SUMMARY AND ASSESSMENT
HUD'S PROPOSED AFFH RULE

Ed Gramlich, NLIHC, January 9, 2020

Overall Summary and Analysis

HUD posted an advance version of its proposed replacement for the 2015 affirmative furthering fair housing (AFFH) rule on January 7. The formal *Federal Register* version was published on January 14 for a 60-day comment period ending March 16. The proposed rule is not a fair housing rule. It considers 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. It substitutes a supply-side ideology that misleadingly assumes that an overall increase in the supply of housing will trickle down to become "affordable" housing without any consideration of jurisdictions' policies and practices on race and other protected classes or on overcoming patterns of housing segregation. This proposed rule would be worse than the minimal AFFH process that existed from 1994 that the Government Accountability Office (GAO) found to be ineffective.

HUD prematurely suspended implementation of the 2015 rule based on only 49 initial Assessment of Fair Housing (AFH) submissions, 32 of which were ultimately accepted by HUD. For a brand new and meaningful approach to AFFH, a learning curve was anticipated by the 2015 rule that provided for an iterative process for jurisdictions and HUD to interact.

Contrary to HUD's claims, the 2015 rule was not prescriptive; it did not force jurisdictions to adhere to set issues or solutions. The 2015 rule gave jurisdictions the flexibility to identify their own fair housing issues and develop their own priorities and methods for taking action to address those fair housing issues.

A New AFFH Certification Demonstrates the Supply-Side Approach

The proposed rule discards a genuine means to affirmatively further fair housing as required by the Fair Housing Act of 1968. It would scrap the 2015 rule's Assessment of Fair Housing (AFH) that was the product of nearly four years' of diligent consultation and broad public engagement on the part of HUD starting in late 2009. The AFH was developed in response to jurisdictions' requests for uniform guidance in order to reduce uncertainty regarding how to meet their AFFH obligation.

In place of the AFH, HUD proposes substituting a newly designed "AFFH certification" that reflects HUD's equating an increased supply of housing with fair housing choice. However, simply increasing the supply of housing will not necessarily result in housing that is affordable to low-income (much less extremely low-income) people, and it is even less likely to reduce or eliminate discriminatory attitudes, policies, practices or entrenched segregation.

For the AFFH certification, HUD would require a jurisdiction to identify three goals and describe how addressing those goals would address fair housing. However, the proposed rule would not require such a description if a jurisdiction chose its goals from a list of 16 "obstacles" that HUD considers inherent barriers to fair housing choice. The effect of the exemptions is to steer a jurisdiction toward choosing the "obstacles," 13 of which have nothing to do with fair housing; rather, they are factors that might affect the cost of building housing and thereby might inhibit growth of the supply of housing.

"Obstacles" include the time it takes for title clearance, construction approval procedures, construction permitting procedures, design standards, and building codes. Another "obstacle", tax policies, might harm local and state housing trust funds. Other "obstacles" protect people and the environment, such as rent control, labor protections, energy and water efficiency policies, and wetland and environmental rules.

A New HUD Evaluation Process Does Not Measure AFFH

HUD would evaluate a jurisdiction's compliance with its obligation to affirmatively further fair housing by assessing the extent to which the jurisdiction measures up based on nine factors – only two of which relate to fair housing choice. Another two factors relate to housing supply, two to affordability, and three to quality. Assessing a jurisdiction on the basis of these nine factors will not provide a genuine measure of its success at achieving its AFFH obligation.

Contrary to HUD's false claims that the 2015 rule did not take into account the unique fair housing circumstances facing individual jurisdictions, the proposed rule would rank and compare jurisdictions based on their nine-factor evaluations. Arbitrarily ranking jurisdictions using the nine factors is a meaningless exercise that cannot truly gauge the success of any jurisdiction's compliance with its AFFH obligations.

Jurisdictions that HUD ranks as "Outstanding" would be eligible for preference points when competing for grants through Notices of Funding Availability (NOFAs), ostensibly an incentive for jurisdictions to better perform their AFFH obligations. But few HUD programs operate via NOFAs, and most of these are relatively small programs. High ranking jurisdictions are likely to be those that readily strive to genuinely comply with their obligation to affirmatively further fair housing, so would not need these incentives. Jurisdictions that attempt to avoid complying with AFFH are not at all likely to be motivated by the marginal benefits of points awarded in a NOFA competition.

