Comprehensive Assessment of HUD's Streamlining AFFH ANPR

August 16, 2018

HUD published in the *Federal Register* on August 16, "Affirmatively Furthering Fair Housing: Streamlining and Enhancements," an Advanced Notice of Proposed Rulemaking (ANPR) inviting public comment on amending the Affirmatively Furthering Fair Housing (AFFH) rule. NLIHC previously reported that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget received a "prerule" sometime late in the day on August 2 (see *Memo*, 8/6). In record time, OIRA concluded its review of the prerule on August 9, after only five working days. Comments are due October 15.

The opening summary of the ANPR lists five changes that HUD will propose making. HUD wants to:

1. Minimize regulatory burden;
2. Create a process that is focused primarily on accomplishing positive results, rather than on performing an analysis of community characteristics;
3. Provide for greater local control;
4. Encourage actions that lead to greater housing supply; and
5. Use HUD resources more efficiently.

Before discussing each of the proposed changes, it should be noted that the ANPR is laced with exaggerations and distortions throughout, beginning with HUD's claim that its "experience over the three years since the newly-specified approach was promulgated demonstrates that it is not fulfilling its purpose…" While the AFFH rule was finalized on July 16, 2015 and became effective on August 17, 2015, there has not been three years' worth of actual experience.

First, the drafters of the rule thoughtfully structured implementation to roll out slowly and in modest increments (see *Memo*, 7/13/15). For instance, out of a universe of approximately 1,200 local jurisdictions, it is estimated that only 22 local jurisdictions would have been obligated to operate under the new AFFH rule in 2016 as their five-year Consolidated Plans were to be completed. About 98 local jurisdictions might have been required to follow the new AFFH rule in 2017. However, during this time HUD staff indicated that fewer local jurisdictions would have to comply as a number of them decided to undertake joint or regional approaches, which enabled them to use a later due date tied to a lead jurisdiction in the joint or regional approach.

Further truncating the three-year period, the new administration published a *Federal Register* notice on January 5, effectively suspending the AFFH rule by suspending most jurisdictions' obligation to submit an Assessment of Fair Housing (AFH) until 2025 (see *Memo*, 1/8). In response to a suit filed by the National Fair Housing Alliance, the Texas Low Income Housing Information Service (Texas Housers), and Texas Appleseed (see *Memo*, 5/14), HUD published three notices in the *Federal Register* on May 23 taking a different tack on effectively suspending the AFFH rule by withdrawing, without following the Paperwork Reduction Act, the Local Government Assessment Tool that jurisdictions were required to use to develop an AFH (see *Memo*, 5/21).

The background section of the ANPR declares, "Evidence from peer-reviewed literature indicated that the positive outcomes of policies focused on deconcentrating poverty are likely limited to certain age and demographic groups." HUD cites, "The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Project" by Raj Chetty, Nathaniel Hendren, and Lawrence Katz. Of course, the preponderance of children in high poverty areas are African American and/or Latino.

The researchers concluded that children under the age of 13 who move from high-poverty neighborhoods to lower-poverty neighborhoods have increased college attendance, and as adults have annual income 31% higher than that of a control group in their mid-twenties. The children also live in better neighborhoods themselves as adults and are less likely to become single parents. The researchers also report that such moves may reduce the intergenerational persistence of poverty and ultimately generate positive returns for taxpayers. It is disturbing that HUD would so flippantly disregard this important research and the urgency of its findings.

The background section also claims that the Local Government Assessment Tool is ineffective, repeating claims HUD made in its January 5 and May 23 efforts to suspend the AFFH rule. As NLIHC has written (see *Memo*, 5/21), HUD is basing its claim 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. As advocates have noted, the AFFH rule anticipated a learning curve and provided for an iterative process by which HUD would identify problems with a draft AFH that a jurisdiction could fix.

One of the three *Federal Register* notices HUD made available on May 18 identified seven categories of problems with the Assessment Tool and gave an example for each. NLIHC noted that, based on the examples, most of the "problems" could have been addressed very easily by using the AFFH rule's process for HUD offering suggestions for curing a deficiency. And one of the problems HUD highlighted was an egregious violation of the public participation requirements by a jurisdiction; a violation that warranted rejection of the AFH until adequate public participation was provided (see *Memo*, 5/21).

