

Affirmatively Furthering Fair Housing (AFFH), Part 3: The Suspended 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” protected classes—race, color, religion, sex, national origin, disability, and familial status (in other words, households with children).

See Also: For related information, refer to the *Affirmatively Furthering Fair Housing (AFFH), Part 1: Secretary Carson's Challenges to AFFH in 2018*, *Affirmatively Furthering Fair Housing (AFFH), Part 2: Reverting to the Flawed Analysis of Impediments (AI) During AFFH Rule Suspension*, and the *Consolidated Planning Process, Public Housing Agency Plan* sections of this guide.

HUD EFFECTIVELY SUSPENDED THE 2015 AFFH RULE INDEFINITELY

All but 32 local governments that submit a Consolidated Plan (roughly 1,200 local governments) will not have to comply with the July 16, 2015, Affirmatively Furthering Fair Housing (AFFH) rule as a result of Secretary Carson indefinitely suspending implementation of the 2015 Affirmatively Furthering Fair Housing (AFFH) rule. Consequently, jurisdictions must, at a minimum, revert to the old, flawed AI process. (See *Affirmatively Furthering Fair Housing (AFFH), Part 2: Reverting to the Flawed Analysis of Impediments (AI) During AFFH Rule Suspension*) Even though it is effectively suspended, this article describes the 2015 AFFH rule because advocates should know what might be lost. In addition, jurisdictions and public housing agencies (PHAs) may voluntarily follow the AFFH rule and use its Assessment of Fair Housing Tool in order to develop an Assessment of Fair Housing (AFH) as outlined in the suspended

AFFH rule. See the previous *Advocates' Guide* article *Affirmatively Furthering Fair Housing (AFFH), Part 1: Secretary Carson's Challenges to AFFH in 2018* to learn more about what led up to the indefinite suspension of the 2015 AFFH rule.

AFFIRMATIVELY FURTHERING FAIR HOUSING

This article describes the AFFH rule implemented on July 16, 2015 and the Assessment of Fair Housing (AFH) process introduced by the rule. This new rule and process was to be implemented on a staggered basis. Only an estimated 22 Community Development Block Grant (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. All other CDBG entitlement jurisdictions, states, and public housing agencies were required to use the pre-existing Analysis of Impediments (AI) process (see the preceding *Advocates' Guide* article, *Affirmatively Furthering Fair Housing (AFFH), Part 2: Reverting to the Flawed Analysis of Impediments (AI) During AFFH Rule Suspension*.)

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, and/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 assure 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” 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 new submission date. A proposed tool for states was published on March 11, 2016, but never finalized. HUD under Secretary Carson suspended use of the 2015 AFFH rule for all but 32 jurisdictions on May 23, 2018. For details about the suspension, see *Affirmatively Furthering Fair Housing (AFFH), Part 1: Secretary Carson’s Challenges to AFFH in 2018*.

SUMMARY

The opening text of the 2015 final AFFH rule declared that the purpose of the AFFH rule

was 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 stressed that the new AFFH approach did not mandate specific outcomes; rather, it established basic parameters to help guide public sector housing and community development planning and investment decisions. The rule encouraged a more engaged and data-driven approach to assessing fair housing and planning actions. The rule established 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 affirmatively furthering fair housing 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 furthering 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 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.

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 and still refers to it, but that booklet does 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 Differed From the Pre-existing AI System

The key differences the 2015 AFFH rule established, compared to the pre-existing AI system, included:

1. The AFH replaced the AI. There was no formal guidance for preparing an AI. The AFFH rule provided a standardized framework for program participants (the generic name given to local governments, states, and PHAs) to use to identify and examine what HUD called "fair housing issues" and the underlying "contributing factors" that cause the fair housing issues.
2. HUD provided each program participant data covering not only the local jurisdiction, but also the surrounding region. Program participants were required to consider this data when assessing fair housing.
3. HUD would for the first time receive and review AFHs; HUD did not receive or review AIs.
4. The fair housing goals and priorities that program participants set in their AFH were to be incorporated into their ConPlans and PHA Plans.

5. Public participation was required in the development of the AFH.
6. The AFH had to be submitted every five years in sync with a new ConPlan or PHA Plan.

The AFFH Rule Supported a Balanced Approach to AFFH

In the AFFH rule, HUD clarified that it supported 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 AFFH rule, HUD stressed that the final rule supported 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 DID IT MEAN TO "AFFIRMATIVELY FURTHER FAIR HOUSING"?

