

Affirmatively Furthering Fair Housing (AFFH): Under the July 16, 2015 Final Rule

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Administering agency: HUD's Office of Fair Housing and Equal Opportunity (FHEO)

Year started: 1968

Population targeted: The Fair Housing Act's protected classes—race, color, religion, sex, national origin, disability, and familial status (in other words, households with children).

See Also: *Consolidated Planning Process, Public Housing Agency Plan*

HUD EFFECTIVELY SUSPENDS AFFH RULE FOR MOST JURISDICTIONS ON JANUARY 5, 2018

In a surprise move, HUD published a notice in the *Federal Register* on January 5, 2018, suspending most local governments' obligation under the Affirmatively Furthering Fair Housing (AFFH) rule to submit an Assessment of Fair Housing (AFH) well after October 31, 2020, and in many cases after 2025. The AFFH rule, published on July 16, 2015, requires local governments to conduct an AFH using an "Assessment Tool" to assist them in meeting their obligation to affirmatively further fair housing. The suspension effectively postpones implementation of the AFFH rule until 2025 for a large majority of jurisdictions. Based on a review of the first 49 AFH initial submissions, HUD claimed that many local governments need additional time and technical assistance to adjust to the AFFH process instituted in 2015.

The AFFH rule requires local jurisdictions receiving more than \$500,000 a year in Community Development Block Grant (CDBG) funds to submit their first AFH 270 days before their program year that begins on or after January 1, 2017, for which a new Consolidated Plan (ConPlan) is due. In addition, the AFFH rule (as modified by an October 24, 2016, *Federal Register* notice) requires local governments that receive \$500,000 or less in CDBG each year to submit an AFH when they have to prepare a new ConPlan in a program year that begins on or after January 1, 2019.

The vast majority of local governments renew their ConPlans on a five-year cycle that had them renewing their ConPlans in 2015, with an estimated 60% of those renewing by July 1, 2015; consequently they did not need to submit an AFH until their next new ConPlan in 2020. Therefore, the AFFH rule would require those July 1 program year local governments to submit an AFH 270 days before or around October of 2019 – well before the new suspension date of October 31, 2020. The local governments with the latest program year start dates, October 1, 2015 (an estimated 12% of 2015 jurisdictions), would be required to submit an AFH around January of 2020 – again, well before the suspension date of October 31, 2020.

Two additional groups of local governments will also be subject to the suspension: those that have prepared an AFH but have not yet submitted them to HUD, and those that are preparing to re-submit an AFH that HUD found had deficiencies when first submitted.

Advocates estimate that approximately 900 jurisdictions make up all four of the above categories of local jurisdictions affected by the suspension. There are approximately 1,200 local governments that submit a ConPlan.

Because HUD's *Federal Register* notice postpones jurisdictions' requirement to submit an AFH until their required AFH submission date that falls after October 31, 2020, HUD is effectively postponing implementation of the AFFH rule for a large majority of jurisdictions until 2025.

The legal obligation to affirmatively further fair housing continues for all. However, until a local government is required to submit an AFH according to the suspension date, their AFFH obligation reverts to the previous, grossly inadequate protocol of certifying that they are affirmatively furthering fair housing, which simply means conducting an analysis of impediments (AI) to fair housing choice, taking appropriate actions to overcome the effects of any impediments, and keeping records reflecting the analysis and actions. See the *Advocates' Guide* article following this one for information about the AI.

Local governments that have already submitted an AFH that has been accepted by

HUD must continue to execute the goals of that accepted AFH.

The January 5, 2018, *Federal Register* notice is at <http://bit.ly/2mmWrGe>

AFFIRMATIVELY FURTHERING FAIR HOUSING

This article describes the AFFH rule and AFH process introduced by the new July 16, 2015, rule. This new rule and process is being implemented on a staggered basis. Only an estimated 22 CDBG entitlement jurisdictions were required to use this new rule and process in 2016. Another estimated 105 CDBG entitlement jurisdictions began in 2017. Both lists are approximate; for example, a few of the 2016 jurisdictions decided to pair with another jurisdiction in their region, resulting in the 2016 jurisdiction postponing implementation due to the later required start date of the jurisdiction it paired with. NLIHC has obtained an unofficial list from HUD that might provide a clue about which jurisdictions are required to comply in 2018. All other CDBG entitlement jurisdictions, states, and public housing agencies will continue to use the pre-existing AI process (see the following *Advocates' Guide* article, *Affirmatively Furthering Fair Housing (AFFH): For Jurisdictions and Public Housing Agencies Not Yet Required to Comply with the 2015 AFFH Rule.*)

HISTORY

Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act) requires jurisdictions receiving federal funds for housing and urban development activities to affirmatively further fair housing. The Fair Housing Act not only makes it unlawful for jurisdictions to discriminate; the law also requires jurisdictions to take actions that can undo historic patterns of segregation and other types of discrimination, as well as to take actions to promote fair housing choice and to foster inclusive communities. The protected classes of the Fair Housing Act are determined by race, color, national origin, religion, sex, disability, or familial status.

