Affirmatively Furthering Fair Housing (AFFH)

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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" "protected classes"—race, color, sex, national origin, disability, familial status (in other words, households with children), and religion

See Also: *Consolidated Planning Process*, and *Public Housing Agency Plan* sections of this *Guide*

AFFIRMATIVELY FURTHERING FAIR HOUSING

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, sex, disability, familial status, and religion.

This article describes the Interim Final Rule (IFR) "Restoring Affirmatively Furthering Fair Housing Definitions and Certifications" published in the *Federal Register* on June 10, 2021 shortly after the Biden Administration took office. The IFR, which went into effect on July 31, 2021, requires "program participants" (local and state governments as well as public housing agencies, PHAs) to submit "certifications" (pledges) that they will affirmatively further fair housing (AFFH) in connection with their Consolidated Plans (ConPlans), Annual Action Plans to their ConPlans, and annual PHA Plans. The IFR does not require a specific planning process such as the one in the 2015 AFFH Rule; instead, it creates a voluntary fair housing planning process.

HUD published the first Affirmatively Furthering Fair Housing rule on July 16, 2015. However, the 2015 AFFH rule was suspended by the Trump Administration in 2018, and then on August 7, 2020, the Trump Administration abruptly and without public review and comment, published the "Preserving Neighborhood and Community Choice" rule. The IFR rescinded that rule.

HUD published a complete proposed AFFH rule on February 9, 2023, intended to improve upon the 2015 AFFH rule. That proposed rule had a 60-day public review and comment period ending on April 10, 2023. At the time of writing, NLIHC was still assessing the many details of the proposed AFFH rule. Consequently, only a high-level overview of the proposed rule can be presented here. Advocates are urged to visit NLIHC's Racial Equity and Fair Housing webpage as the year progresses for more detailed analyses of the 2023 proposed rule and its status.

HISTORY

Although affirmatively furthering fair housing has been law since the "Fair Housing Act of 1968," meaningful regulations to provide jurisdictions and PHAs with guidance on how to comply had not existed. The 1974 law creating the Community Development Block Grant (CDBG) program required jurisdictions to certify that they would affirmatively furthering fair housing. Eventually, that certification was defined in CDBG regulations (and later in Consolidated Plan, ConPlan, regulations) to mean that the executive of a jurisdiction "certified" (pledged) that the jurisdiction had an Analysis of Impediments (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. In addition, the 1990 statute creating the Comprehensive Housing Affordability Strategy or CHAS (the statutory basis of the ConPlan) and the HOME Investment Partnerships Program, and the 1998 statute creating the PHA Plan for public housing agencies, each require jurisdictions and PHAs to certify in writing that they are affirmatively furthering fair housing (AFFH) in accord with the Fair Housing Act.

On July 16, 2015, HUD published the long-awaited final rule implementing the Fair Housing Act 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 did not have to use the Tool until HUD provided the needed data and issued a notice in the *Federal Register* announcing a new submission date. That data was never provided, hence PHAs did not have to use an Assessment Tool, unless they joined with their local city or county, in which case the city or county took the lead and used the local jurisdiction Assessment Tool. A proposed tool for states was published on March 11, 2016, but never finalized. Details about the 2015 final AFFH rule are available on NLIHC's Racial Equity and Fair Housing webpage.

The 2015 rule and process were to be 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 were to begin in 2017. All other CDBG entitlement jurisdictions, states, and public housing agencies were required to use the pre-existing Analysis of Impediments (AI) process.

HUD under Secretary Carson suspended use of the 2015 AFFH rule for all but 32 jurisdictions on May 23, 2018. Then, on August 16, HUD published an Advanced Notice of Proposed Rule Making (ANPR) inviting public comment regarding amending the AFFH rule. Subsequently, Secretary Carson published a proposed rule on January 14, 2020 that was not an AFFH rule; in fact it would gut fair housing by, among other means, falsely equating increasing the housing supply with fair housing choice. Finally, without public review and comment, the Trump Administration abruptly issued a final rule, "Preserving Community and Housing Choice" on August 7, 2020 repealing the 2015 regulations implementing the statutory obligation to "affirmatively further fair housing" (AFFH).