There was 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 Would 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 AFFH rule amended the old definitions of certifying AFFH compliance to mean that program participants would:

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

FIRST, A FEW DEFINITIONS OF OTHERWISE SIMPLE WORDS

Fair Housing Choice

Fair housing choice meant people would have enough information about realistic housing options to live where they chose without unlawful discrimination and other barriers. For people with disabilities, it also meant 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 was important. The term was used throughout the AFFH rule. Fair housing issue meant a condition that restricted 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 included evidence of illegal discrimination or violations of civil rights laws, regulations, or guidance.

Fair Housing "Contributing Factor"

This definition was important. The term was used throughout the AFFH rule. Fair housing contributing factor meant something that created, contributed to, perpetuated, or increased the severity of one or more fair housing "issues."

Definitions for the Four Fair Housing Issues

- Integration meant that there was not a high concentration of people of a particular protected class in an area subject to analysis required by the Fair Housing Assessment Tool, such as a census tract or neighborhood, compared to the broader geographic area.
- Segregation meant that there was 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) meant a geographic area with significant concentrations of poverty and minority populations. The rule did 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, defined a R/ECAP as an area with a non-white population of 50% or more and a poverty rate greater than 40% or that was three or more times the average poverty rate for the metropolitan area, whichever threshold was lower.
- Significant disparities in access to opportunities meant substantial and measurable differences in access to education, transportation, economic, and other important opportunities in a community, based on protected class related to housing.
- Disproportionate housing need referred 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 were:
 - 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.

Fair Housing Assessment Tool

The Fair Housing Assessment Tool referred to forms or templates provided by HUD that had to be used to conduct and submit an AFH. The Assessment Tool consisted 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 gave more detailed definitions of those than the rule did. HUD stated that the Assessment Tool questions were 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 provided more detailed examples of fair housing issues and contributing factors. There were to be separate assessment tools for local jurisdictions, states, and PHAs.

What Was an Assessment of Fair Housing (AFH)?

An Assessment of Fair Housing (AFH) was 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 were to be submitted to HUD using the Assessment Tool. The purpose of the AFH was to identify goals to affirmatively furthering fair housing that had to 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 stated that in order to develop a successful AFFH strategy, it was 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 had to conduct an AFH using the HUD-prescribed Assessment Tool. The rule set out a structure for the AFH, unlike the AI it replaced, 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 was 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 had to:
 - 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 had to:
 - i. Identify one or more contributing factors that the goal was designed to address;
 - ii. Describe how the goal related to overcoming the contributing factor(s) and related fair housing issue(s); and,
 - iii. Identify the metrics and milestones for determining the fair housing results to 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, and 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 had to be included in a program participant’s Five-Year ConPlan, Annual ConPlan Action Plan, or Five-Year PHA Plan. However, the AFH did not have to include the strategies and actions. If a program participant did not have a HUD-accepted AFH, HUD would not approve its ConPlan or PHA Plan.

ConPlan or PHA Plan strategies and actions had to affirmatively further fair housing. Strategies and actions could include (but were 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 could 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 would affirmatively further fair housing by having strategies and actions consistent with the goals and "other elements" identified in the AFH. Annual Action Plans submitted in between Five-Year ConPlans had to describe the actions the program participant planned to take during the upcoming year to address fair housing goals.

HUD REVIEW OF THE AFH

The AFH (unlike the AI) had to be submitted to HUD for review and "acceptance." HUD would determine whether the AFH had a fair housing analysis, assessment, and goals. HUD could decide not to "accept" an AFH, or a part of an AFH, if:

- The AFH was "inconsistent" with fair housing or civil rights laws, examples of which included:
 - 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 did not identify policies or practices as fair housing contributing factors even though they could result in excluding protected class people from areas of opportunity.
- The AFH was "substantially incomplete," examples of which included an AFH that:
 - Was developed without the required community participation or required consultation with other entities.
 - Failed to satisfy a required element of the AFFH regulation, examples of which included an AFH with priorities or goals materially inconsistent with the data and other evidence and an AFH that had priorities or goals not designed to overcome the effects of contributing factors and related fair housing issues.

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

PUBLIC PARTICIPATION IN THE AFH PROCESS

To ensure that the AFH is informed by meaningful community participation, the rule required 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 had to 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 included: 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 added to the ConPlan rule, requirements for 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 was 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 had to 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 added to the ConPlan rule, requirements for 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 intended 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 had to indicate how the proposed AFH would be published. Publishing could be met by:
 - Summarizing the AFH in one or more newspapers of general circulation. The summary had to include a list of places where copies of the entire AFH could be examined.
 - Making copies available on the jurisdiction's official website, and at libraries, government offices, and other public places.
- Provide a reasonable number of free copies of the proposed AFH to those who request it.
- Make available to the public the HUD-accepted AFH and any revisions—including in forms accessible to people with disabilities—when requested.
- Provide the public with 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 added to the ConPlan rule, requirements for jurisdictions to:

- Have at least one public hearing during the development of the AFH.
- Have at least one public hearing before the proposed AFH was 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 had to be attached to the final AFH, and an explanation of reasons for not accepting comments had to be attached to the final AFH.
- Have at least one public hearing before a proposed ConPlan was published for comment in order to obtain public comments about affirmatively furthering fair housing 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 had to be in writing, meaningful, and provided within 15 working days.