The laws that establish the CDBG program, the Comprehensive Housing Affordability Strategy [(CHAS), the statutory basis of the ConPlan], the HOME Investment Partnerships Program, and the PHA Plan for public housing agencies (PHAs) each require jurisdictions to certify in writing that they are affirmatively furthering fair housing. States must

ensure that units of local government receiving CDBG or HOME funds from the state comply.

On July 16, 2015, HUD published the long-awaited final rule implementing the Fair Housing Act of 1968's obligation for HUD to administer its programs in a way that affirmatively furthers fair housing. HUD began planning for an AFFH rule in 2009 by meeting with a broad spectrum of stakeholders, mindful of vehement opposition that erupted in 1998, which ultimately doomed HUD's effort to publish a rule then. On July 19, 2013, HUD published a proposed AFFH rule. On September 26, 2014, HUD published a proposed Fair Housing Assessment Tool to help guide the AFFH planning process. A final Fair Housing Assessment Tool for larger CDBG entitlement jurisdictions was published on December 31, 2015. An Assessment Tool for PHAs was published on January 13, 2017; however, PHAs do not have to use the Tool until HUD provides the needed data and issues a notice in the *Federal Register* announcing new submission dates. A proposed tool for states was published on March 11, 2016, but never finalized.

SUMMARY

The opening text of the final rule declares that the purpose of the AFFH rule is to provide “program participants” [cities, counties, states, and public housing agencies (PHAs)] “with an effective planning approach to aid them in taking meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination.”

In the preamble, HUD stresses that the new AFFH approach does not mandate specific outcomes; rather, it establishes basic parameters to help guide public sector housing and community development planning and investment decisions. The rule encourages a more engaged and data-driven approach to assessing fair housing and planning actions. The rule establishes a standardized fair housing assessment and planning process to give jurisdictions and PHAs a more effective means to affirmatively further the purposes of the Fair Housing Act.

The Need for the AFFH Rule

Although AFFH has been law since 1968, meaningful regulations to provide jurisdictions and PHAs with guidance on how to comply had not existed. The 1974 law creating CDBG required jurisdictions to certify that they would affirmatively

further fair housing. Eventually, that certification was defined in CDBG regulations (and later in ConPlan regulations) to mean that the executive of a jurisdiction affirmed that the jurisdiction had an AI to fair housing choice, that the jurisdiction would take appropriate actions to overcome the effects of the impediments, and that the jurisdiction would keep records of its actions.

That pre-existing system was not effective, as noted by the Government Accountability Office. There were numerous limitations of the pre-existing AFFH system, beginning with the absence of regulatory guidance. (HUD published a booklet in 1996, but that booklet did not have the authority of regulation, policy notice, or policy memorandum.) Consequently, there was no authoritative source to suggest what might constitute impediments to fair housing choice, nor was there guidance to indicate what actions to overcome impediments might be adequate. Without guidance, many jurisdictions did not take meaningful actions to overcome impediments to fair housing. A classic abuse on the part of some jurisdictions was to assert that they were taking actions to overcome impediments to fair housing by placing fair housing posters around public places during Fair Housing Month. Without guidance and because public participation was not required in the preparation of an AI, many wholly inadequate AIs were drafted. Although other AIs were quite extensive, they seemed destined to sit on a shelf in case HUD asked to see them. (AIs were not submitted to HUD for review.) In addition, AIs were not directly linked to a jurisdiction's ConPlan or a PHA's Five-Year PHA Plan. AIs also had no prescribed schedule for renewal; consequently, many were not updated in a timely fashion.

How the New AFH System Differs From the Pre-existing AI System

The key differences the new rule establishes, compared to the pre-existing AI system, include:

1. The AFH replaces the AI. There was no formal guidance for preparing an AI. The new rule provides a standardized framework for program participants to use to identify and examine what HUD is calling "fair housing issues" and the underlying "contributing factors" that cause the fair housing issues.
2. HUD will provide each program participant with data covering not only the local jurisdiction, but

also the surrounding region. Program participants must consider these data when assessing fair housing.

3. HUD will now receive and review AFHs; HUD did not receive or review AIs.
4. The fair housing goals and priorities that program participants set in the AFH will be incorporated into their ConPlans and PHA Plans.
5. Public participation is required in the development of the AFH.
6. The AFH must be submitted every five years in sync with a new ConPlan or PHA Plan.

When Will the New AFFH System Begin?

Most program participants will not be required to use the new AFFH system until 2019. However, see "HUD Effectively Suspends AFFH Rule on January 5, 2018" at the beginning of this article. Until a program participant is required to submit an AFH, it must continue to follow the current AI process (see following *Advocates' Guide* article *Affirmatively Furthering Fair Housing (AFFH): For Jurisdictions and Public Housing Agencies Not Yet Required to Comply with the 2015 AFFH Rule*).

