New HUD rule repeals Obama-era Affirmatively Furthering Fair Housing rule

By Harry J. Kelly

On Friday, August 7, HUD announced its new “Preserving Community and Neighborhood Choice” rule (85 Fed. Reg. 47899) (the “Choice Rule”), effectively repealing the Affirmatively Furthering Fair Housing (AFFH) rule announced by the Obama administration in 2015. The subject of much controversy, the 2015 AFFH rule imposed rigorous obligations on state and local recipients of HUD funds to identify obstacles to fair housing in their jurisdictions and to take active steps to eliminate them. The new Choice Rule effectively eliminates those obligations, setting an extremely low bar about what HUD grantees must do to meet their affirmative fair housing duties. While all regulations inevitably have some political edge, the new Choice Rule appears to be an attempt to use the Fair Housing Act (FHAct) to draw political lines in ways that have not been seen before at the national level.

Affirmatively Furthering Fair Housing, then and now

Although not necessarily at the top of the national dialogue, the topic of affirmatively furthering fair housing has been one of the most politically charged issues addressed by HUD in recent decades. Beginning in the mid-1990s, when the duty to affirmatively further fair housing was first imposed on HUD grantees, including state and local governments and agencies, HUD insisted that grantees provided an “analysis of impediments” to fair housing in their jurisdictions and certified that they were taking steps to affirmatively further fair housing. Commentators complained that this requirement did not go far enough, imposing no measured, specific duty to take action to halt discriminatory practices, like exclusionary zoning. Litigation arose, including False Claims Act litigation against Westchester County in New York State, charging that grantees were making their certifications—and receiving federal funds—without taking any actual steps to promote fair housing goals.

During the Obama administration, HUD adopted a more aggressive posture, publishing its AFFH rule in 2015. Essentially, the AFFH rule required HUD grantees to take a harder look at the legal, demographic, and socio-economic issues in their jurisdictions that made achieving fair housing difficult and to propose steps that they would take—including measures of their success or failure—to overcome those obstacles. HUD offered “assessment tools” and deep databases of socio-economic and demographic data to help local jurisdictions prepare their “assessments of fair
housing.” The threat existed that if a grantee did not take effective measures to overcome those challenges, HUD would restrict or even eliminate funding.

The AFFH rule had implementation issues relating to complexity and the volume of information needed for completing the assessments. Although a few jurisdictions managed to submit their assessments of fair housing, delays by the Office of Management and Budget in approving the multiple versions of the assessment tool developed by HUD for different types of grantees meant that few jurisdictions really started the new AFFH process. Criticisms were leveled that, in addition to the time and cost involved in preparing assessments of fair housing, the AFFH rule required local grantees to assess issues—such as the availability of education and health care resources—that were outside their jurisdictional authority and areas of professional competence.

In 2018, the Trump administration suspended the duty to file assessments of fair housing for most grantees until 2020 or later. Then, earlier this year, HUD announced an overhaul of the AFFH rule. While the proposed rule retained the model of state and local assessment of fair housing issues, it identified a list of sixteen obstacles to fair housing and directed grantees to identify three goals to overcome those obstacles. Some of the obstacles listed by HUD—such as source of income laws, rent control, and energy and water efficiency standards—were themselves politically charged. HUD retained the right to review submissions and to take action regarding grantees depending on their success. In most respects, the proposed rule was a scaled-back version of the 2015 AFFH rule.

The Choice Rule

According to the announcement, earlier this year, President Trump “expressed concern that the HUD approach [in the proposed rule] did not go far enough” to lessen the burden on local grantees and directed HUD to revise the rule “to empower local communities and to reduce the regulatory burden” on local grantees. 85 Fed. Reg. at 47901. Essentially, HUD’s approach is to start again from scratch. HUD declares that “affirmatively furthering fair housing” is “a vague, undefined term that could be open to several different plausible meanings.” Id. Announcing that “HUD’s interpretation will be entitled to deference as long as it is reasonable,” HUD adopts the so-called “Ordinary-Meaning Canon” and walks through dictionary definitions of “affirm” and “further” to develop new interpretations of grantees' duties. Id. at 47901, 02.

In the end, the Choice Rule removes the prior AFFH rule (24 CFR §§ 5.150-.168) and replaces it with three short provisions:

- A new section 5.150(a) that defines “fair housing” as “housing that, among other attributes, is affordable, safe, decent, free of unlawful discrimination, and accessible as required under civil rights laws.” Id. at 47905.

- A new section 5.150(b) that defines “affirmatively further” to mean “to take any action that is rationally related to promoting any attribute or attributes of fair housing as defined in the previous subsection.” Id.

- A new section 5.151 that states that a grantee’s certification “that it will affirmatively further fair housing is sufficient if the participant takes, in the relevant period, any action that is rationally related to promoting one or more attributes of fair housing as defined in section 5.150(a).” Id. (emphasis added).

In effect, a grantee can meet its AFFH obligation by certifying it has taken “any action” to promote the “attributes” of “fair housing” in the new § 5.150(a). That sets a pretty minimal level of
obligation: for example, by promoting a single “attribute” of the new definition of “fair housing”—such as “safe” housing—a grantee arguably would meet its AFFH requirement, even if there was no express anti-discrimination component to its action.

Given the intense history of this AFFH Rule over the past half-dozen years, we probably haven’t heard the final word on affirmatively furthering fair housing.

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