The background section offers a second reason for amending the AFFH rule by repeating its reference to the May 15, 2017 *Federal Register* notice asking the public to identify regulations that are outdated, ineffective, or exceedingly burdensome. That notice, in response to the administration's Executive Orders 13771 and 13777 (see *Memo*, 2/13/17, 3/6/17) was not specific to AFFH. NLIHC wrote to urge HUD to protect and maintain the AFFH rule (see Memo, 6/19/17). However, the notice provided a forum for AFFH opponents to complain about the AFFH rule before most local jurisdictions had to consider implementing the rule. In addition, HUD writes that small public housing agencies (PHAs) in particular wrote that compliance would be costly, even though PHAs in general had not yet been required to carry out the provisions. In addition, HUD had a streamlined "insert" to a PHA Assessment Tool for Qualified PHAs, those with 550 or fewer public housing units or 1,250 or fewer public housing units and vouchers, that were going to partner with a larger PHA. Furthermore, in a January 13, 2017 *Federal Register* notice, HUD committed to developing a special, streamlined Assessment Tool for Qualified PHAs that would chose to submit their own AFH.

The ANPR asks the public to comment on eight sets of questions.

Question Set 1: HUD asks whether issues considered in the context of AFFH merit public participation procedures separate from the public participation procedures already 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.

NLIHC welcomed the AFFH rule's requirement that there be genuine public participation in drafting an AFH. Under the flawed Analysis of Impediments (AI) to fair housing choice protocol, there was no public input, no opportunity to identify fair housing issues or to suggest reasonable actions and policies to address those fair housing issues. The AFFH rule introduced 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, assessing which needs among the many have the highest priority in the coming year of the five-year Consolidated Plan cycle, and which programs and activities ought to be funded at what level and by which programs. That is quite a bit to consider. Identifying fair housing issues, assessing priorities among many fair housing issues, and recommending goals entail very different concepts and sometimes even different stakeholders, thereby warranting separate public participation procedures. The AFFH rule reasonably 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 2: Should program participants (a generic term for local governments, PHAs, and state governments) be allowed to choose which data to consider instead of using uniform data provided by HUD? One of the hallmarks of the system underlying the AFFH rule was that HUD provided data from national sources and a free mapping tool to make it easier for jurisdictions to prepare an AFH. This was intended, in part, to lessen if not totally eliminate dependency on procuring outside consultants, as was done under the old AI protocol. The AFFH rule also required program participants to use local information and knowledge, including that suggested during the public input process, to complement the standard data provided by HUD.

NLIHC thinks that there must be a minimum, uniform standard set of data that program participants should 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 program participant to cherry pick which data to use can only lead to jurisdictions creating rosy AFHs and/or establishing low-hanging fair housing goals and accomplishments.

Question Set 2 also asks whether jurisdictions should be allowed to rely on their experiences instead of relying on what HUD calls a "data-centric approach." NLIHC thinks that data is essential for rational analysis of fair housing issues. Data can reveal situations that might not otherwise be obvious. Data can help overcome unconscious bias. Data can help discern degrees of severity (or lack thereof) associated with fair housing issues. The AFFH rule's requirement to use local information and knowledge, which is often not quantitative, can enhance a "data-centric approach."

Question Set 2 seems to be related to HUD's second proposed amendment: "to create a process that is focused primarily on accomplishing positive results, rather than on performing analysis of community characteristics." However, how can a jurisdiction accomplish appropriate results without a reasoned analysis of underlying conditions and the factors and forces that cause those

conditions? How else can jurisdictions set priorities for deciding which results to strive for, in what order, and in what timeframe?

Question Set 3: HUD asks whether program participants should be required to provide a detailed report of any AFFH analysis, or whether a summary of goals is sufficient. NLIHC thinks details are essential. Public officials who are 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 public also needs detailed analysis to monitor AFFH compliance and progress and keep public officials accountable.

HUD also asks how often program participants should report on their AFFH efforts, and whether an amended rule should retain the AFFH rule's requirement that a new AFH be submitted every five years in synch with the five-year Consolidated Plan cycle. The AFFH rule modified the Consolidated Plan and Annual Action Plan regulations to incorporate AFFH. However, it did not modify the performance report provisions at 24 CFR Part 91.105(d) or 91.520. That latter section already requires jurisdictions to report actions taken to affirmatively further fair housing in their Consolidated Annual Performance and Evaluation Reports (CAPERs), an aggregate program report in which AFFH reporting can be easily overlooked.