HUD Supports a Balanced Approach to AFFH

In the final rule, HUD clarifies that it supports a balanced approach to AFFH.

"Strategies and actions must affirmatively further fair housing and may include, but are not limited to, enhancing mobility strategies and encouraging development of new affordable housing in areas of opportunity, as well as place-based strategies to encourage community revitalization, including preservation of existing affordable housing, including HUD-assisted housing."

At several places in the preamble to the final rule, HUD stresses that the final rule supports a balanced approach to AFFH. For example:

"The concept of affirmatively furthering fair housing embodies a balanced approach in which additional affordable housing is developed in areas of opportunity with an insufficient supply of affordable housing; racially or ethnically concentrated areas of poverty are transformed into areas of opportunity that continue to contain affordable housing as a result of preservation and revitalization efforts; and the mobility of low income residents from low-opportunity

areas to high-opportunity areas is encouraged and supported as a realistic, available part of fair housing choice.”

“HUD’s rule recognizes the role of place-based strategies, including economic development to improve conditions in high poverty neighborhoods, as well as preservation of the existing affordable housing stock, including HUD-assisted housing, to help respond to the overwhelming need for affordable housing. Examples of such strategies include investments that will improve conditions and thereby reduce disparities in access to opportunity between impacted neighborhoods and the rest of the city or efforts to maintain and preserve the existing affordable rental housing stock, including HUD-assisted housing, to address a jurisdiction’s fair housing issues.”

WHAT DOES IT MEAN TO “AFFIRMATIVELY FURTHER FAIR HOUSING”?

There is a new AFFH definition:

“Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.”

“Specifically it means taking meaningful actions that:

1. Address significant disparities in housing needs and in access to community opportunity.
2. Replace segregated living patterns with truly integrated and balanced living patterns.
3. Transform racially and ethnically concentrated areas of poverty into areas of opportunity.
4. Foster and maintain compliance with civil rights and fair housing laws.”

What Are “Meaningful Actions”?

Meaningful actions are “significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity.”

What Does It Mean to “Certify”?

Jurisdictions submitting ConPlans and PHAs submitting PHA Plans have always had to certify (pledge) that they are affirmatively furthering fair

housing choice. The final rule amends the old definitions of certifying AFFH compliance to mean that program participants will:

- Take meaningful actions to further the goals in the AFH; and,
- Not take any action that is materially inconsistent with its obligation to AFFH.
- PHAs must also address fair housing issues and contributing factors in their programs.

A FEW DEFINITIONS OF OTHERWISE SIMPLE WORDS

Fair Housing Choice

Fair housing choice means people have enough information about realistic housing options to live where they choose without unlawful discrimination and other barriers. For people with disabilities, it also means accessible housing in the most integrated setting appropriate to the person’s needs, including disability-related services needed to live in the housing.

Fair Housing “Issue”

This definition is also important and is likewise used throughout the new rule. Fair housing issue means a condition that restricts choice or access to opportunity, including:

1. Ongoing local or regional segregation, or lack of integration.
2. Racial or ethnic concentrations of poverty.
3. Significant disparities in access to opportunity.
4. Disproportionate housing needs based on the “protected classes” of race, color, national origin, religion, sex, familial status, or disability.

A fair housing issue also includes evidence of illegal discrimination or violations of civil rights laws, regulations, or guidance.

Fair Housing “Contributing Factor”

This definition is important. The term is used throughout the new rule. Fair housing contributing factor means something that creates, contributes to, perpetuates, or increases the severity of one or more fair housing “issues.”

Definitions for the Four Fair Housing Issues

- **Integration** means that there is not a high concentration of people of a particular protected class in an area subject to analysis required by

the Assessment Tool, such as a census tract or neighborhood, compared to the broader geographic area.

- **Segregation** means that there is a high concentration of people of a particular protected class in an area subject to analysis required by the Assessment Tool, such as a census tract or neighborhood, compared to the broader geographic area.
- **Racially or Ethnically Concentrated Area of Poverty (R/ECAP)** means a geographic area with significant concentrations of poverty and minority populations. The rule does not define “significant” or give metrics. However, the mapping system provided by HUD outlines R/ECAPs on maps and indicates them on data tables. An obscure document, *AFFH Data Documentation*, defines an R/ECAP as an area with a non-white population of 50% or more and a poverty rate that is greater than 40% or that is 3 or more times the average poverty rate for the metropolitan area, whichever threshold is lower.
- **Significant disparities in access to opportunities** means substantial and measurable differences in access to education, transportation, economic, and other important opportunities in a community, based on a protected class related to housing.
- **Disproportionate housing need** refers to a significant disparity in the proportion of a protected class experiencing a category of housing need compared to the proportion of any other relevant groups or the total population experiencing that category of housing need in the geographic area. Categories of housing need are:
 - Cost burden and severe cost burden (paying more than 30% and 50% of income, respectively, for rent/mortgage and utility costs).
 - Overcrowded housing (more than one person per room).
 - Substandard housing conditions.