In its final form, the Preserving Community and Housing Choice "AFFH" rule in essence was reduced to three lines, two of which were in a definition section. One line defined "fair housing" to mean "housing that, among other attributes, is affordable, safe, decent, free of unlawful discrimination, and accessible as required under civil rights laws." The other line defined "affirmatively further" to mean "to take ***any*** action rationally related to promoting ***any*** attribute or attributes of fair housing" (emphasis added). Theoretically, to "affirmatively further fair housing" a city could merely donate one abandoned building in a disinvested neighborhood to a developer to rehabilitate and rent to low-income households, some of whom might use Housing Choice Vouchers to make it affordable.

States, local governments, and public housing agencies receiving HUD funds ("program participants") had to certify that they were affirmatively furthering fair housing. The third line stated that such a certification "is sufficient if the program participant takes ***any*** action that is rationally related to promoting one or more attributes of fair housing." (emphasis added) Although the final rule was voluminous, the bulk of the document simply removed from all HUD

regulations, reference to the Assessment of Fair Housing (AFH) that the 2015 rule required.

On January 26, 2021, the Biden White House issued a Memorandum to the Secretary of Housing and Urban Development, which declared that the affirmatively furthering fair housing provision in the Fair Housing Act, "...is not only a mandate to refrain from discrimination but a mandate to take actions that undo historic patterns of segregation and other types of discrimination and that afford access to long-denied opportunities." The Memorandum ordered HUD to examine the effects of the previous Administration's actions against the AFFH Rule and the effect that it has had on HUD's statutory duty ensure compliance with the Fair Housing Act and the duty to affirmatively further fair housing.

HUD published the Interim Final Rule (IFR), "Restoring Affirmatively Furthering Fair Housing Definitions and Certifications" in the *Federal Register* on June 10, 2021, becoming effective on July 31. The IFR restores a number of definitions from the 2015 AFFH rule and the certifications that were removed by the previous Administration.

Advocates sent recommendations for a renewed AFFH regulation to HUD's Office of Fair Housing and Equal Opportunity (FHEO) on August 27, 2021. In October 2021, FHEO held a number of listening sessions with stakeholders to gather thoughts that might inform drafting of a proposed AFFH rule. In addition to detailed suggestions made during the listening sessions, advocates, including NLIHC sent a letter to FHEO highlighting suggestions made during those listening sessions.

HUD subsequently published a complete, proposed AFFH rule on February 9, 2023, taking as its starting point the fair housing planning process created by the 2015 AFFH rule and proposing refinements informed by lessons HUD learned from implementation of the 2015 AFFH rule and by feedback provided by stakeholders. The 2023 proposed rule would provide a framework under which program participants set and implement meaningful fair housing goals that will determine how they leverage HUD funds and other resources to affirmatively further fair housing. In short, program participants will identify fair housing issues, prioritize the issues on which they will focus, and develop fair housing goals they will implement to overcome fair housing issues over the next three to five years (depending on their ConPlan cycle).

HUD will accept comments regarding the proposed rule until April 10, 2023, after which HUD will read all comments and eventually publish a final rule. It is not possible to predict when a final rule will be published. Even after a final rule is implemented, the way the proposed rule intends to roll out implementation by program participants of various sizes means that it could be several years before most program participants would be required to follow the provisions of a final AFFH rule. Until a program participant is required to comply with a final AFFH rule, it will continue to carry out its AFFH obligations following the IFR.

The Need for the AFFH Rule

The pre-existing system based on the Analysis of Impediments (AI) to fair housing was not effective, as noted by the Government Accountability Office (GAO). There were numerous limitations of the pre-existing AFFH system, beginning with the absence of regulatory guidance (HUD published a booklet in 1996, the *Fair Housing Planning Guide*, but it 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 annual action plan, or to a PHA's Five-Year PHA Plan and Annual Plans. AIs also had no prescribed schedule for renewal; consequently, many were not updated in a timely fashion.

SUMMARY OF THE INTERIM FINAL RULE

The AFFH webpage of HUD's Office of Fair Housing and Equal Opportunity website has Frequently Asked Questions (FAQs) that are a bit clearer than the IFR itself. In addition, the AFFH webpage has links to the three 2015 rule Assessment Tools, AFFH Rule Guidebook, links to eight fact sheets, and links to the AFFH data and mapping tool.

Definitions

The Interim Final Rule (IFR) restores certain definitions from the 2015 AFFH rule, in particular the definition of affirmatively furthering fair housing and the definition of meaningful actions.

> "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, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development."
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> "Meaningful actions means 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."