Public Participation in the AFFH Process Greatly Diminished

The proposed rule would eliminate the 2015 rule's separate public participation process that required a public hearing and written comment period to inform a jurisdiction about its residents' fair housing concerns and priorities before any AFFH-related considerations might be reflected in a jurisdiction's Consolidated Plan (ConPlan), which is focused on housing and community development needs. Identifying fair housing issues, assessing priorities among many fair housing issues, and recommending fair housing goals and actions entail very different concepts and sometimes even different stakeholders than the ConPlan process, thereby warranting separate public participation procedures.

Public Housing Agencies' Requirements Greatly Reduced

Public housing agencies (PHAs) would not have to have an AFFH certification listing AFFH goals. The proposed rule would eliminate the 2015 rule's requirement to take "meaningful actions" rather than token actions, and to not take actions that are not consistent with the obligation to AFFH. A PHA would merely have to consult with its jurisdiction on how the two could satisfy their common AFFH obligations.

The advanced version of the proposed AFFH rule is at: https://bit.ly/2t2YOnZ

A Note about Citations

The page numbers referenced in this summary and analysis are based on the version made available by HUD on January 7, prior to being posted on the *Federal Register* website. This advance version has larger type and is double spaced, making reading easier and allowing for margin notes.

Throughout this summary and analysis, the proposed changes to Consolidated Plan regulations cited will be those for entitlement jurisdictions. Keep in mind, unless otherwise indicated there are parallel changes to the state Consolidated Plan regulations.

Definition of Affirmatively Furthering Fair Housing

Most regulations have a "definitions section", but the proposed rule would eliminate all of the 2015 rule's definitions. Instead, two key definitions are placed in **§5.150**, the opening section of both the 2015 rule and HUD's proposed changes.

HUD proposes a drastic rewrite of §5.150, primarily by eliminating the 2015 rule's statement of purpose: to have an effective planning approach to aid program participants in taking meaningful actions to "overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination". This is not surprising because in 2018 HUD proposed eliminating from its mission statement, "build inclusive and sustainable communities free from discrimination".

Without specifically defining AFFH, a drastically rewritten **§5.150** would read:

> "(a)(1) Every recipient of HUD funding must affirmatively further fair housing by acting in a manner consistent with reducing obstacles within the participant's sphere of influence to providing fair housing choice. HUD may consider a failure to meet the duty to affirmatively fair housing a violation of program requirements."
>
> "(b) Affirmatively furthering fair housing requires an effort that is in addition to, and not a substitute for, compliance with the specific requirements of the Fair Housing Act."

Revised §5.150 would also insert a reworded definition of "fair housing choice", emphasizing housing affordability and adding that housing should be decent, safe, and sanitary. Although the proposed rule includes reference to accessible housing for people with disabilities, it omits a key qualifier in the 2015 rule – that accessible housing should be in the most integrated setting appropriate for an individual and have disability-related services.

HUD explains why it is proposing the above revised definition of AFFH on page 16 of the preamble to the proposed rule. HUD's explanation makes several false claims about the 2015 rule that it asserts the proposed rule would fix by:

HUD Claim: "Avoiding a federal government directive for local action that does not align with the statutory directive."

NLIHC Response: The 2015 rule does not have any "federal government directive".

HUD Claim: Not requiring program participants to take actions that "goes beyond the authority of subject jurisdictions".

NLIHC Response: The 2015 rule did not require a program participant to take actions beyond their borders or out of their control. The definition of affirmatively furthering fair housing in the 2015 rule clearly stated, "The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development", which echoes the Fair Housing Act.

HUD Claim: "Alleviating the unintended consequences of discouraging the use of federal assistance in communities that need help instead of restrictions."

NLIHC Response: The 2015 definition of AFFH called for, among three other actions, "transforming racially and ethnically concentrated areas of poverty into areas of opportunity". Although not in the actual definition of AFFH, the 2015 rule at §5.150 famously contained the description of the "both/and" nature of the AFFH rule: "strategically enhancing access to opportunity, including through targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing…"

HUD Claim: "Providing a more tailored approach that would take into account local issues and concerns by allowing local jurisdictions to create custom approaches based on their unique circumstances."

NLIHC Response: The 2015 rule is designed to enable program participants to reflect local issues, priorities, goals, and actions.

Elimination of the Assessment of Fair Housing (AFH)

The proposed rule eliminates §5.151 through §5.154. The former is a short description of AFFH implementation and the latter is an extensive discussion of the nature and content of an Assessment of Fair Housing (AFH) – the document to be used by program participants to demonstrate their compliance with the Fair Housing Act's obligation to AFFH. The proposed rule would eliminate the AFH, and instead rigorously tie AFFH compliance to a significantly altered meaning of AFFH "certification", one which requires a minimum of three goals and explanations of how meeting the goals would affirmatively further fair housing, as described in the next section of this summary.