Assessment Tool

The Assessment Tool refers to forms or templates provided by HUD that must be used to conduct and submit an AFH. The Assessment Tool consists of a series of questions designed to help program participants identify racially and ethnically concentrated

areas of poverty, patterns of integration and segregation, disparities in access to opportunity, and disproportionate housing needs. The Assessment Tool gives more detailed definitions of these than the rule does. HUD states that the Assessment Tool questions are intended to enable program participants to perform meaningful assessments of fair housing issues and contributing factors, and to set meaningful fair housing goals and priorities. The Assessment Tool provides more detailed examples of fair housing issues and contributing factors. There are separate assessment tools for local jurisdictions, states, and PHAs.

WHAT IS AN AFH?

An AFH is an analysis of fair housing data, identification of fair housing “issues,” and assessment of “contributing factors” leading to the establishment of fair housing priorities and statement of fair housing goals, all of which are submitted to HUD using the Assessment Tool. The purpose of the AFH is to identify goals to AFFH that must inform fair housing strategies in the Five-Year ConPlan, Annual ConPlan Action Plan, PHA Plan, and other community plans regarding transportation, education, or the environment. The introduction to the AFH in the regulation states that in order to develop a successful AFFH strategy, it is necessary to assess the factors that cause, increase, contribute to, or maintain fair housing problems such as segregation, racially or ethnically concentrated areas of poverty, significant disparities in access to opportunity, and disproportionate housing needs.

CONTENT OF AN AFH

Program participants must conduct an AFH using the HUD-prescribed Assessment Tool. The rule sets out a structure for the AFH, unlike the AI it replaces, requiring the AFH to:

1. **Analyze data and other information**, such as HUD-provided data, other readily available local data, and local knowledge—including information gained from community participation. The purpose of this analysis is to identify—across the protected classes, both within the jurisdiction and region—the “fair housing issues” of integration and segregation patterns and trends, racially or ethnically concentrated areas of poverty, significant disparities in access to opportunity, and disproportionate housing needs.

2. **Assess fair housing issues** by using the Assessment Tool and the data analysis of step #1 to identify “contributing factors” for segregation, racially or ethnically concentrated areas of poverty, disparities in access to opportunity, and disproportionate housing needs.
3. **Identify fair housing priorities** and goals based on the identified “fair housing issues” and “contributing factors” of steps #1 and #2. The AFH must:
 - a. Identify and discuss the fair housing issues.
 - b. Identify significant contributing factors, assign a priority to them, and justify the priorities.
 - c. Set goals for overcoming the effects of the prioritized contributing factors. For each goal the program participant must:
 - i. Identify one or more contributing factors that the goal is designed to address;
 - ii. Describe how the goal relates to overcoming the contributing factor(s) and related fair housing issue(s); and,
 - iii. Identify the metrics and milestones for determining what fair housing results will be achieved.
4. **Summarize the public participation**, including a summary of efforts to broaden participation in developing the AFH, public comments received in writing and/or orally at public hearings, unaccepted comments and the reasons why they were declined.
5. **Review progress** by summarizing (after the first AFH) the progress achieved in meeting the goals and related metrics and milestones of the previous AFH and identifying any barriers that prevented achieving those goals.

LINKAGE BETWEEN THE AFH AND THE CONPLAN OR PHA PLAN

Strategies and actions to implement the fair housing goals and priorities in an AFH must be included in a program participant’s Five-Year ConPlan, Annual ConPlan Action Plan, or Five-Year PHA Plan.

However, the AFH does not have to include the strategies and actions. If a program participant does not have a HUD-accepted AFH, HUD will not approve its ConPlan or PHA Plan.

ConPlan or PHA Plan strategies and actions must affirmatively further fair housing. Strategies and

actions may include (but are not limited to) enhancing mobility, encouraging development of new affordable housing in areas of opportunity, encouraging community revitalization through place-based strategies, and preserving existing affordable housing.

Activities to affirmatively further fair housing may include:

- Developing affordable housing in areas of high opportunity.
- Removing barriers to developing affordable housing in areas of high opportunity.
- Revitalizing or stabilizing neighborhoods through targeted investments.
- Preserving or rehabilitating existing affordable housing.
- Promoting greater housing choice within or outside of areas of concentrated poverty.
- Promoting greater access to areas of high opportunity.
- Improving community assets, such as quality schools, employment, and transportation.

The ConPlan regulations were modified to require the Strategic Plan portion of the ConPlan to describe how a program participant’s ConPlan priorities and specific objectives will affirmatively further fair housing by having strategies and actions consistent with the goals and “other elements” identified in the AFH. Annual Action Plans that are submitted in between Five-Year ConPlans must describe the actions the program participant plans to take during the upcoming year to address fair housing goals.