Certifications

The IFR [at 24 CFR §5.152] requires program participants to certify that they will comply with their obligation to affirmatively further fair housing when required by statutes governing HUD programs, such as the ConPlan statute. Under the 2015 rule, the definition of certification "meant that the program participant will take meaningful actions to further the goals identified in an Assessment of Fair Housing (AFH), and by referring to the ConPlan and PHA Plan regulations, that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing."

Fair Housing Planning

The IFR does not require program participants to undertake any specific type of fair housing planning. They do not have to conduct an Assessment of Fair Housing (AFH) using an Assessment Tool as required by the 2015 rule, nor do they have to conduct an Analysis of Impediments (AI) to Fair Housing Choice, as was required prior to the 2015 rule. The IFR allows a program participant to engage in a fair housing planning process that supports its certification that it is affirmatively furthering fair housing. Program participants may voluntarily use the 2015 Assessment Tool to create an AFH, or may voluntarily undertake an AI. Program participants are not required to submit their fair housing planning documents to HUD for review, unlike with the 2015 AFFH rule. HUD will only conduct a review when there is reason to believe a program participant's certification is not supported by their actions. There is no formal mechanism for the public to file complaints regarding a program participant's certification or compliance with its obligation to affirmatively further fair housing.

The voluntary nature of the IFR will likely lead to similar failures by program participants to adequately examine whether their policies and practices are consistent with their obligation to affirmatively further fair housing.

No Public Participation Requirement

The IFR does not have a public participation requirement specific to fair housing planning; instead, program participants merely have to follow the public participation requirements of the ConPlan or PHA Plan regulations – which will not necessarily provide adequate engagement regarding affirmatively furthering fair housing.

Loss of Text Regarding a Balanced Approach to AFFH

IFR omits language from the 2015 AFFH Rule that included important language clarifying that AFFH encompasses more than mobility out of racially and ethnically concentrated areas of poverty and can include place-based strategies such as preservation of affordable housing. This key language illustrated what is commonly known as the "balanced approach" between mobility strategies and place-based investments adopted by the 2015 Rule. The 2015 rule's explanation of the purpose of the rule read in part:

> "…A program participant's strategies and actions must affirmatively further fair housing and may include various activities, such as developing affordable housing, and removing barriers to the development of such housing, in areas of high opportunity; strategically enhancing access to opportunity, including through: Targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation."

PRELIMINARY HIGHLIGHTS OF KEY PROVISIONS OF THE 2023 PROPOSED RULE

Because the proposed rule was published on February 9, 2023, NLIHC was still assessing its many details when this *Advocates' Guide* was being finalized. Consequently, what follows is only a high-level overview of some of the proposed rule's key provisions. NLIHC is generally pleased with the proposed rule, but even at this preliminary analysis stage, NLIHC has some concerns about the community engagement provisions and the failure to define "affordable housing" as housing that requires a household to spend no more than 30% of its adjusted income on rent or mortgage plus utilities. (This definition is known as the "Brooke Rule.") In addition, NLIHC already has a number of suggestions for further improving the proposed rule. Advocates are urged to visit NLIHC's Racial Equity and Fair Housing webpage for more detailed analyses of the 2023 proposed rule and its status as the year progresses.

Greatly Increased Community Engagement Requirements

It is significant that HUD's summary in the preamble to the proposed rule begins with a discussion of improved community participation provisions – placing upfront "community engagement" (as the proposed rule now terms community/citizen participation). In addition, throughout the proposed text, the rule reminds program participants of their community engagement obligations.

In general, the proposed rule requires program participants to "actively engage with a wide variety of diverse perspectives within their communities" and to "proactively facilitate" community engagement "during the development" of the "Equity Plan," enabling the public to identify fair housing "issues" and set fair housing "goals," taking into consideration views and recommendations received from the community. The Equity Plan (briefly described below) is the streamlined replacement for the 2015 final rule's Assessment of Fair Housing

(AFH). The public must have a reasonable opportunity to be involved in the program participant's required incorporation of the Equity Plan's "fair housing goals as strategies and meaningful actions into the ConPlan, Annual Action Plan, PHA Plan, and other required planning documents."

Program participants must use communication methods designed to reach "the broadest possible audience" and should make efforts to reach members of protected classes and "underserved communities." The text provides examples of communication methods. As defined in the proposed rule, the term "underserved communities" notably provides as examples people experiencing homelessness, LGBTQ+ people, survivors of domestic violence, persons with criminal records, and rural communities.