A Few Additional Key Public Participation Features of the ConPlan Regulations

- Jurisdictions had to take appropriate actions to encourage participation by people of color, people who do not speak English, and people with disabilities. Localities also had to encourage participation by residents of public and assisted housing.
- Access to information had to be reasonable and timely. For local jurisdictions (not states) the public had to have “reasonable and timely” access to local meetings, such as Advisory Committee meetings, City Council subcommittee meetings, etc.
- There had to be “adequate” public notice of and access to upcoming hearings. Publishing small print notices in the newspaper a few days before the hearing was not adequate notice. Two weeks’ notice was adequate. Hearings had to be held at times convenient to people who were likely to be affected. Hearings had to be held in places easy for lower-income people to get to.

Consultation with Other Entities and the AFH Process

The AFFH rule also amended the ConPlan regulations’ consultation requirements to include the AFH. When preparing the AFH and then the ConPlan, jurisdictions were 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 had to be with any organizations that had relevant knowledge or data to inform the AFH, and that were independent and representative.
- Consultation “should” occur with organizations that had the capacity to engage with data informing the AFH, and were independent and representative.
- Consultation had to 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 had to specifically seek input about how the AFH goals would inform the priorities and objectives of the ConPlan.

HUD ENCOURAGED JOINT AND REGIONAL AFHS

HUD encouraged program participants to collaborate to submit a joint AFH or a regional AFH. A joint AFH involved two or more program participants submitting a single AFH. A regional AFH involved at least two program participants that had to submit a ConPlan. Collaborating program participants did not have to be adjacent to each other, and they could cross state lines, as long as they were in the same Core Based Statistical Area. One of the program participants had to be designated as the lead entity. All program participants were accountable for the analysis and any joint goals and priorities. Collaborating program participants had to include their individual analysis, goals, and priorities in the collaborative AFH, and were accountable for them. A joint or regional AFH did 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 had to have a plan for public participation that included residents and others in each of the jurisdictions.

TIMING OF THE AFH

As originally designed in the AFFH rule, most program participants were not be required to use the new AFFH system until 2019. Until a program participant was required to submit an AFH, it had to continue to follow the AI to fair housing choice process. (See the previous *Advocates' Guide* article, *Affirmatively Furthering Fair Housing (AFFH), Part 2: Reverting to the Flawed Analysis of Impediments (AI) During AFFH Rule Suspension*).

There were five categories of due dates for the initial AFH. In each case, the first AFH had to 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 was due.

1. CDBG entitlement jurisdictions receiving \$500,000 or more in FY15 and that were 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 was due. It was estimated that there were 22 such jurisdictions. However, HUD indicated that several of those jurisdictions decided to join with another jurisdiction which had a later due date.
2. CDBG entitlement jurisdictions receiving \$500,000 or less in FY15 and that were required to have a new Five-Year ConPlan on or after January 1, 2018, had to submit an initial AFH 270 calendar days before that new ConPlan is due. It was estimated that there were 105 entitlement jurisdictions with 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 for them 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 chose to collaborate with another local government completing the regular Assessment Tool.

3. States that were required to have a new Five-Year ConPlan on or after January 1, 2018, had to submit an initial AFH 270 calendar days before that new ConPlan was 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. PHAs with more than 550 public housing units and vouchers, combined, ("non-qualified PHAs") had 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 did not have to use the Tool until HUD provided the needed data and issues a notice in the *Federal Register* announcing new submission date. HUD introduced interim guidance on January 18, 2017.
5. PHAs with fewer than 550 public housing units and vouchers, combined ("qualified PHAs") had to submit an AFH 270 calendar days before a new Five-Year PHA Plan was due on or after January 1, 2019. As with the non-qualified PHAs, qualified PHAs did not have to use the Assessment Tool right away. 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 chose to collaborate with a local government completing the regular Assessment Tool. In addition, HUD indicated its intent to create a separate Assessment Tool for qualified PHAs.

After the first AFH, all program participants were to 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 were to submit an AFH at least every five years.