HUD REVIEW OF THE AFH

The AFH (unlike the AI) must be submitted to HUD for review and “acceptance.” HUD will determine whether the AFH has a fair housing analysis, assessment, and goals. HUD may choose not to “accept” an AFH, or a part of an AFH, if:

- The AFH is “inconsistent” with fair housing or civil rights laws, examples of which include:
 - The analysis of fair housing issues, fair housing contributing factors, goals, or priorities in the AFH would result in policies or practices that would discriminate.
 - The AFH does not identify policies or practices as fair housing contributing factors even

though they result in excluding protected class people from areas of opportunity.

- The AFH is “substantially incomplete,” examples of which include an AFH that:
 - Was developed without the required community participation or required consultation with other entities.
 - Fails to satisfy a required element of this regulation, examples of which include:
 - An AFH with priorities or goals materially inconsistent with the data and other evidence.
 - An AFH that has priorities or goals not designed to overcome the effects of contributing factors and related fair housing issues.

The AFH will be considered “accepted” by HUD within 60 calendar days. HUD “acceptance” does not mean a program participant is meeting its obligation to AFFH; rather, it means that for purposes of administering HUD funds (such as CDBG) the program participant has provided the elements required in an AFH. If HUD does not “accept” an AFH, HUD must provide specific reasons and describe actions that must be taken to gain “acceptance.” Program participants have 45 days to revise and resubmit an AFH. A revised AFH will be considered “accepted” after 30 calendar days, unless HUD does not “accept” the revised version.

PUBLIC PARTICIPATION IN THE AFH PROCESS

To ensure that the AFH is informed by meaningful community participation, the rule requires program participants to give the public reasonable opportunities for involvement in both the development of the AFH and its incorporation into the ConPlan, PHA Plan, and other planning documents. The public participation provisions of the ConPlan and PHA Plan regulations must be followed in the process of developing the AFH.

Program participants “should” use communications means designed to reach the broadest audience. Examples in the rule include: publishing a summary of each document in one or more newspapers; making copies of each document available on the program participant’s official website; and, making copies of each document available at libraries, government offices, and public places.

The AFFH rule amended the ConPlan public participation regulations to include the AFH Encouraging Public Participation in the Development of the AFH

The AFFH rule adds to the ConPlan rule, requiring jurisdictions to:

- Provide for and encourage residents to participate in the development of the AFH and any revisions to the AFH.
- Encourage participation by the Continuum of Care, local and regional institutions, and other organizations (including community-based organizations) in the process of developing and implementing the AFH.
- Encourage participation by public housing residents, Resident Advisory Boards, resident councils, and other low income residents of a targeted revitalization area where a development is located, regarding developing and implementing the AFH.
- Describe procedures for assessing residents’ language needs, including any need for translation of notices and other vital documents. At a minimum, jurisdictions must take reasonable steps to provide language assistance to ensure meaningful access to participation by people with limited English proficiency.

Make Data, the Proposed and Final AFH, and Records Available to the Public

The AFFH rule adds to the ConPlan rule, requiring jurisdictions to:

- Make available to the public as soon as practical [but] “*after* the start of the public participation process,” the HUD-provided data and any supplemental information the jurisdiction intends to use in preparing the AFH.
- Publish the proposed AFH in a manner that gives the public a reasonable opportunity to examine it and submit comments. The public participation plan must indicate how the proposed AFH will be published. Publishing may be met by:
 - Summarizing the AFH in one or more newspapers of general circulation. The summary must include a list of places where copies of the entire AFH may be examined.
 - Making copies available on the jurisdiction’s official website, and at libraries, government offices, and other public places.

- The jurisdiction must provide a reasonable number of free copies of the proposed AFH to those who request it.
- The HUD-accepted AFH and any revisions must be available to the public—including in forms accessible to people with disabilities—when requested.
- The public must be able to have reasonable and timely access to records from the last five years that relate to the AFH.

Public Review and Comment During the Development of the AFH and the ConPlan

The AFFH rule adds to the ConPlan rule, requiring jurisdictions to:

- Have at least one public hearing during the development of the AFH.
- Have at least one public hearing before the proposed AFH is published for comment, in order to obtain public comments about AFH-related data and affirmatively furthering fair housing in the jurisdiction's housing and community development programs.
- Provide the public at least 30 days to comment on the proposed AFH.
- Consider public comments submitted in writing, or orally at public hearings, when preparing the final AFH. A summary of the comments must be attached to the final AFH, and an explanation of reasons for not accepting comments must be attached to the final AFH.
- Have at least one public hearing before a proposed ConPlan is published for comment in order to obtain public comments about AFFH concerns.
- Make one of the two required public hearings about the ConPlan address a program participant's proposed strategies and actions for affirmatively furthering fair housing consistent with the AFH.
- Respond to written complaints from the public about the AFH or any revisions to it. The response must be in writing, meaningful, and provided within 15 working days.