The proposed rule requires program participants to prioritize fair housing issues in each fair housing "goal category" prescribed by HUD. However, the community engagement provisions do not specifically require public involvement regarding prioritizing fair housing issues. NLIHC is concerned that a program participant could just "listen" to public input about issues but ignore the public when setting which fair housing issues to prioritize. NLIHC will urge HUD to specially add that community engagement must also take place during the required prioritization of fair housing issues prior to setting fair housing goals.

The proposed rule requires program participants to hold at least three public "meetings" at various accessible locations and at different times to ensure protected class groups and underserved communities are afforded opportunities to provide input during the development of the Equity Plan. At least one of these meetings must be held at a location in which underserved communities disproportionately live, and efforts must be made to obtain input from members of underserved communities who do not live in underserved communities.

It is important to note that the proposed AFFH rule uses the term "meeting" instead of the ConPlan's and PHA Plan's use of the term "hearing." Hearings are formal proceedings governed by state and local law and hence can be limiting. However, because fair housing, ConPlan, and PHA Plan decisions are ultimately "political" in nature, there is value in having community engagement with elected officials present (or politically appointed officials in the case of PHAs). On the other hand, there are advantages to having "meetings" because they are less formal, more flexible, and might be less intimidating to community members.

It is not clear whether the three required meetings must address different stages of developing an Equity Plan: for example, at one stage to gather input regarding fair housing issues, at another stage regarding setting priorities among all the identified fair housing issues, and at a third stage to engage the community in setting fair housing goals, strategies, and actions. Or does HUD intend that the three required meetings take place at the required different locations and times? NLIHC recommends the latter while adding four separate, additional required meetings: one for identifying fair housing issues, a second for setting fair housing priorities, a third for deciding on fair housing goals, strategies, and actions, and a fourth meeting calling for the public to have an opportunity to comment on a "draft" Equity Plan before it is sent to HUD for review.

The public will be able to file complaints directly with HUD regarding a program participant's AFFH-related activities, and this in turn will enable HUD to open a compliance review in response to a complaint.

Annual Evaluation of Progress toward Achieving Fair Housing Goals

While an Equity Plan is in effect, program participants will be required to conduct and submit to HUD for posting on a HUD website Annual Progress Evaluations regarding the status of each fair housing goal. Program participants must assess whether to establish a new fair housing goal (or goals) or whether to modify an existing fair housing goal because it cannot

be achieved in the amount of time previously anticipated.

Program participants must engage the public at least annually through at least two public meetings at different locations, one of which must take place in an area in which underserved communities predominately live. This community engagement activity is separate from the three public meetings required during the development of the Equity Plan. The purpose of these meetings about the Annual Progress Evaluation is to receive public input indicating whether the program participant is "taking effective and necessary actions to implement the Equity Plan's fair housing goals."

In addition, an Equity Plan must include a summary of a program participants' progress in meeting its fair housing goals set in prior-year Equity Plans. This is distinct from the requirement to have an Annual Performance Evaluation. Subsequent Equity Plans may have a compilation of previous years' Annual Performance Evaluation summaries.

Greater Public Transparency

The proposed rule provides the public with more opportunities to directly engage with HUD and provides HUD with regulatory ability to respond to the public and to encourage program participants to take necessary actions. All Equity Plans submitted to HUD for review will be posted to a HUD webpage. The public will be able to directly provide HUD with additional information about an Equity Plan still under HUD review, information that HUD will use in its review of an Equity Plan. Also to be posted on the HUD website will be the reasons HUD accepted an Equity Plan *or* HUD's communications with a program participant indicating why an Equity Plan was not accepted, along with actions a program participant can take to resolve the non-acceptance. The HUD review, non-acceptance, recommended corrective actions, and program participant adoption or non-adoption of the recommendations can go back and forth many times, as long as necessary to arrive at HUD acceptance. In addition, a program participant's Annual Progress Evaluations will be posted on the HUD website, along with any important HUD communications regarding them.

The Equity Plan

Every five years, program participants must develop and submit an Equity Plan to overcome local fair housing "issues" by conducting an analysis in their "geographic area of analysis" that identifies fair housing issues and the circumstances and factors that cause, increase, contribute to, maintain, or perpetuate those fair housing issues. The description of a fair housing issue must include its specific condition and any protected classes that are adversely affected by the issue. The analysis must be informed by community engagement, HUD-provided data, and local data and local knowledge.