The AFH is intended to replace the failed Analysis of Impediments (AI) by providing a standardized road map that program participants could use, eliminating the lack of guidance and subsequent uncertainty that many program participants complained about regarding the AI process. The AFH text clearly demonstrates that localities have the flexibility to identify the fair housing issues and contributing factors to those issues that exist in their communities, and then to assign priorities among the identified fair housing issues and contributing factors, ultimately setting goals for overcoming the effects of the contributing factors. (There is no §5.153.)

AFFH Certification

AFFH certification is codified in the 2015 rule at §5.166, which in turn references the Consolidated Plan (ConPlan) regulation and the PHA Plan regulation. The 2015 rule at §91.225(a)(1) significantly improved the 1994 definition of AFFH certification (which until 2015 was the only AFFH "regulation"). The 2015 rule amended ConPlan definition of AFFH certification to mean that a jurisdiction "will take meaningful actions to further the goals of the AFH…and that it will take no action that is materially inconsistent with the obligation to affirmatively further fair housing."

HUD now proposes to significantly alter the meaning of AFFH certification to the extent that a certification's nature and limited content would substitute for the AFH or even the AI. However, in the process HUD virtually eliminates a genuine assessment of affirmatively furthering fair housing – replacing such an assessment with a supply-side assessment. Affirmatively furthering fair housing will seldom trickle down from a supply side strategy.

The AFFH Certification Would Become a Faux Replacement for the AFH

The preamble on page 17 criticizes the 2015 AFFH certification because it "does not specify the exact way the jurisdiction intends to AFFH". Of course the AFH, not the certification, was the vehicle for specifying how a jurisdiction intended to meet its AFFH obligation.

HUD proposes to require an AFFH certification to contain at least three goals a jurisdiction plans to undertake to address fair housing choice. The proposed text at §91.225(a)(1) reads:

> "Each jurisdiction is required to submit a certification that it will AFFH by addressing at least three goals towards fair housing choice or obstacles to fair housing choice, identified by the jurisdiction, that the jurisdiction intends to achieve or ameliorate, respectively. The identified goals or obstacles must have concrete and measurable outcomes or changes."

The preamble twice indicates that the three goals/obstacles are those that a jurisdiction would reasonably expect to undertake over the upcoming five-year period associated with the ConPlan [pages 1 and 17]. The text of the proposed rule does not specify a set time period for the three goals; however, it is probably implied because §91.225(a)(1) is part of the ConPlan regulations and most ConPlans are updated every five years.

The 2015 rule required jurisdictions to notify the public that an AFH would be drafted and required significant opportunities for broad community input into that draft AFH. Under the proposed rule a jurisdiction's AFFH certification will be developed without such public input and with very little public knowledge that such a certification exists; only entities consulted by a jurisdiction (per the ConPlan regulations at §91.100 and §91.110) would even be aware of the AFFH certification (see page 18 below regarding Consultation).

Certification to Require Descriptions Explaining How Goals Would Further AFFH, but 16 "Obstacles" Are Exempt

The proposed rule at §91.225(a)(1)(i) would require an AFFH certification to describe how each goal/objective in a certification would AFFH. However, 16 goals/obstacles on a proposed HUD list would not need to be described because HUD misleadingly asserts that they are inherent barriers to fair housing choice. The propose rule at §91.225(a)(1)(i) reads:

> "(i) Jurisdictions must include with each goal or obstacle a brief description of how accomplishing the goal or ameliorating the obstacle affirmatively furthers fair housing in that jurisdiction, ***unless*** (*emphasis added*) the obstacle is an obstacle to fair housing choice identified from the following non-exhaustive list of obstacles which HUD considers to be inherent barriers to fair housing choice:"

The preamble on page 19 explains that the non-exhaustive list consists of conditions that HUD wrongly considers to be common barriers to fair housing choice.

> "HUD would consider a goal to take concrete steps toward alleviating or improving one of these listed conditions as a justified method of affirmatively furthering fair housing, and therefore jurisdictions would not need to include an explanation of why the jurisdiction is pursuing solutions to these barriers."

Overemphasis on Supply-Side Conditions

The proposed rule lists 16 conditions, 13 of which have nothing substantive to do with fair housing; rather, they address factors that might affect the cost of building new housing and perhaps inhibit growth of the supply of housing. They also reflect the current administration's intent to drastically reduce regulations, even if they provide valuable protections for people and the environment. The preamble [pages 20-22] expounds upon a number of factors that might affect development costs that could possibly inhibit housing construction. Increasing the supply of housing, however, does not address the many obstacles to fair housing choice for people in the protected classes under the Fair Housing Act; it might not even have a measurable impact on developing housing that is affordable. An augmented housing supply will not necessarily trickle down to low-income (much less extremely low-income people), nor will it necessarily reduce or eliminate discriminatory attitudes and practices.