REVISING THE ASSESSMENT OF FAIR HOUSING

An AFH had to be revised if there was a “material change,” that would affect the information the AFH was based on so that the analysis, fair housing contributing factors, or priorities and goals no longer reflected the present situation. Examples included a presidentially declared disaster, major demographic changes, new significant contributing factors, or significant civil rights findings. HUD could also require a revision if it detected a significant change. A revised AFH had to be submitted within 12 months of the onset of the material change. For presidentially declared disasters, the revised AFH was due two years after the date the disaster was declared.

A revised AFH might not require submitting an entirely new AFH. It only needed to focus on the material change and any new fair housing issues and contributing factors. It had to 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 had to specify the criteria that would be used for determining when substantial (ConPlan) or significant (PHA Plan) revisions to the AFH were appropriate. When there were revisions to the AFH, the ConPlan and PHA Plan public or resident participation regulations pertaining to substantial/significant amendments had to be followed. Completed revisions had to be made public and submitted

to HUD, following the ConPlan or PHA Plan regulations.

RECORDKEEPING

ConPlan participants and PHAs preparing their own AFHs were required to 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 had to be made available to HUD. The AFFH rule did not state that these records were to be made available to the public as well. However, the modified ConPlan regulations required 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 AFFH rule offered PHAs three ways to meet their obligation to affirmatively further fair housing:

1. A PHA could work with a local or state government in preparing an AFH. If a PHA served residents of two or more jurisdictions, the PHA could choose the jurisdiction that most closely aligned with its PHA Plan activities.
2. A PHA could work with one or more other PHAs in the planning, resident participation, and preparation of an AFH. One of the PHAs had to be designated the lead agency.
3. A PHA could conduct its own AFH.

A PHA had to certify that it would affirmatively further fair housing. This meant the PHA would take meaningful actions to further the goals identified in the AFH, take no action that was materially inconsistent with its obligation to affirmatively furthering fair housing, and address fair housing issues and contributing factors.

A PHA was obligated to affirmatively furthering fair housing in its operating policies, procedures, and capital activities. A PHA's admission and occupancy policies for public housing and vouchers had to comply with the PHA's plans to affirmatively furthering fair housing. 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 planned to take had to 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 could 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 could challenge a certification if a PHA failed to meet the requirements in the AFFH regulations, failed to take meaningful actions to further the goals of its AFH, or took action that was materially inconsistent with affirmatively furthering fair housing.

A PHA's certification was in compliance if it met the above requirements and it:

- Examined its programs.
- Identified any fair housing issues and contributing factors in those programs.
- Specified actions and strategies designed to address contributing factors, related fair housing issues, and goals in its AFH.
- Worked with local governments to implement those local governments' efforts to affirmatively furthering fair housing that required the PHA's involvement.
- Operated its programs in a manner consistent with local jurisdictions' ConPlans.

TIPS FOR LOCAL SUCCESS

Even though HUD has indefinitely suspended the AFFH rule, unless the courts override the suspension, advocates can still organize to convince their local jurisdictions and PHAs to follow the lead of the AFFH rule and use the Assessment Tool to create an AFH.

FORECAST FOR 2019

When a presidential candidate, HUD Secretary Ben Carson wrote that the 2015 AFFH 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*.

Jurisdictions will continue to only be required to use the flawed AI process in 2019 because the 2015 AFFH rule was indefinitely suspended by Secretary Carson's HUD. In addition, on August 16, 2018 HUD published an Advanced Notice of Proposed Rulemaking (ANPR) for comment. That ANPR sought public comment on eight

sets of questions that reflected HUD's desire to substantially re-write an AFFH rule (see *Affirmatively Furthering Fair Housing (AFFH), Part 1: Secretary Carson's Challenges to AFFH in 2018*). As of the date this *Advocates' Guide* went to press, a proposed rule has not been published for comment. Consult NLIHC's AFFH webpage to learn whether anything new has transpired in the subsequent months.

WHAT TO SAY TO LEGISLATORS

Remind your congressional delegation that the new approach in the AFFH rule did not mandate specific outcomes; rather, it established basic parameters to help guide public sector housing and community development planning and investment decisions. The rule encouraged a more engaged and data-driven approach to assessing fair housing and planning actions. The rule established 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, <https://nlihc.org/explore-issues/policy-priorities/fair-housing>.

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, <https://prrac.org/fair-housing/affirmatively-furthering-fair-housing>.

HUD Office of Fair Housing and Equal Opportunity, <http://1.usa.gov/VFQ4Nk>, with a page titled Affirmatively Furthering Fair Housing providing general background information, http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/16affh_home_page.

AFFH on HUD's Policy Development and Research (PD&R) website containing its AFFH

data and mapping tool https://www.huduser.gov/portal/affht_pt.html.

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

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