A Few Additional Key Public Participation Features of the ConPlan Regulations

- Jurisdictions must take appropriate actions to encourage participation by people of color, people who do not speak English, and people

with disabilities. Localities must also encourage participation by residents of public and assisted housing.

- Access to information must be reasonable and timely. For local jurisdictions (not states) the public must have “reasonable and timely” access to local meetings, such as Advisory Committee meetings, City Council subcommittee meetings, etc.
- There must be “adequate” public notice of and access to upcoming hearings. Publishing small print notices in the newspaper a few days before the hearing is not adequate notice. Two weeks’ notice is adequate. Hearings must be held at times convenient to people who are likely to be affected. Hearings must be held in places easy for lower income people to get to.

CONSULTATION WITH OTHER ENTITIES AND THE AFH PROCESS

The AFFH rule also amends the ConPlan regulations’ consultation requirements to include the AFH.

When preparing the AFH and then the ConPlan, jurisdictions are required to consult with community and regionally based (or state-based) organizations, including:

- Organizations that represent protected class members.
- Organizations that enforce fair housing laws (including participants in the Fair Housing Assistance Program).
- Fair housing organizations and nonprofits receiving funding under the Fair Housing Initiative Program.
- Other public and private fair housing service agencies.
- Adjacent governments, including agencies with metro-wide planning and transportation responsibilities, particularly for problems that go beyond a single jurisdiction.
- Entities previously listed in the ConPlan regulations, such as public and private agencies that provide assisted housing, health services, and social services.
- PHAs, not only about the AFH, but also about proposed strategies and actions for affirmatively furthering fair housing in the ConPlan.

- Consultation must be with any organizations that have relevant knowledge or data to inform the AFH, and that are independent and representative.
- Consultation “should” occur with organizations that have the capacity to engage with data informing the AFH, and are independent and representative.
- Consultation must occur at various points in the fair housing planning process, at least in the development of both the AFH and the ConPlan.
- Consultation regarding the ConPlan must specifically seek input about how the AFH goals inform the priorities and objectives of the ConPlan.

HUD ENCOURAGES JOINT AND REGIONAL AFHS

HUD encourages program participants to collaborate to submit a joint AFH or a regional AFH. A joint AFH involves two or more program participants submitting a single AFH. A regional AFH involves at least two program participants that must submit a ConPlan. Collaborating program participants do not have to be adjacent to each other, and they may cross state lines, as long as they are in the same Core Based Statistical Area. One of the program participants must be designated as the lead entity. All program participants are accountable for the analysis and any joint goals and priorities. Collaborating program participants must include their individual analysis, goals, and priorities in the collaborative AFH, and are accountable for them. A joint or regional AFH does not relieve each program participant from its obligation to analyze and address local and regional fair housing issues and contributing factors, and to set priorities and goals for its geographic area to overcome the effects of contributing factors and related fair housing issues. Collaborating program participants must have a plan for public participation that includes residents and others in each of the jurisdictions.

TIMING OF THE AFH

Most program participants will not be required to use the new AFFH system until 2019. However, see “HUD Effectively Suspends AFFH Rule on January 5, 2018” at the beginning of this article. Until a program participant is required to submit an AFH, it must continue to follow the current AI to fair housing choice process. (See the following *Advocates’ Guide* article, *Affirmatively Furthering Fair Housing (AFFH)*:

For Jurisdictions and Public Housing Agencies Not Yet Required to Comply with the 2015 AFFH Rule)

There are five categories of due dates for the initial AFH. In each case, the first AFH must be submitted to HUD 270 calendar days before the start of the program participant’s program year in which a new Five-Year ConPlan or Five-Year PHA Plan is due.

1. CDBG entitlement jurisdictions receiving \$500,000 or more in FY15 and that are required to have a new Five-Year ConPlan on or after January 1, 2017, had to submit an initial AFH 270 calendar days before that new ConPlan is due. It is estimated that there were 22 such jurisdictions. However, HUD has indicated that several of these jurisdictions decided to join with another jurisdiction which has a later due date.
2. The final AFFH rule would have required CDBG entitlement jurisdictions receiving \$500,000 or less in FY15 and that are required to have a new Five-Year ConPlan on or after January 1, 2018, to submit an initial AFH 270 calendar days before that new ConPlan is due. It is estimated that there were 105 entitlement jurisdictions with either more or less than \$500,000 expected to have to submit a new Five-Year ConPlan on or after January 1, 2018. However, on October 24, 2016, HUD announced in the *Federal Register* that the deadline for submitting an AFH was extended to new Five-Year ConPlans due on or after January 1, 2019.

The Assessment Tool published on January 13, 2017, had an “insert” intended to streamline compliance for local governments with a CDBG entitlement of \$500,000 or less that chooses to collaborate with another local government completing the regular Tool.