The old AI protocol did not specify how often a new AI should be conducted. Consequently, some AIs were very out of date. The *Fair Housing Planning Guide*, a booklet from March 1996, suggested that jurisdictions update their AI with the Consolidated Plan cycle. In addition, informal HUD guidance in the form of a Memorandum dated September 2, 2004, that most jurisdictions were not aware of, suggested that a new AI be conducted in concert with the Consolidated Plan cycle. The AFFH rule, for the first time, requires jurisdictions to undertake a new AFH process every five years, in synch with the five-year Consolidated Plan cycle. This five-year cycle makes sense. As part of the new AFH cycle, the AFFH rule requires jurisdictions to provide a summary of progress achieved in meeting the goals and associated metrics and milestones of the previous AFH. So, at a minimum there is a five year requirement to report on AFFH efforts.

The AFFH rule requires a jurisdiction to identify metrics and milestones for measuring the extent to which they are achieving fair housing results. The reasonable intent of this requirement would be less than effective if annual reporting was not required. Public officials and the general public need to have annual performance reports in order detect difficulties in meeting metrics and milestones so that corrections or adjustments can be made on a timely basis.

Question Set 4: One of the questions in this set asks whether an amended rule should allow program participants to determine the number and types of fair housing obstacles to address. The AFFH rule does not specify, has is hinted at in Question Set 4, 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.

As a guiding principle, the AFFH rule does require use of a framework comprised of four "fair housing issues" across the protected classes:

1. Integration and segregation patterns and trends;

2. Racially or ethnically concentrated areas of poverty;

3. Significant disparities in access to opportunity; and,

4. Disproportionate housing needs.

The AFFH regulation then requires the AFH to identify factors that might contribute to creating these fair housing issues. The AFFH rule does not specify "contributing factors" a jurisdiction must consider, but does provide a lengthy list of potential factors to help jurisdictions contemplate factors. In short, jurisdictions have great latitude in determining the number and types of fair housing obstacles to address.

Question 5: In a related vein, HUD asks how much deference jurisdictions should have in establishing objectives to address obstacles to identified fair housing goals and associated metrics and milestones. Again, the AFFH rule does not prescribe how jurisdictions set objectives, goals, metrics, or milestones.

Question Set 4 and Question 5 seem to relate to the first and third changes HUD lists in the summary section of the ANPR, "minimizing regulatory burden" and "provide for greater local control." The background section of the ANPR asserts that the AFFH rule is "highly prescriptive" and gives program participants "inadequate autonomy in developing fair housing goals." The background section also refers to the Executive Order 13771 requiring two regulations be eliminated for every one new regulation, and Executive Order 13777 asking public input regarding regulations that are outdated, ineffective, or exceedingly burdensome.

These all seem to reflect the current administration's ideological animus toward any regulations that protect people, ranging from consumer protections, environmental protections, or in this case fair housing protections. Ironically, in a *Wall Street Journal* article dated August 13, HUD Secretary Ben Carson is quoted as saying, "The last administration, when they put this [AFFH rule] together, they really went down an ideological pathway."

NLIHC does not view the AFFH rule as overly burdensome, prescriptive, or inimical to local autonomy and control. The AFFH rule replies to jurisdictions' frustration with the AI system and its lack of clarity and guidance.

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

That leeway can allow a jurisdiction to have an AFH approved that fair housing advocates might consider very inadequate. On the other hand, that absence of "prescription" offers jurisdictions the opportunity to submit and HUD to accept an AFH that is appropriately tailored to a given

community. The only consideration should be whether the AFH identifies meaningful goals and activities that relate to genuine fair housing issues. The days of jurisdictions claiming that they were addressing fair housing impediments by putting up fair housing posters during fair housing month should be over.

Question 7: HUD asks whether the amended rule should specify certain levels of effort on specific actions that will be deemed to be in compliance, or should there be "safe harbors." Again, the AFFH rule does not prescribe specific levels of activity, and this is appropriate given varying conditions in communities and the extent to which local governments have any influence on the actions of businesses and individuals both within their jurisdiction and from without their jurisdiction. Ultimately it is up to the public to judge whether a program participant's efforts are sufficient and convince the jurisdiction and/or HUD that more needs to be done.