The proposed rule does have three conditions that could pertain to fair housing choice:

- (C) Concentration of substandard housing stock in a particular area.
- (F) Source of income restrictions on rental housing.
- (M) Unnecessary manufactured housing regulations and restrictions.

While (C) does potentially address undue concentrations of substandard housing in a particular area, it does not directly address racial or ethnically concentrated housing, whether substandard or even standard. In addition, unlike the 2015 rule, it does not address jurisdictions that over the years have not equitably invested non-housing resources, such as Community Development Block Grants (CDBG), in disinvested neighborhoods primarily occupied by protected class people.

A fourth condition is not a fair housing obstacle but is a problem that must be addressed, "(H) High rates of housing-related lead poisoning in housing". Even this otherwise meritorious item is inadequate; it ought to address lead hazards, not lead poisoning. Congress, HUD, and local jurisdictions must do much more to identify and mitigate or eradicate lead hazards before children become poisoned by lead hazards.

The twelve irrelevant supply-side conditions are:

(A) Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable.
(B) Lack of a sufficient supply of decent, safe, and sanitary housing that is affordable and accessible to people with disabilities.
(D) Not in derogation of applicable federal law or regulations, inflexible or unduly rigorous design standards or other similar barriers which unreasonably increase the cost of the construction or rehabilitation of low-to-mid price housing or impede the development or implementation of innovative approaches to housing.
(E) Lack of effective, timely, and cost-effective means for clearing title issues, if such are prevalent in the community.
(G) Administrative procedures which have the effect of restricting or otherwise materially impeding the approval of affordable housing development
(I) Artificial economic restrictions on the long-term creation of rental housing, such as certain types of rent control.
(J) Unduly prescriptive or burdensome building and rehabilitation codes.
(K) Arbitrary or excessive energy and water efficiency mandates.
(L) Unduly burdensome wetland or environmental regulations.
(N) Cumbersome or time-consuming construction or rehabilitation permitting and review procedures.
(O) Tax policies which discourage investment or reinvestment.
(P) Arbitrary or unnecessary labor requirements.

Among the above, depending on how they are designed and implemented, some of the "inherent obstacles" could protect protected class people as well as others, for example rent control, energy and water efficiency standards, wetlands and environmental regulations, and labor protections.

Zoning Policies

The above list of conditions does not explicitly include zoning policies. However, the preamble on page 20 states:

"Although not expressly included on HUD's proposed examples of common barriers (because they are generally legitimate and widely vary), jurisdictions should feel free to examine their State or local zoning laws and may determine that modifying these provisions is how they can best AFFH."

"HUD considers changes to zoning laws to be a useful and appropriate tool to further fair housing choice. Jurisdictions are free to choose to undertake changes to zoning or land-use policies as one method of complying with the AFFH obligation; however, no jurisdiction may have their certification questioned because they do not choose to undertake zoning changes."

In the past Secretary Carson has stated contradictory positions about local zoning policies. In a July 2015 *Washington Times* Op Ed piece, Secretary Carson wrote;

> "In practice, the [AFFH] rule would fundamentally change the nature of some communities from primarily single-family to largely apartment-based areas by encouraging municipalities to strike down housing ordinances that have no overtly (or even intended) discriminatory purpose – including race-neutral zoning restrictions on lot sizes and limits on multi-unit dwellings, all in the name of promoting diversity."

However, later in a *Wall Street Journal* interview dated August 13, 2018, discussing an Advance Notice of Proposed Rulemaking published on April 16, 2018, Secretary Carson said he wants to "focus on restrictive zoning codes…Stringent codes have limited home construction, thus driving up prices and making it more difficult for low-income families to afford homes". Indirectly referring to the CDBG program, Secretary Carson said he "would incentivize people who really would like to get a *nice juicy* government grant to take a look at their zoning codes."

Combating restrictive zoning that inhibits housing production is an important goal given the deep racial disparities created by some local zoning laws. Any AFFH rule must treat restrictive zoning laws as potential obstacles to AFFH. However, while increasing the supply of the appropriate types of housing in areas of opportunity is necessary, it is not sufficient. Merely increasing the supply does not necessarily even result in any portion of that new supply being affordable to low-income or extremely low-income people. Nor, does an increased supply necessarily trickle down in a manner that overcomes the many obstacles to realizing fair housing choice.

