

Affirmatively Furthering Fair Housing (AFFH), Part 1: Trump Administration Eliminates AFFH Rule

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Administering Agency: HUD's Office of Fair Housing and Equal Opportunity

Year Started: 1968

Population Targeted: The Fair Housing Act's "protected classes" – race, color, national origin, sex, familial status, disability, and religion

See Also: *Affirmatively Furthering Fair Housing (AFFH), Part 2: The Suspended 2015 Final Rule*, as well as the *Consolidated Planning Process and Public Housing Agency Plan* sections of this guide.

HISTORY

Title VIII of the "Civil Rights Act of 1968" (the "Fair Housing Act") requires HUD to administer its programs in a way that affirmatively furthers fair housing. The laws that establish the Community Development Block Grant (CDBG) program, the Comprehensive Housing Affordability Strategy (CHAS, the statutory basis of the Consolidated Plan, ConPlan), and the Public Housing Agency (PHA) Plan all require local governments, states, and PHAs to certify in writing that they are affirmatively furthering fair housing. States must ensure that units of local government receiving CDBG or HOME Investment Partnerships Program funds from the state comply. Further, HUD's 1996 *Fair Housing Planning Guide* declared that the obligation to affirmatively further fair housing applies to all housing and housing-related activities in a jurisdiction, whether publicly or privately funded.

ABRUPT ACTION BY THE TRUMP ADMINISTRATION

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). NLIHC and 14 other civil rights and housing organizations issued a [media statement](#) condemning the administration's action as well as the president's use of incendiary racial rhetoric about the move for political gain.

The 2015 regulations, which were suspended by HUD Secretary Ben Carson in 2018, were the first significant regulations since the Fair Housing Act of 1968 requiring federal agencies, particularly HUD, as well as states, counties, and cities to affirmatively further fair housing if they receive HUD funds. The Fair Housing Act not only banned discrimination, but it also required meaningful actions to undo decades of federal, state, and local discriminatory policies and practices that resulted in segregated communities.

An [announcement](#) about the final rule on July 23 followed President Trump's recent false Twitter claim that the AFFH rule was having "a devastating impact on these once thriving suburban areas," would "destroy the suburbs," and was "not fair to homeowners." The preamble to the final rule states that after reviewing Secretary Carson's proposed AFFH rule, "the President expressed concern that the HUD approach did not go far enough," and "The President therefore asked HUD to reconsider the rule to see whether HUD could do more...to empower local communities and to reduce the regulatory burden of providing unnecessary data to HUD. After review, and based on prior internal discussions, HUD produced the current rule."

Secretary Carson's 2018 proposed rule was not a fair housing rule; it considered housing that might be "affordable" to be the same as housing that is available to people in the Fair Housing Act's protected classes based on race, color, national origin, sex, familial status, disability, or religion. The proposed rule might mislead people

to think that HUD proposed to comply with the Fair Housing Act's requirement to affirmatively further fair housing. President Trump's final rule strips away that façade and completely abandons the obligation to affirmatively further fair housing.

THE FINAL TRUMP AFFH RULE

In its final form the "AFFH" rule in essence is reduced to three lines, two of which are in a definition section [24 CFR part 5.150]. One defines "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 defines "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") must certify that they are affirmatively furthering fair housing. The third line states 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 is voluminous, the bulk of the document simply removes from all HUD regulations reference to the Assessment of Fair Housing (AFH) that the 2015 rule required.

The "Administrative Procedure Act" (APA) requires any meaningful change to HUD regulations to undergo a 60-day public review and comment. This final rule did not undergo any review and comment. According to the preamble, the APA exempts from notice-and-comment rulemaking any "matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." Therefore, HUD asserted that this rule is exempt because

the rule applies only to the AFFH obligation of grantees (including states, local governments, and public housing authorities). HUD noted that the Administrative Conference of the United States (ACUS) in 1969 urged Congress to amend the APA to remove the exemption, but Congress declined. However, HUD issued statements of policy that had the effect of voluntarily adopting ACUS's recommendation, and that policy remains in force [24 CFR 10.1] and can no longer be repealed. Nevertheless, in issuing the final rule HUD asserted that the Secretary retains the authority to waive the requirements of 24 CFR 10.1 in individual cases. HUD's explanation of the waiver was in a confusing, convoluted footnote.

Consistent with previous statements, the preamble to the final rule made a number of false claims:

- "HUD began to use this AFFH certification as a vehicle to force states and localities to change zoning and other land use laws."
- "Once in place, the Analysis of Impediments (AI) process [from a 1995 Consolidated Plan rule] became a vehicle for interest groups and HUD to impose even greater and more controversial obligations on state and local grantees."
- "The [Analysis of Fair Housing (AFH) of the 2015] regulation specifically required a detailed analysis of the grantee jurisdiction's 'zoning and land use' laws."
- The 2015 rule's "assessment tool" forced public housing authority grantees to analyze and consider data and policies beyond their jurisdictional control and typical subject-matter expertise.
- The preamble repeated the gross exaggeration that the Assessment of Fair Housing (AFH) was "unworkable" and that there was a "high failure rate."

In reality, jurisdictions were not forced to change zoning laws or undertake greater controversial obligations. While the initial assessment tool did require a detailed and rigorous analysis, as a result of the "Paperwork Reduction Act"

requirement for several rounds of public review and comment, a streamlined version was offered for smaller PHAs and those partnering with other PHAs or the jurisdiction in which they operated. Ultimately, a final assessment tool for PHAs was never issued and no PHA ever had to complete one. In addition, HUD suspended the AFH in early 2018 when only 49 AFHs had been submitted for HUD review (out of what over a period of years would be more than 1,200). While 17 were not immediately approved by HUD on first review, the 2015 rule, recognizing that this new process would entail a learning curve, had an iterative process that entailed HUD explaining what it would take to gain acceptance and to resubmit an AFH with adjustments. Consequently 32 AFHs out of the first batch of 49 were accepted prior to the rule's suspension.

TIPS FOR LOCAL SUCCESS

Even though HUD the final rule has effectively eliminated an effective AFFH rule, advocates can still organize to convince their local jurisdictions and PHAs to follow the lead of the 2015 AFFH rule and use the Assessment Tool to create an AFH.

FORECAST FOR 2021

The Biden Administration is well aware of the effective elimination of an AFFH rule and is very likely to embark on an effort to review the 2015 AFFH rule and Assessment Tool, make slight adjustments, and propose a meaningful substitute for Trump's 2020 final rule.

WHAT TO SAY TO LEGISLATORS

Ask your congressional delegation to register its support for any Biden Administration proposed replacement AFFH rule. Remind your congressional delegation that the 2015 AFFH rule did not mandate specific outcomes; rather, it established basic parameters to help guide public sector housing and community development planning, along with investment decisions. The 2015 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. See *Affirmatively Furthering Fair Housing (AFFH), Part 2: The Suspended 2015 Final Rule*.

FOR MORE INFORMATION

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

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

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

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

The formal, *Federal Register* version of "Preserving Community and Housing Choice," <https://bit.ly/3gCP48C>.

An easy-to-read version of "Preserving Community and Housing Choice," <https://bit.ly/2P5Xk45>.