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HUD Sets Stage For FCA Claims Against Fund Recipients

Law360, New York (July 23, 2013, 5:16 PM ET) -- The Fair Housing Act requires agencies to administer their programs and activities relating to housing and urban development "affirmatively to further" fair housing. Recipients of U.S. Department of Housing and Urban Development program funding currently are required to conduct a fairly unstructured analysis of impediments to fair housing choices and certify that they will affirmatively further fair housing.



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A HUD rule proposed on July 18 details in sweeping fashion the obligation that all recipients of funds have to "affirmatively further fair housing" (AFFH). At the heart of the new rule is a definition of AFFH itself, which requires, in addition to anti-discrimination measures, "proactive steps" to "foster more inclusive communities and access to community assets for all persons protected by the Fair Housing Act."

The rule had been sitting on HUD's agenda for more than five years. Why issue it now?

In remarks delivered on July 16, HUD Secretary Shaun Donovan noted that HUD has been more active in enforcement in the last several years. For example, HUD charged more cases in 2011 than it had in the entire preceding decade, and it has more than tripled the number of secretary-initiated complaints since 2008.

Donovan acknowledged that discrimination takes both "in your face" and in subtler forms, and that the agency must be responsive to both. Suggesting some degree of historic passivity relating to subtle discrimination, Donovan noted that HUD's mandate includes not only ensuring access to housing, but also "giving every community access to important neighborhood amenities that can make a tremendous difference in a person's life outcome." HUD has concluded that the mechanisms currently in place to fulfill the AFFH mandate are ineffective in achieving these outcomes.

HUD views better data as a key to better outcomes. To that end, the agency will provide data to program participants to "assist them in their assessment of the availability of fair housing choice in their jurisdictions and in overcoming barriers to such choice."

Specifically, national and local data will relate to patterns of integration and segregation; racially and ethnically concentrated areas of poverty; access to neighborhood opportunities such as education, employment, low poverty, transportation and environmental health; disproportionate housing needs; individuals with disabilities and families with children; and discrimination. Site locational data will include the distribution of housing choice vouchers and occupancy information.

Taken together, HUD intends for the data to provide an understanding of segregation dynamics and disproportionate housing needs for protected classes. HUD also intends for

the data to measure (1) the depth and intensity of poverty, (2) school proficiency, (3) labor market intensity and engagement of human capital, (4) geography of access to jobs, (5) health hazards exposure, and (6) access to transit.

Building on this data, the new rule directly links the AFFH obligation to housing and community development planning processes. It requires program participants to conduct and submit an assessment of fair housing, which will include, at a minimum:

- Summary of fair housing issues and the capacity to address them, including findings or judgments relating to fair housing or other civil rights laws and assessment of compliance with existing fair housing laws, regulations and guidance, and an assessment of fair housing enforcement and outreach capacity;
- Analysis of the data provided by HUD, which will identify integration and segregation patterns and trends across protected classes, racially or ethnically concentrated areas of poverty, whether significant disparities in access to community assets exist, and whether disproportionate housing needs exist across protected classes;
- Assessment of determinants of fair housing issues, including those influencing conditions of integration and segregation, concentrations of poverty, disparities in access to community assets, and disproportionate housing needs based on protected class;
- Identification of fair housing priorities and general goals, which will be specific and driven by the analyses above; and
- Summary of community participation in the development of the assessment of fair housing.

Perhaps most significantly, each jurisdiction is required to submit a certification that it will affirmatively further fair housing, "which means that it will take meaningful actions to further the goals identified in the [assessment of fair housing] ... and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing."

There is no direct cause of action against HUD grantees for failure to comply with AFFH obligations. However, certification to the government could be likened to the bases for False Claims Act lawsuits filed by the U.S. Department of Justice in connection with FHA insurance programs in recent years; the lawsuits have alleged that institutions falsely certified that certain mortgage loans qualified for insurance and have resulted in hundreds of millions of dollars in settlements.

The False Claims Act imposes liability on any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States government ... a false or fraudulent claim for payment or approval." These claims may be brought as a result of a federal inquiry or by private persons (called "relators") who file suits on behalf of the government in a qui tam action. Qui tam plaintiffs may be disgruntled employees — or even a whistleblower who did little more than file a freedom of information request for an assessment of fair housing.

In U.S. ex rel. Anti-Discrimination Center v. Westchester County, the ADC alleged that Westchester had falsely certified that it complied with its AFFH obligations in order to receive \$52 million in HUD and other government funds. In particular, ADC alleged that Westchester failed to consider race-based impediments to fair housing choice, failed to identify and take steps to overcome impediments, and failed to maintain records relating to its efforts.

Settlement of the lawsuit required Westchester to spend more than \$50 million to build or acquire 750 homes or apartments, 630 of which were to be provided in areas where black residents constitute 3 percent or less of the population and Hispanic residents constitute less than 7 percent. Westchester also agreed to pay \$7.5 million as a relator's share under the FCA to the ADC, as well as \$2.5 million in attorney's fees.

These were the numbers when AFFH was underdefined. The treble damages provision of the FCA, in combination with (1) a defined AFFH, (2) guideposts and data for measuring and tracking compliance, and (3) the requirement that funds recipients certify not only compliance but also that they will take no action inconsistent with AFFH, creates considerable likelihood that litigation will follow the final rule.

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