

Three Things HUD Should Do to Strengthen Its Interim AFFH Rule

Background:

On June 10, 2021, HUD published an interim final rule to revoke the 2020 Preserving Community and Neighborhood Choice (PCNC) rule and reinstate the Affirmatively Furthering Fair Housing (AFFH) definitions and certification requirements from the 2015 AFFH rule. Unlike the PCNC rule, the 2015 rule defined AFFH in a manner consistent with Congressional intent, agency interpretation, and decades of judicial decisions. This interim rule is an important step toward full restoration of an effective AFFH rule, which HUD will propose in the months ahead. But this interim rule is not as strong as it can and should be. To create an effective – if partial – regulatory framework to guide its own AFFH efforts and those of its grantees, HUD should make three changes before the rule goes into final effect on July 31.

The three things HUD should do to strengthen the interim final rule are:

1. **Restore the full scope of the rule's purpose** as it was stated in §5.150 of the 2015 rule, to better reflect the breadth of what it means to affirmatively further fair housing. That section emphasized the need for grantees to take such actions as, "developing affordable housing, and removing barriers to the development of such housing, in areas of high opportunity; strategically enhancing access to opportunity, including through: targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation."
2. **Reinstate the full 2015 certification standard**, making it clear that not only must grantees take meaningful actions to affirmatively further fair housing, *but they must also not* take any action that is materially inconsistent with that obligation: they must not engage in discrimination themselves, take actions that perpetuate segregation, or diminish equitable access to community resources and opportunities.
3. **Require grantees to take immediate steps to ensure that their fair housing plans are up to date.** These plans should guide the way grantees spend their housing and community development funds, including the billions of dollars that Congress has already allocated for COVID-19 recovery and will likely allocate for infrastructure. Bringing these plans current cannot wait for the next round of rulemaking. Some grantees have not updated their fair housing plans since before the 2015 AFFH rule went into effect and have plans that date back to 2010 or even 2005. These are not sufficient to guide current decision-making. Further, it will take HUD some time to develop a proposed new AFFH rule, which must then go through notice and public comment before being made final. It could take a year to put a new rule in place. And then, if – as was the case under the 2015 AFFH rule – the timeline for doing fair housing planning is tied to the Consolidated Plan and PHA plan cycles, it could be several more years before grantees have to do new fair housing plans. More than half of grantees that do Consolidated Plans submitted them to HUD in 2020 and will not do so again until 2025. If HUD puts a new AFFH rule in place sometime in 2022, it is possible that many grantees will not update their fair housing plans until 2024 or 2025. That is too long to wait, particularly for grantees whose plans are already out of date. HUD should require grantees to update their plans now, and use the lessons learned from implementation of the 2015 rule to give them guidance on how best to do so.