Question 8: HUD asks for other types of revisions that could add clarity, reduce uncertainty, or decrease regulatory burden. While the AFFH rule did not include all of the provisions that NLIHC and other advocates requested, the final AFFH rule represents the previous administration's conscientious, lengthy, and cautious approach to drafting the final rule. Therefore, NLIHC does not recommend any changes to the AFFH rule until there has been substantial experience by all jurisdictions with the July 16, 2015 rule.

In 2010, the previous administration began informally seeking input from a comprehensive set of stakeholders, such as mayors, county executives, governors, staff of housing and community development offices, advocates representing all of the Fair Housing Act's protected classes, as well as fair housing professionals.

Informed by the success of the Fair Housing and Equity Assessment used by jurisdictions participating in the Sustainable Communities Initiative that began in 2012, HUD issued proposed AFFH regulations on July 19, 2013. The AFFH rule was not finalized until July 16, 2015.

A proposed Assessment Tool for Local Governments was issued on September 26, 2014 for a 60-day public comment period as required by the Paperwork Reduction Act (PRA). After considering comments, a revised version was submitted for the required 30-day comment period before being implemented on December 31, 2015. Because that initial Assessment Tool was such a significant, new document it was only approved for one year. Consequently, the Assessment Tool was subject to a second round of 60-day and 30-day PRA review and comment. This second Assessment Tool was formally approve on January 13, 2017.

Now, according to the *Wall Street Journal* interview with Secretary Carson, HUD is aiming to have a new rule in place by the fall. Compared with the five-year journey the AFFH rule took, the current administration is seeking to rush through drastic changes in two months, hardly time for comprehensive, thoughtful stakeholder input.

Returning to the summary section of the ANPR, the fourth change HUD seeks is to encourage actions that increase housing choice, including through greater housing supply. In the background section of the ANPR, HUD claims that the AFFH rule is ineffective in addressing the lack of adequate housing supply. HUD's media release hyperbolically asserts that the AFFH rule is "suffocating investment."

With perhaps one exception, it is difficult to imagine how an AFFH rule could address the failure of the private market to build affordable multifamily housing. That one exception relates to local zoning and land-use ordinances, which the AFFH rule suggests jurisdictions consider assessing, but the rule does not require jurisdictions to actually change local zoning or land-use ordinances. Senator Mike Lee (R-UT) and Representative Paul Gosar (R-AZ) introduced bills in 2017 titled "Local Zoning Decisions Protection Act" to nullify the AFFH rule, fearing that the AFFH would require jurisdictions to change zoning laws that would facilitate the development of multifamily rental housing.

While the substantive, formal HUD and OIRA-approved ANPR does not mention zoning laws as barriers to increasing the supply of housing, most of Secretary Carson's *Wall Street Journal* interview is devoted to him wanting to "focus on restrictive zoning codes" which have "limited home construction thus driving up prices and making it difficult for low-income families to afford homes." Secretary Carson "wants to simply the process for communities to address the proliferation of stricter land-use rules," noting that communities "have layered on regulations that make development difficult and costly." Indirectly referring to the Community Development Block Grant (CDBG) program, Secretary Carson "would incentivize people who really would like to get a nice juicy government grant to take a look at their zoning codes." While the AFFH rule does not require jurisdictions to modify their zoning codes in order to continue receiving CDBG funds, the Assessment Tool considers land use and zoning laws to be a potential "contributing factor" leading to a lack of racial integration which jurisdictions could consider.

Secretary Carson, "wants to encourage the development of mixed-income multifamily dwellings all over the place." NLIHC and many others couldn't agree more. But this discussion of increasing the supply of housing fails to address the core of the Fair Housing Act's affirmatively furthering fair housing obligation based on the protected classes: race, color, national origin, sex, disability, familial status, and religion. A robust AFFH rule is essential to ensuring that an increased supply of housing is in fact available to people in the protected classes.

The Advanced Notice of Proposed Rulemaking is at: https://bit.ly/2OC1n5H

HUD's media release is at https://bit.ly/2KQVVJU