3. The final AFFH rule would have required states required to have a new Five-Year ConPlan on or after January 1, 2018, to submit an initial AFH 270 calendar days before that new ConPlan is due. Six states were expected to start then. However, although a proposed Assessment Tool for states was published on March 11, 2016, it was never finalized. In response to comments from states, HUD started working with states to redesign the state Assessment Tool. In addition, HUD had not fully developed the data and mapping tool for states. HUD introduced interim guidance on January 18, 2017.

4. The final AFFH rule would have required PHAs with more than 550 public housing units and vouchers, combined, (“non-qualified PHAs”) to submit an AFH 270 calendar days before a new Five-Year PHA Plan was due on or after January 1, 2018. An Assessment Tool for PHAs was published on January 13, 2017; however, PHAs do not have to use the Tool until HUD provides the needed data and issues a notice in the *Federal Register* announcing new submission date. HUD introduced interim guidance on January 18, 2017.
5. The final AFFH rule would have required PHAs with fewer than 550 public housing units and vouchers, combined (“qualified PHAs”) to submit an AFH 270 calendar days before a new Five-Year PHA Plan is due on or after January 1, 2019. As with the non-qualified PHAs, qualified PHAs do not have to use the Assessment Tool yet. HUD introduced interim guidance on January 18, 2017. The PHA Assessment Tool published on January 13, 2017, had an “insert” intended to streamline compliance for PHAs with 1,250 or fewer public housing units and vouchers (combined) that choose to collaborate with local governments completing the regular Tool. In addition, HUD indicated its intent to create a separate Assessment Tool for qualified PHAs.

After the first AFH, all program participants must submit a new AFH 195 calendar days before the start of the first year of their next Five-Year ConPlan or Five-Year PHA Plan. All program participants must submit an AFH at least every five years.

REVISING THE ASSESSMENT OF FAIR HOUSING

An AFH must be revised if there is a “material change,” which is a change that affects the information the AFH is based on so that the analysis, fair housing contributing factors, or priorities and goals do not reflect the current situation. Examples include a presidentially declared disaster, major demographic changes, new significant contributing factors, or significant civil rights findings. HUD may also require a revision if it detects a significant change. A revised AFH must be submitted within 12 months of the onset of the material change. For presidentially declared disasters, the revised AFH is due two years after the date the disaster is declared.

A revised AFH might not require submitting an entirely new AFH. It only needs to focus on the

material change and any new fair housing issues and contributing factors. It must include appropriate adjustments to the analysis, assessments, priorities, or goals.

A jurisdiction’s ConPlan-required “Citizen Participation Plan” and a PHA’s definition of a significant amendment must specify the criteria that will be used for determining when substantial (ConPlan) or significant (PHA Plan) revisions to the AFH are appropriate. When there are revisions to the AFH, the ConPlan and PHA Plan public or resident participation regulations pertaining to substantial/significant amendments must be followed. Completed revisions must be made public and submitted to HUD, following the ConPlan or PHA Plan regulations.

RECORDKEEPING

ConPlan participants and PHAs preparing their own AFHs must have and keep records, including:

- The information that formed the development of the AFH.
- Records demonstrating compliance with the consultation and community participation requirements, including: the names of the organizations involved in the development of the AFH, written public comments, summaries or transcripts of public meetings or hearings, public notices, other correspondence, distribution lists, surveys, interviews, etc.
- Records demonstrating actions taken to AFFH.

The records must be made available to HUD. The AFFH rule does not state that these records are to be made available to the public as well. However, the ConPlan regulations require ConPlan jurisdictions to provide the public with reasonable and timely access to information and records relating to the jurisdiction’s AFH.

FOCUS ON PUBLIC HOUSING AGENCIES

The new AFFH rule offers PHAs three ways to meet the obligation to affirmatively further fair housing:

1. A PHA may work with a local or state government in preparing an AFH. If a PHA serves residents of two or more jurisdictions, the PHA may choose the jurisdiction that most closely aligns with its PHA Plan activities.

2. A PHA may work with one or more other PHAs in the planning, resident participation, and preparation of an AFH. One of the PHAs must be designated the lead agency.
3. A PHA may conduct its own AFH.

A PHA must certify that it will affirmatively further fair housing. This means the PHA will take meaningful actions to further the goals identified in the AFH, take no action that is materially inconsistent with its obligation to AFFH, and address fair housing issues and contributing factors.

A PHA is obligated to AFFH in its operating policies, procedures, and capital activities. A PHA's admission and occupancy policies for public housing and vouchers must comply with the PHA's plans to AFFH. A PHA's policies should be designed to reduce the concentration of tenants by race, national origin, and disability. Any affirmative steps or incentives a PHA plans to take must be stated in the admission policy. PHA policies should include affirmative steps to overcome the effects of discrimination and the effects of conditions that resulted in limiting participation because of race, national origin, disability, or other protected class. Affirmative steps may include:

- Marketing.
- Tenant selection and assignment policies that lead to desegregation.
- Providing additional supportive services and amenities (for example, supportive services that enable someone with a disability to transfer from an institutional setting into the community).
- Coordinating with agencies serving people with disabilities to provide additional community-based housing opportunities.
- Connecting people with disabilities to supportive services to enable them to transfer from an institutional setting into the community.

