

NLIHC  
SAMPLE COMMENT LETTER  
HUD'S AFFH "STREAMLINGING"

October X, 2018

Office of the General Counsel  
Rules Docket Clerk  
Department of Housing and Urban Development  
451 Seventh Street SW, Room 10276  
Washington, DC 20410-0001

Docket No. FR-6123-A-01  
Affirmatively Furthering Fair Housing: Streamlining and Enhancements

Via regs.gov

I am writing on behalf of [YOUR ORGANIZATION'S NAME HERE] in response to the Advanced Notice of Proposed Rulemaking (ANPR) seeking comments regarding HUD's intent to streamline the Affirmatively Furthering Fair Housing (AFFH) rule. **[YOUR ORGANIZATION] urges HUD to make no changes to the AFFH rule because the rule had just begun to be implemented by a very small number of the approximately 1,200 jurisdictions that would ultimately be required to comply over the coming years.**

[BRIEF DESCRIPTION OF YOUR ORGANIZATION]

In 2010, HUD began to informally seek input from a comprehensive set of stakeholders. Only after conscientious consideration of that input did HUD publish a proposed rule on July 19, 2013. HUD carefully considered the formal comments, taking until July 15, 2015 to issue a final rule. The Fair Housing Assessment Tool underwent two Paperwork Reduction Act 60-day and 30-day public review and comment cycles. Therefore, HUD should not now make abrupt changes to the AFFH rule, Assessment of Fair Housing (AFH), and Assessment Tool at this time.

The background section of the ANPR claims that the Local Government Assessment Tool is ineffective, based on the experience of only the first 49 AFH submissions. Eighteen of the 49 were accepted by HUD on initial submission, and according to HUD 32 were ultimately approved. The AFFH rule anticipated a learning curve and provided for an iterative process by which HUD could identify problems with an AFH that a jurisdiction could fix.

One of the three *Federal Register* notices HUD issued on May 23 identified seven categories of problems with the Assessment Tool, providing one example for each. Based on those examples, most of the "problems" could have been addressed very easily using the AFFH rule's process for HUD offering suggestions to a jurisdiction for curing a deficiency. One of the problems HUD highlighted was a severe violation of the public participation requirements; a violation that warranted rejection of the AFH until adequate public participation was provided.

In response to the eight sets of questions posed by HUD in the ANPR, [YOUR ORGANIZATION] offers the following.

**Question Set 1:** HUD asks whether AFFH issues need public participation procedures separate from the public participation procedures required by the Consolidated Plan’s Annual Action Plan process. In other words, could public input about AFFH be included as part of the Annual Action Plan process.

Response:

The AFFH rule’s requirement for genuine public participation in drafting an AFH was a great improvement over the lack of public input under the flawed Analysis of Impediments (AI) to fair housing choice process. In addition, the AFFH rule introduced specific public engagement and consultation with fair housing organizations for the first time.

The Consolidated Plan’s Annual Action Plan public participation process is designed to obtain input regarding: housing and community development needs, which needs have priority, and which activities ought to be funded. Identifying fair housing issues, assessing fair housing priorities, and recommending fair housing goals entail very different concepts and sometimes even different stakeholders. Consequently, separate public participation procedures are necessary. The AFFH rule designed the AFFH public participation process to precede and inform the decision making associated with the Consolidated Plan and its Annual Action Plan system.

**Question Set 2a:** HUD asks whether jurisdictions should be allowed to choose which data to consider instead of using uniform data provided by HUD?

Response:

We think that there must be a minimum, standard set of data local jurisdictions must use. All recipients of federal housing and community development assistance should be required to attempt AFFH analysis based on the same data considerations. Allowing a jurisdiction to cherry pick which data to use can lead to jurisdictions creating rosy AFHs and/or establishing low-hanging fair housing goals and accomplishments.

**Question Set 2b:** HUD asks whether jurisdictions should be allowed to rely on their experiences instead of relying on what HUD calls a “data-centric approach.”