Mr. Carson's discussion of increasing the supply of housing fails to address the core of the Fair Housing Act's affirmatively furthering fair housing obligation based on the protected classes: race, color, national origin, sex, disability, familial status, and religion. The purpose of a robust AFFH rule is to ensure that more affordable housing is available to people in protected classes and to reverse decades-long patterns of segregation and discrimination.

Decoupling AFFH from a Jurisdiction's Strategic Plan in the ConPlan

The proposed rule would delete the paragraphs in the ConPlan regulations that require a jurisdiction's Five-Year Strategic Plan to describe how its priorities and specific objectives will AFFH by being consistent with its AFFH goals. The deleted paragraphs would be from §91.215(a)(5) for entitlement jurisdictions and §91.315(a)(5) for states. Perhaps HUD proposes deleting these simply because they refer to the AFH. At a minimum HUD should keep these paragraphs and insert the AFFH certification in place of the AFH. This is what the proposed rule would do with respect to the ConPlan's Annual Action Plan regulations at §91.220(k)(1) for entitlement jurisdictions and §91.320(j)(1) for states.

Minimum Level of Standard Data Rejected

The proposed rule at §91.225(a)(1)(iii) states:

> "The contents of the certification need not be based on any HUD-prescribed specific analysis or data but should reflect the practical experience and local insights of the jurisdiction, including objective quantitative and qualitative data as the jurisdiction deems appropriate."

For the 2015 rule, HUD provided standard data sets to use as reasonable benchmarks so that there would be a minimum level of quality applied to all jurisdictions. HUD now proposes to discard a common set of minimum analytical tools to be used by all in favor of "practical experience and local insights". While this makes a certain level of sense (the 2015 rule also urged the use of local data and knowledge), there is a danger that jurisdictions that find AFFH inimical will concoct "practical experiences and local insights" that evade addressing meaningful AFFH.

Misplaced Emphasis on Actions within a Jurisdiction's Control

The preamble [pages 7, 15, 17, and 36] and the proposed rule [§§150(a)(1),150(a)(2), 225 (a)(1)(i) and (ii), 325(a)(1)(ii), and 903.7(o)(1)] frequently use the phrase "within their control" or "within the jurisdiction's sphere of influence", falsely implying that the 2015 rule imposed AFFH obligations on jurisdictions that that they could not control.

For example, the proposed rule at §91.225(a)(1)(ii) states:

> "Jurisdictions should focus on goals or obstacles within their control or partial control. If, in addition to identifying obstacles within the jurisdiction's control or partial control, a jurisdiction identifies obstacles to fair housing choice not within its control or partial control, but which the jurisdiction determines deserve public or HUD scrutiny, the certification may also discuss those issues and include suggested solutions to address the obstacles."

At least the proposed rule recognizes that there are obstacles to fair housing choice that are not in a jurisdiction's control or that exist beyond the jurisdiction's borders in neighboring jurisdictions. Examples might be local business decisions or the policies and programs of other jurisdictions in the region that affect fair housing choice. The 2015 rule required jurisdictions to identify such obstacles, but did not require jurisdictions to actually attempt to diminish or eliminate such obstacles. The 2015 rule, recognizing that fair housing issues cross borders in a metropolitan area, did encourage jurisdictions within a region to coordinate in efforts to overcome obstacles to fair housing choice.

In a related vein, the preamble on page 18 again falsely implies that under the 2015 rule HUD micromanaged localities, "requiring jurisdictions to carry out specific steps to AFFH", and denying them the "flexibility to take action based on the needs, interests, and means of the local community".

A New Way for HUD to Evaluate AFFH Compliance

The proposed rule would introduce a new provision at §5.155 titled "Jurisdiction risk analysis". (The text indicates that the proposed rule would revise §5.155, but such a section does not exist with the 2015 rule.) Continuing HUD's proposed emphasis on a supply-side approach to affirmatively furthering fair housing, the new "evaluation" would focus on measuring the adequacy of a jurisdiction's supply of affordable housing throughout the jurisdiction as well as the quality of the affordable housing. The preamble on page 13 explains:

> "HUD is proposing to evaluate how program participants are carrying out their AFFH obligation as a threshold matter by using a series of data-based measures to determine whether a jurisdiction (1) is free of adjudicated fair housing claims; (2) has an adequate supply of affordable housing throughout the jurisdiction; and (3) has an adequate supply of quality affordable housing."

And on page 23 the preamble adds:

> "To provide a way for jurisdictions to measure their progress in affirmatively furthering fair housing over time, and to allow HUD to verify that jurisdictions are taking actions and not just making plans, HUD is proposing a system that would use publicly available metrics to score and rank the CDBG-receiving jurisdictions that submit a consolidated plan that year."

