

ALERT

HUD Proposes to Require Broadband Infrastructure Installation in Projects to Construct or Substantially Rehabilitate Multifamily Rental Housing

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The U.S. Department of Housing and Urban Development (HUD) has published a notice of proposed rulemaking (NPRM) seeking comment on a proposal to require HUD grantees to install broadband infrastructure when undertaking new construction or substantial rehabilitation of multifamily rental housing funded by any of ten HUD programs. Under the proposed rules, HUD grantees could install either fixed or wireless infrastructure, and would be responsible only for in-dwelling infrastructure, not the provision of service or connection to an Internet service provider. This new requirement could present opportunities for partnerships to deploy broadband infrastructure in multifamily dwellings using HUD grant funding. Comments on the NPRM are due on or before July 18, 2016.

The NPRM follows a March 2015 Presidential memorandum issued by President Obama directing agencies to identify and address regulatory barriers to broadband deployment. The memorandum directs agencies to “pay particular attention to increasing broadband access for under-served communities . . . and to exploring opportunities to reduce costs for potential low-income users.” In July 2015, HUD launched its “ConnectHome” initiative designed to bring together Internet service providers, non-profits, and other stakeholders to offer broadband access, technical training, digital literacy programs, and broadband-equipped devices to low-income residents. The NPRM explains that the proposed broadband infrastructure requirement would be a way, “beyond ConnectHome, to narrow the digital divide for the low-income individuals and families

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serviced by HUD multifamily rental housing programs.”

In the NPRM, HUD proposes to amend regulations governing ten programs to require the installation of broadband infrastructure in multifamily rental housing supported by HUD funding. The requirement would apply only to new construction or substantial rehabilitation projects. Under the proposed rules, “broadband infrastructure” would include cables, fiber optics, wiring, and other permanent infrastructure, including wireless broadband infrastructure. Affected grantees would need to ensure that the broadband connections made available by the infrastructure could achieve speeds determined by the Federal Communications Commission (FCC) to satisfy “advanced telecommunications capability,” which the NPRM notes currently requires speeds of 25 Megabits per second (Mbps) download and 3 Mbps upload.

The broadband infrastructure installation requirements would be subject to several limitations and exceptions. First, because “other charitable and public social programs, including [ConnectHome], provide free or reduced-cost service,” the NPRM reasons that the role of the broadband infrastructure requirement is to “put[] broadband Internet service within reach.” Accordingly, the NPRM clarifies that affected grantees would not be required to provide a subscription to broadband service or to ensure that the in-dwelling infrastructure is connected to the network of an Internet service provider. Second, a grantee would not be required to install broadband infrastructure if: (i) installation would be infeasible; or (ii) the cost of installation would result in a fundamental alteration of the grantee’s activities or would present an undue burden. Although affected grantees would be required to install only one form of broadband infrastructure, the NPRM “suggests that grantees consider whether installing more than one form of broadband infrastructure would be beneficial to encourage competition among service providers on quality and price.”

The NPRM seeks comment on several specific aspects of the proposal, including the scope of HUD programs subject to the proposed requirement, the definition of “substantial rehabilitation,” the costs of installing broadband infrastructure, and the proposed exceptions to the requirement. Comments on the NPRM are due by July 18, 2016.