HUD may challenge a certification if a PHA fails to meet the requirements in the AFFH regulations, fails to take meaningful actions to further the goals of its AFH, or takes action that is materially inconsistent with AFFH.

A PHA's certification is in compliance if it meets the above requirements and it:

- Examines its programs.
- Identifies any fair housing issues and contributing factors in those programs.

- Specifies actions and strategies designed to address contributing factors, related fair housing issues, and goals in its AFH.
- Works with local governments to implement those local governments' efforts to AFFH that require the PHA's involvement.
- Operates its programs in a manner consistent with local jurisdictions' ConPlans.

FORECAST FOR 2018

As noted in "HUD Effectively Suspends AFFH Rule on January 5, 2018" at the beginning of this article, HUD abruptly suspended implementation of the AFFH rule for the vast majority of local governments. As this *Advocates' Guide* goes to press, advocates are considering what – if anything – can be done. Consult NLIHC's AFFH webpage to learn whether anything new has transpired in the subsequent months.

There are serious concerns about continued implementation of the AFFH rule in 2018. Attempts by a few members of Congress in 2017 appropriations bills to prevent HUD from using staff funds to implement the new rule were defeated, but are likely to emerge again in 2018. Furthermore, when he was a presidential candidate, HUD Secretary Ben Carson wrote that the rule "relies on a tortured reading of the Fair Housing law" and is "social engineering" akin to other "failed socialist experiments." He later amended these comments with a statement before the Senate banking committee that fair housing is "the law of the land" and expressed a commitment to implement the law. In July, 2017, in response to a letter from Senator Mike Lee (R-UT) asking that the July 15, 2015, AFFH rule be rescinded, Secretary Carson indicated that he would move to reinterpret the rule, according to an article in the *Washington Examiner*. It is likely that we will see attacks on AFFH implementation—whether through appropriations bills or additional attacks by the administration.

TIPS FOR LOCAL SUCCESS

In light of the surprise January 5, 2018, suspension of the AFFH rule, unless the courts or Congress override the suspension, advocates can still organize to convince their local jurisdictions to follow the lead of the AFFH rule and use the Assessment Tool to create an AFH.

All advocates should become familiar with the new AFFH rule and the Assessment Tools. For advocates

whose jurisdictions should be or are implementing the new rule in 2018, it is critical to be actively engaged with your jurisdiction in the development of the AFH. Don't wait to be contacted; take the initiative. Provide data that you are aware of that helps identify fair housing issues and contributing factors; for example, research conducted by local universities or think tanks and records of social service agencies. Beyond quantifiable information, offer "local knowledge," for example experiences of protected class members that reveal fair housing issues or contributing factors—experiences such as displacement due to economic forces or landlords refusing to rent to households with children. Check NLIHC's AFFH webpage and HUD's webpage periodically for new information. For advocates in jurisdictions that should be required to implement the new rule in 2018, it will be important to ensure that the fair housing priorities and goals in your new AFH are reflected in the strategies and actions in your jurisdiction's 2018 ConPlan and Annual Action Plan. For advocates in jurisdictions or PHAs that will not be required to submit an AFH until later, work to convince your jurisdiction or PHA to begin using some or all of the new rule's guidance and the Assessment Tools even before being required to do so.

WHAT TO SAY TO LEGISLATORS

Be prepared to tell your Congressional delegation to oppose any attempts to prevent HUD from implementing the new rule. Remind them that HUD stresses that the new AFFH approach does not mandate specific outcomes; rather, it establishes basic

parameters to help guide public sector housing and community development planning and investment decisions. The rule encourages a more engaged and data-driven approach to assessing fair housing and planning actions. The rule establishes a standardized fair housing assessment and planning process to give jurisdictions and PHAs a more effective means to affirmatively further the purposes of the Fair Housing Act.

FOR MORE INFORMATION

NLIHC, 202-662-1530, <http://nlihc.org/issues/affh>

National Housing Law Project, 415-546-7000, <https://www.nhlp.org/initiatives/fair-housing-housing-for-people-with-disabilities/affirmatively-furthering-fair-housing>

National Fair Housing Alliance, 202-898-1661, <http://nationalfairhousing.org/affirmatively-furthering-fair-housing>

Poverty & Race Research Action Council, http://prrac.org/full_text.php?text_id=1217&item_id=15168&newsletter_id=0&header=Current%20Projects

HUD's Affirmatively Furthering Fair Housing webpage, has links to the Assessment Tools, Frequently Asked Questions, an extensive Guidebook, and mapping tools <https://www.hudexchange.info/programs/affh>

HUD Office of Fair Housing and Equal Opportunity, <http://1.usa.gov/VFQ4Nk>