Because §5.155 is such an integral, major component of the proposed rule, the text is copied (mostly) in full:

> "(a) Purpose. HUD will conduct an analysis and ranking of jurisdictions to determine which jurisdictions are especially succeeding at affirmatively furthering fair housing and which should be subject to an enhanced review and may need additional assistance to affirmatively further fair housing. This ranking is not a determination that the jurisdiction has complied with the Fair Housing Act."
>
> "(b) Frequency. HUD will conduct the analysis and ranking every year."

Evaluating AFFH Performance by Looking at Factors Unrelated to Fair Housing

As with the proposed AFFH certification that, with two or three exceptions, did not address genuine fair housing choice issues, HUD proposes to evaluate jurisdictions looking at nine factors, only two of which relate to fair housing choice. These will not address genuine obstacles to meeting the obligation to affirmatively further fair housing. Using the nine factors, HUD will give each jurisdiction a baseline score that HUD thinks indicates the adequacy of the supply of quality affordable housing.

> "(c) Method. (1) HUD will, using publicly available data and databases, establish a base score for each jurisdiction regarding the extent to which there is an adequate supply of affordable and available quality housing for rent and for sale to support fair housing choice.
>
> The following are non-exclusive examples of the type of data for each jurisdiction:
>
> (i) Median home value and contract rent
> (ii) Household cost burden
> (iii) Percentage of dwellings lacking complete plumbing or kitchen facilities
> (iv) Vacancy rates
> (v) Rates of lead-based paint poisoning
> (vi) Rates of subpar Public Housing conditions
> (vii) Availability of housing accepting housing choice vouchers throughout the jurisdiction
> (viii) The existence of excess housing choice voucher reserves
> (ix) Availability of housing accessible to persons with disabilities."

The preamble on page 25 states:

> "To determine each jurisdiction's success at furthering fair housing choice, HUD would develop a scoring system based on quantitative data generated by publicly available datasets…These data would seek to represent how well a jurisdiction is providing affordable, quality housing free of violations of the Fair Housing Act and related statutes. HUD would create the scoring system using data related to affordable housing availability, the jurisdiction's housing quality, and adjudicated complaints of violations of the Fair Housing Act or related statutes."

Out of the nine factors, two actually address fair housing choice:

> (vii) The availability of housing accepting vouchers, and
> (ix) Availability of housing accessible to persons with disabilities.

Another two factors relate to "affordability":

> (i) Median home value and contract rent and
> (ii) Household cost burden.
>
> (Does HUD consider "cost burden" to mean the standard of a household paying no more than 30% of adjusted income for rent and utilities or homeowner payments plus utilities?)

Three factors relate to housing quality:

(iii) Percentage of dwellings lacking complete plumbing or kitchen facilities,
(v) Rates of lead-based paint poisoning, and
(vi) Rates of subpar Public Housing conditions.

(Note that HUD has a very bad track record of enforcing Uniform Physical Inspection Standards for both Public Housing and private, HUD-assisted Multifamily Housing.)

Two factors relate to supply:

(iv) Vacancy rates and
(viii) The existence of excess housing choice voucher reserves (which is a function of PHAs playing accounting games given the annual uncertainty of Congressional appropriations for voucher renewals).

Seven of the nine proposed factors are not indicators of fair housing choice. This set of data will in no way provide a genuine analysis of a jurisdiction's success at achieving AFFH. To be sure, HUD is correct that "This ranking is not a determination that the jurisdiction has complied with the Fair Housing Act."

Relying on these nine factors does not even provide a meaningful indication of HUD's purported desire to use increasing supply as a substitute for affirmatively furthering fair housing. Only two factors indicate anything regarding supply, and most PHAs do not horde vouchers. Regarding the three quality factors, all housing should be free of lead hazards (not just lead poisoning) and have complete plumbing and kitchen facilities. HUD should enforce Public Housing Uniform Physical Condition Standards. Affordability indicators such as cost burden and rents and home prices (as well as vacancy rates) are affected by much greater market forces. For example in areas of high demand they will only be addressed if housing supply is vastly increased and people are paid living wages, while areas that are losing sources of employment will "look good" because rents will decline and vacancy rates will increase.