After engaging the community, program participants must prioritize the identified fair housing issues in order to set one or more fair housing goals to overcome the prioritized fair housing issues for each fair housing "goal category." An Equity Plan's identification of priority fair housing issues and goals must address, at a minimum, the following fair housing goal categories, which HUD considers to be the core areas of the AFFH analysis:

i. Segregation and integration;
ii. Racially or ethnically concentrated areas of poverty (R/ECAPs, which are not well-defined);
iii. Disparities in access to opportunity;
iv. Inequitable access to affordable housing and homeownership opportunities;
v. Laws, ordinances, policies, practices, and procedures that impede the provision of affordable housing in well-resourced areas of opportunity, including housing that is accessible for people with disabilities;
vi. Inequitable distribution of local resources, which may include municipal services, emergency services, community-based supportive services, and investments in infrastructure;
vii. Discrimination or violations of civil rights

law or regulations related to housing or access to community assets based on race, color, national origin, religion, sex, familial status, and disability.

ConPlan program participants must address all seven goal categories, which entail 31 questions plus 28 subquestions. PHAs must address five of the goal categories, which entail 21 questions plus 30 subquestions. HUD will not prescribe the format used by program participants to answer the questions.

To establish an Equity Plan's fair housing goals, program participants must prioritize the fair housing issues in each fair housing goal category, giving consideration to fair housing issues historically faced by "underserved communities." In determining how to prioritize fair housing issues within each fair housing goal category, program participants must give highest priority to fair housing issues that will result in the most effective fair housing goals for achieving material positive change for underserved communities. The Equity Plan must have timeframes for achieving a goal, including metrics and milestones.

Fair housing goals, when taken together, must be designed to overcome prioritized fair housing issues in each fair housing goal category and be reasonably expected to result in material positive change consistent with a balanced approach. Examples of potential goals include: siting future affordable housing outside of segregated areas; expanding mobility programs; reducing land use and zoning restrictions; removing nuisance or crime-free ordinances; enacting and enforcing source of income laws; enhancing housing accessibility features for people with disabilities; enacting protections for LGBTQ+ people; and revising PHA eviction, admissions, and prior criminal records policies.

More Direct Incorporation of the New Fair Housing Equity Plan into ConPlans and PHA Plans

After HUD "accepts" an Equity Plan, a program participant must incorporate the Equity Plan's fair housing goals, strategies, and actions necessary to implement the goals into its ConPlan, Annual Action Plans of the ConPlan, or PHA Plan. The purpose is to ensure that a program participant's programs, activities, and services, as well as its policies and practices, are consistent with the obligation to affirmatively furthering fair housing. In addition, program participants must identify specific, expected allocations of HUD funds (as well as other federal, state, local, and charitable funds) that will be used to carry out a program participant's programs, activities, and services in ways consistent with the obligation to affirmatively further fair housing. This more direct inclusion of an Equity Plan's fair housing goals, strategies, and actions, as well as fund allocations, in a program participant's ConPlan, Annual Action Plan, or PHA Plan is an improvement over the 2015 AFFH rule, which was less clear.

Clarification of and Emphasis on the Need for a Balanced Approach

The proposed rule, unlike the 2015 rule, provides a detailed definition of "balanced approach" to affirmatively furthering fair housing. It means an approach to community planning and investment that balances a variety of actions to eliminate housing-related disparities using a combination of place-based and mobility actions and investments. Examples of place-based strategies include preserving existing affordable housing in racially or ethnically concentrated areas of poverty (which HUD calls "R/ECAPs") while also making substantial investments designed to improve community living conditions and community assets in those disinvested neighborhoods. Examples of mobility strategies, those that enable households to seek greater affordable housing opportunities by moving to areas that already have better infrastructure and community assets, include removing barriers (such as zoning ordinances, or PHA portability policies) that prevent people from obtaining affordable housing in well-resourced neighborhoods.

