>*Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 881-82 (2011).

<sup>6</sup>See *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) ("[T]he existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute."); see also *Park Vill. Tenants Assoc. v. Mortimer Howard Trust*, 636 F.3d 1150 (9th Cir. 2011) (giving HUD Renewal Policy deference under *Skidmore* in a case where the anti-parroting canon could have been appropriately applied without mentioning the canon).

<sup>7</sup>5 U.S.C. § 553 (2012).

<sup>8</sup>Unpublished directives stating agency policy may nevertheless be enforceable against the agency via an abuse of discretion claim under the APA, 5 U.S.C. § 706(2) (2013).

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to issue the circulars.<sup>9</sup> The circulars were procedurally valid because they fell within the contracts exemption from the APA's procedural requirement, as HUD had contractual relationships with individual housing authorities through Annual Contribution Contracts.<sup>10</sup>

However, these cases are distinguishable because HUD removed itself from the APA's contract exemption through rulemaking in 1979.<sup>11</sup> Accordingly, HUD must use the notice and comment process to issue binding rules, even if such a procedure is not required under the APA.<sup>12</sup> Under its rulemaking regulation, HUD may still issue statements of policy, interpretive rules, or internal procedural rules without employing notice and comment procedures.<sup>13</sup> But if HUD issues a Handbook containing a substantive rule that lacks a statutory or regulatory antecedent but "creates rights, imposes obligations, or effects a change in existing law," that rule is likely a procedurally invalid legislative rule.<sup>14</sup>

### Application of Law to These Facts

Here, the statute provides that tenants in Project-based units "may not be evicted without good cause."<sup>15</sup> The regulations for the various project-based programs define "good cause" to include "knowingly providing incomplete or inaccurate information."<sup>16</sup> The Secretary provided further guidance in the Handbook that "fraud should not be confused with tenant errors, which HUD considers unintentional program violations" that are "not basis for eviction."<sup>17</sup> The Handbook also sets forth an example of what HUD considers to be an unintentional program violation, as opposed to fraud.<sup>18</sup>

The Handbook's guidance interprets both the definition of "good cause" in the statute and what it means to commit fraud that constitutes good cause in the regulation. Further, the anti-parroting canon does not apply because HUD exercised its rulemaking authority to include fraud within the meaning of "good cause." Therefore, the Handbook's interpretation of what constitutes fraud under HUD's own regulation receives *Auer* deference,<sup>19</sup> and thus should be given full effect since it is not plainly inconsistent with the regulation. ■

<sup>9</sup>Thorpe v. Durham Hous. Auth., 393 U.S. 268 (1969).

<sup>10</sup>See Hous. Auth. of City of Omaha v. United States, 468 F.2d 1, 9 (8th Cir. 1972).

<sup>11</sup>24 C.F.R. § 10.1 (2012).

<sup>12</sup>See Yesler Terrace Cmty. Council v. Cisneros, 37 F.3d 442, 447 (9th Cir. 1994) (holding that HUD's own regulation required HUD to employ notice and comment even if the procedure was not required under the APA).

<sup>13</sup>24 C.F.R. § 10.1.

<sup>14</sup>Yesler Terrace Cmty. Council v. Cisneros, 37 F.3d at 447-50 (invalidating HUD's due process determination for Washington due to failure to employ notice and comment rulemaking); see also Lee v. Kemp, 731 F. Supp. 1101 (D.D.C. 1989) (holding that HUD's property disposition procedures, as contained in the HUD Disposition Handbook, are procedurally improper legislative rules and thus invalid).

<sup>15</sup>42 U.S.C. § 1715z-1b (2012).

<sup>16</sup>24 C.F.R. § 880.607(b)(3)(i)(A), § 247.3(c)(3)(ii) (2012).

<sup>17</sup>HUD Handbook 4350.3 ¶ 8-13 (emphasis in original).

<sup>18</sup>*Id.* at ¶ 8-17.

<sup>19</sup>*Cf.* Greenport Assocs. v. Gallimore, 2005 N.Y. Slip Op. 50649(U) (App. Term. 2005) (deferring to HUD Handbook 4350.3's definition of fraud without specifying the degree of deference); Kingsbridge Ct. Assocs., L.P. v. Hamlette, 2009 N.Y. Slip Op. 52486(U) (Civ. Ct. 2009) (holding that Handbook 4350.3's definition of fraud is "binding upon this court").