Ranking Jurisdictions

Based on each jurisdiction's baseline score using the nine factors above, HUD proposes ranking all jurisdictions. §5.155 continues:

"(3) HUD will create a ranking score for each jurisdiction, using a method to be specified in a *Federal Register* notice after opportunity for public comment, ranking jurisdictions more favorably for high relative performance in the objective measures set forth in paragraph (c)(1) of this section. HUD will then rank the jurisdictions based on this score, divided into the following categories:

(i) Jurisdictions with population growth and tight housing markets.
(ii) Jurisdictions with population growth and loose housing markets.
(iii) Jurisdictions with population decline and tight housing markets.
(iv) Jurisdictions with population decline and loose housing markets.
(v) States with significant population growth.
(vi) States without significant population growth."

The preamble on page 23 explains:

> "By using public data, HUD intends to create a "dashboard" that would allow jurisdictions to anticipate where they would rank and therefore plan ahead accordingly…These rankings would allow HUD to objectively determine a jurisdiction's success in providing quality affordable housing without adjudicated adverse fair housing findings…This ranking system, while useful in helping HUD evaluating compliance with the jurisdiction's requirement to AFFH, would not reflect a determination that the jurisdiction has complied with the Fair Housing Act."

Arbitrarily ranking jurisdictions, especially using the nine factors makes no sense. It is contrary to HUD's frequent refrain that each jurisdiction's situations are unique – and on that NLIHC agrees. Therefore, to establish a ranking system solely to compare jurisdictions contradicts HUD's own view of jurisdictions' relative fair housing choice needs, while proposing to undertake a meaningless exercise that cannot truly assess the success of any jurisdiction's compliance with its AFFH obligations.

Providing Incentives for Jurisdictions Ranked as "Outstanding"

Jurisdictions that HUD ranks as "Outstanding" based on the nine-factor evaluation would be eligible for preference points when competing for grants through Notices of Funding Availability (NOFAs), ostensibly an incentive for jurisdictions to better perform their AFFH obligations. But there are relatively few HUD programs that operate via NOFAs, and most of these are relatively small programs.

§5.155 continues:

> "(d) Results. (1) After ranking the jurisdictions as described in paragraph (c)(3) of this section, HUD will designate the top ranking jurisdictions submitting a consolidated plan that year in each category as 'outstanding AFFH performers' and the bottom ranking jurisdictions in each category as 'low-ranking jurisdictions.' Outstanding jurisdictions will, for the 24-month period following the approval of the jurisdiction's consolidated plan, be eligible for potential benefits, including additional points in funding competitions and eligibility for additional program funds due to reallocations of recaptured funds as may be provided in NOFAs. Low-ranking jurisdictions may have their AFFH certifications questioned under 24 CFR part 91."

Jurisdictions that HUD ranks as "Outstanding" are likely to be jurisdictions that readily strive to genuinely comply with their obligation to affirmatively further fair housing. Jurisdictions that attempt to avoid complying with AFFH are not at all likely to be motivated by the marginal benefits of points awarded in a NOFA competition.

There are relatively few HUD programs that operate via NOFAs, and most are relatively small programs. The preamble on page 32 mentions the Choice Neighborhoods Initiative (CNI), Jobs-Plus, lead-based paint reduction programs, Resident Opportunity

and Self-Sufficiency (ROSS) grants, Family Self-Sufficiency (FSS) grants, and the Fair Housing Initiative Program (FHIP). The Continuum of Care (CoC) programs operate through NOFAs, but the preamble does not mention this program. CoCs currently have an appropriation of $2.3 billion.

Residents of low-ranking jurisdictions should not be "punished" by their jurisdictions losing out to Outstanding jurisdictions that receive added points in a NOFA competition; they might be the residents who could benefit the most from the program tied to a NOFA.

The preamble on page 32 indicates that HUD is considering adding to the list of incentives, the Moving to Work Demonstration (MTW) and any future expansion of the Rental Assistance Demonstration (RAD). HUD is also considering various forms of regulatory relief, either from the AFFH process or as part of other regulations.

Program funds that are reallocations of recaptured funds might be of marginal value to jurisdictions due to the potentially modest sums and/or due to the fact that the reallocated funds will be limited to a given program, one that a jurisdiction does not need more of or does not value highly.

§5.155(d)(2) provides for evaluation of jurisdictions after the first year:

> "(2) Beginning with the second submission of AFFH certifications under 24 CFR part 91 after [the date the rule goes into effect], HUD will determine how much each jurisdiction has improved according to the factors in paragraph (c) of this section. HUD will also designate as "outstanding AFFH performers" jurisdictions that have shown the most improvement since their last strategic plan submission. These jurisdictions will be eligible for the benefits of that designation for the 24-month period following the approval of the jurisdiction's consolidated plan."

The reservoir of potential benefits is small and limited. While rewarding jurisdictions that make significant improvements, this could also crowd out jurisdictions that consistently perform their AFFH obligations well.