Reference to the need for a balanced approach is also included at three places in the text. One, regarding a program participant's fair housing

goals, requires those goals, when taken together, to be designed and reasonably be expected to result in material positive change consistent with a balanced approach. Another states that a program participant's fair housing goals "may not require residents of racially or ethnically concentrated areas of poverty to move away from those areas if they prefer to stay in those areas as a matter of fair housing choice." The third, pertaining to the incorporation of fair housing goals, strategies, and actions in a ConPlan, Annual Action Plan, or PHA Plan, states that strategies and meaningful activities may include "place-based strategies and meaningful actions that are part of a balanced approach, including the preservation of existing HUD-assisted housing and other affordable housing."

Phased Implementation for Program Participants Based on Size

When a state, local jurisdiction, or a PHA will be required to have an Equity Plan will be phased in over many years, starting with the largest jurisdictions or PHAs. For example, for jurisdictions, those receiving a total of $100 million or more in HUD formula grants from programs that are subject to the ConPlan requirements (CDBG, HOME, HTF, ESG, and HOPWA) for the "program year" beginning on or after January 1, 2024, their first Equity Plan must be submitted by 24 months after the day the AFFH rule is finalized and becomes effective or 365 calendar days before the date a new ConPlan is due – whichever is earlier. There are three more tiers: jurisdictions receiving a total of $30-99 million in formula grant funds, those receiving a total of $1-29 million, and those receiving less than $1 million. For these jurisdictions, the program years that trigger the date an Equity Plan is due are after January 1, 2025, January 1, 2026, and January 1, 2027. For each, their Equity Plans are due no later than 365 days before the date for which a new ConPlan is due. It should be noted that a new ConPlan might not be due until years later if a jurisdiction had a new ConPlan approved just before the trigger date.

When a PHA must have an accepted Equity Plan will depend on the combined number of public housing and Housing Choice Vouchers it administers. Up first will be PHAs that have 50,000 or more combined public housing and vouchers; their first Equity Plans must be submitted no later than 24 months after the AFFH rule becomes finalized and effective or 365 days before a new Five-Year PHA Plan is due following the start of the fiscal year that begins on or after January 1, 2024 – whichever is earlier. There are three more tiers: PHAs with 10,000-49,999 combined public housing and voucher units, PHAs with 1,000-9,999 combined units, and PHAs with fewer than 1,000 combined units. In each case, their Equity Plans are due no later than 365 calendar days before the date a new Five-Year PHA Plan is due following the start of the fiscal year that begins on or after January 1, 2025, January 1, 2026, and January 1, 2027, respectively.

After the first Equity Plan, subsequent Equity Plans must be submitted for review 365 calendar days before the date a new ConPlan or PHA Plan is due.

Complying with the AFFH Planning and Certification Requirements (of the IFR) until the First Equity Plan Is Due

As is evident from the preceding discussion, it will be years before most program participants will have to develop and submit an Equity Plan. However, they will still have to meet their AFFH obligations. As established in the Interim Final Rule (IFR), program participants will still have to engage in fair housing planning, which could include preparing an Analysis of Impediments to Fair Housing Choice (AI) as was required until 2015, completing an Assessment of Fair Housing (AFH) as designed in the 2015 AFFH rule, completing some other fair housing planning, or even voluntarily creating an Equity Plan.

If a program participant has not conducted or updated its fair housing plan for more than three years before the effective date of a final AFFH rule, it must either conduct or update its fair housing plans and submit them to HUD for posting on the HUD website and potential review 365 calendar days after the AFFH rule becomes

effective. Program participants that have conducted or updated their fair housing plans during the three years before the effective date of the final AFFH rule must merely submit their existing fair housing plans to HUD for posting on the HUD website and potential review no later than 120 days from the effective date of the final rule.

HUD Review of Equity Plans

Program participants must submit an Equity Plan for HUD review. HUD will post a submitted Equity Plan on a HUD-maintained website and the public may submit comments regarding it within 60 days from the date the Equity Plan is submitted to HUD. (NLIHC will recommend the final rule change this requirement to 60 days from the date HUD posts an Equity Plan on the HUD website.) HUD will have 100 days to determine whether the Equity Plan includes the required fair housing issue analysis, has identified fair housing issues, and has established fair housing goals in order to accept the Equity Plan.