Response:

[YOUR ORGANIZATION] thinks that data are essential for a rational analysis of fair housing issues. Data can reveal situations that might not otherwise be obvious, help overcome unconscious bias, and identify degrees of severity of fair housing issues. The AFFH rule’s requirement to use local information and knowledge, which is often not quantitative, can complement data.

**Question Set 3a:** HUD asks whether local jurisdictions should be required to provide a detailed report of any AFFH analysis, or whether a summary of goals is sufficient.

Response:

We think details are essential. Public officials responsible for complying with the Fair Housing Act need a thorough presentation of the analysis to responsibly set policies, establish procedures, and fund activities that affirmatively further fair housing. A summary of general goal statements cannot provide the nuance essential for decision-making. The general public also needs detailed analysis to monitor AFFH compliance and progress and to keep public officials accountable.

**Question Set 3b:** HUD asks how often program participants should report on their AFFH efforts, and whether to keep the AFFH rule's requirement that a new AFH be submitted every five years in synch with the five-year Consolidated Plan cycle.

Response:

The AFFH rule requires jurisdictions to identify metrics and milestones for measuring the extent to which they are achieving fair housing results. Public officials and the general public need to have annual performance reports in order to detect difficulties in meeting metrics and milestones so that corrections or adjustments can be made on a timely basis.

The AI process did not specify how often a new AI should be conducted. Consequently, some AIs were very out of date and did not reflect major changes in the housing market. The AFFH rule's five-year cycle in synch with the Consolidated Plan process makes sense.

**Question Set 4:** One of the questions asks whether the rule should be amended to allow local jurisdictions to determine the number and types of fair housing obstacles to address.

Response:

The AFFH rule does not prescribe the number or types of fair housing obstacles a jurisdiction must address. The AFFH rule leaves it up to each jurisdiction to assess its own community and set its own goals.

**Question 5:** HUD asks how much deference jurisdictions should have in establishing objectives to address obstacles to fair housing goals and associated metrics and milestones.

Response:

Contrary to HUD's claim that the AFFH rule is "highly prescriptive" and gives jurisdictions "inadequate autonomy in developing fair housing goals," the AFFH rule does not prescribe how jurisdictions set objectives, goals, metrics, or milestones.

**Question Set 6:** HUD asks what types of elements should distinguish acceptable efforts to address fair housing issues from those that should be considered unacceptable.

Response:

The AFFH rule, for the first time, requires HUD field staff to review a jurisdiction's AFH and assess whether it should be accepted. If there are issues, HUD is to specify the problems in an AFH, and jurisdictions have 45 days to address the issue in order to have an AFH accepted. The criteria for HUD to decide to not accept an AFH are very general, consequently there is a lot of leeway. The AFFH rule's absence of "prescription" offers jurisdictions the opportunity to submit and HUD to accept an AFH that is tailored to the community. The only consideration should be whether the AFH identifies meaningful goals and activities that relate to genuine fair housing issues.

**Question 7:** HUD asks whether the rule should be amended to specify certain levels of effort or specific actions that will be deemed to be in compliance, or should there be "safe harbors."

Response:

The AFFH rule does not prescribe specific levels of activity. This is appropriate given varying conditions in communities. Ultimately it is up to the public to judge whether a local jurisdiction's efforts are sufficient and to convince the jurisdiction and/or HUD that more needs to be done. There should not be any safe harbors.

**Question 8:** HUD asks for other types of revisions that could add clarity, reduce uncertainty, or decrease regulatory burden.

Response:

While the AFFH rule did not include all of the provisions that advocates requested, the final AFFH rule represents the previous administration's conscientious, lengthy, and cautious approach to drafting the final rule.

**Therefore, [YOUR ORGANIZATION] strongly recommends that there be no changes to the AFFH rule until there has been substantial experience by all jurisdictions with the July 16, 2015 rule.**

Sincerely,