HUD will not accept an Equity Plan if it is not in compliance with any of the provisions of the AFFH rule. The proposed rule offers examples of shortcomings which might cause HUD to not accept an Equity Plan if it:

- Does not identify local policies or practices as fair housing issues when they pose a barrier to equity.
- Has fair housing goals that are not designed and cannot be reasonably expected to result in material, positive change with respect to one or more prioritized fair housing issues.
- Was developed without the required community engagement.
- Has fair housing issues or fair housing goals that are materially inconsistent with data or other evidence available to a program participant.
- Has fair housing goals that are not designed to overcome the effects of the fair housing issues in the Equity Plan.
- Fails to acknowledge the existence of fair housing issues identified during community engagement.

If HUD does not accept the Equity Plan, HUD will notify the program participant in writing with the reasons the Equity Plan cannot be accepted, along with guidance on how a non-accepted Equity Plan may be revised and resubmitted within 60 calendar days from the date of HUD notification. HUD will post on its website all communications with a program participant regarding nonacceptance and all revisions or resubmissions. HUD will have 75 calendar days to review revised Equity Plans. If HUD does not accept a revision, the process of notification, revision, and resubmission will repeat until a revised Equity Plan is accepted.

If a program participant does not have an accepted Equity Plan by the time its ConPlan or PHA Plan must be approved, in order to have that ConPlan or PHA Plan approved, the program participant must provide HUD with special assurances that it will achieve an Equity Plan that meets regulatory requirements within 180 days of the end of HUD's review period for its ConPlan or PHA Plan. At the end of the 180-day period, if a program participant still does not have a HUD-accepted Equity Plan, HUD will initiate termination of funding and will not grant or continue granting applicable funds.

TIPS FOR LOCAL SUCCESS

Advocates should organize to convince their local jurisdictions and PHAs to follow the lead of the 2015 AFFH rule or voluntarily follow some or all of the 2023 proposed AFFH rule to create an Equity Plan and incorporate its fair housing goals, strategies, and actions into their ConPlans or PHA Plans.

FORECAST FOR 2023

HUD published a complete proposed AFFH rule on February 9, 2023, with a 60-day public review and comment period ending on April 10, 2023. HUD will read all comments and eventually publish a final rule. It is not possible to predict when a final rule will be published. Even after a final rule is implemented, the way the proposed

rule intends to roll out implementation by program participants of various sizes means that it could be years before most program participants would be required to follow the provisions of a final AFFH rule. Advocates are urged to visit NLIHC's Racial Equity and Fair Housing webpage for more detailed analyses of the 2023 proposed rule and its status as the year progresses.

WHAT TO SAY TO LEGISLATORS

The 2023 proposed AFFH rule would replace the 2015 rule's AFFH Assessment of Fair Housing (AFH) with a streamlined Equity Plan. It would also eliminate the 2015 AFFH Assessment Tool and instead require program participants to conduct a fair housing analysis to identify fair housing issues by responding to questions covering just a few broad areas (seven for Consolidated Plan recipients and five for PHAs). HUD will not prescribe the format used by program participants to answer the questions. In addition, the proposed rule would greatly enhance public accountability by requiring posting on a HUD-maintained website, Equity Plans, Annual Progress Evaluations, and related official correspondence between HUD and a program participant. The proposed rule has provisions greatly enhancing opportunities for community engagement throughout the AFFH process. As with the 2015 rule, program participants would be able to address any concerns raised by HUD regarding a submitted Equity Plan through a virtually unlimited iterative process.

FOR MORE INFORMATION

NLIHC, 202-662-1530, https://nlihc.org/explore-issues/policy-priorities/fair-housing.

particularly a webpage containing archived information, https://nlihc.org/racial-equity-and-fair-housing-affirmatively-furthering-fair-housing-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, https://nationalfairhousing.org.

Poverty & Race Research Action Council, https://prrac.org/fair-housing/affirmatively-furthering-fair-housing.

The Interim Final Rule, easy to read version https://public-inspection.federalregister.gov/2021-12114.pdf, and official *Federal Register* version, https://www.govinfo.gov/content/pkg/FR-2021-06-10/pdf/2021-12114.pdf.

The 2023 proposed rule https://www.govinfo.gov/content/pkg/FR-2023-02-09/pdf/2023-00625.pdf, and an easier to read version https://public-inspection.federalregister.gov/2023-00625.pdf

HUD's Office of Fair Housing and Equal Opportunity (FHEO) homepage, https://www.hud.gov/program_offices/fair_housing_equal_opp.

FHEO's Affirmatively Furthering Fair Housing webpage, https://www.hud.gov/program_offices/fair_housing_equal_opp/affh.