Adjudicated Fair Housing Violations

The preamble mentions "adjudicated fair housing violations" twice [pages 13 and 25]. §5.155(d)(3)(i) provides the proposed regulatory text:

> "(3)(i) No jurisdiction may be considered an outstanding AFFH performer if the jurisdiction or, for a local government, any PHA operating within the jurisdiction, has in the past five years been found by a court or administrative law judge in a case brought by or on behalf of HUD or by the United States Department of Justice to be in violation of civil rights law unless, at the time of the submission of the AFFH certification, the finding has been successfully appealed or otherwise set aside."

Simply being free of any civil rights violations is not a measure of affirmatively furthering fair housing. The proposed text limits this "adjudication" provision to court or administrative judge decisions brought in response to complaints by HUD or DOJ. As the National Fair Housing Alliance (NFHA) notes, most complaints are settled out of court. In addition, year in and year out NFHA reports that most fair housing complaints are brought by private, nonprofit organizations. In 2018, 75% of all complaints were brought by nonprofits, while the other 25% were brought by local and state agencies as well as by the federal government.

In addition, local jurisdictions have little, if any, control over PHAs; therefore it does not seem appropriate to downgrade a jurisdiction for the fair housing findings attached to a PHA.

Also, what would having an "adjudicated" violation mean for a jurisdiction that was not otherwise at the "outstanding" level, but nonetheless measured somewhere in between "outstanding" and "low-ranking"?

PUBLIC PARTICIPATION

The proposed rule would eliminate a separate public participation process pertaining to AFFH, instead hoping that AFFH will be adequately dealt with in the otherwise crowded ConPlan public participation process.

HUD comments on page 7 of the preamble to the proposed rule in the section titled "Justification for Change":

> "The 2015 rule also had public participation requirements that were similar to the consolidated plan citizen participation requirements, but it created a separate process for the AFH that duplicated the existing requirements for citizen participation and consultation with outside organizations that were already required for the consolidated plan."
>
> "Jurisdictions were required to hold at least one public hearing specifically on their proposed AFFH strategies prior to publishing the AFH for comment. According to some commenters [only one from the Michigan State Housing Development Authority is cited], these AFFH-specific hearings created high additional costs for jurisdictions."

It is difficult to know how high the costs of one public hearing and associated notice requirements were and whether they were truly extreme. Obtaining public input regarding fair housing issues should be a very high priority for both HUD and jurisdictions; fostering more democratic processes ought to be a goal.

Because AFFH compliance in the proposed rule would hinge on the proposed, detailed AFFH certification (replacing the AFH), there is even less public involvement in the AFFH process because development of the AFFH certification is not subject to public input – with the limited exception of a jurisdiction's consultation with certain entities, per the ConPlan regulations at §91.100 and §91.100.

The preamble simply states on page 17:

> "By including AFFH planning as part of the consolidated plan process, HUD proposes to incorporate the public participation requirements of the consolidated plan, without imposing an additional burden on jurisdictions."

The text of the proposed rule [page 51] simply indicates "5. Remove § 5.156 through §5.158" – the latter in the 2015 rule is "Community Participation, Consultation, and Coordination". HUD also makes related changes to the ConPlan's public participation regulations.

August 2018 HUD ANPR Hinted at Eliminating AFFH Public Participation

HUD's Advance Notice of Proposed Rulemaking (ANPR) published on August 16, 2018 provided a warning that HUD would propose eliminating a separate AFFH public participation process. In response, NLIHC wrote:

> "NLIHC welcomed the 2015 AFFH rule's requirement that there be genuine public participation in drafting an AFH. Under the flawed AI protocol, there was no public input, no opportunity to identify fair housing issues or to suggest reasonable actions and policies to address those fair housing issues. The 2015 AFFH rule introduced public engagement and consultation with fair housing organizations for the first time.
>
> The Consolidated Plan's public participation process is designed to obtain input regarding housing and community development needs, assessing which needs among the many have the highest priority in the five-year Consolidated Plan cycle, and which programs and activities ought to be funded and at what level. That is quite a bit to consider.
>
> Identifying fair housing issues, assessing priorities among many fair housing issues, and recommending goals entail very different concepts and sometimes even different stakeholders, thereby warranting separate public participation procedures. The 2015 AFFH rule reasonably designed the AFFH public participation process to precede and inform the decision making associated with the Consolidated Plan and its Annual Action Plan system."

The 2015 AFFH Public Participation Rule

Because a separate AFFH public participation provision was such an important feature of the 2015 rule, its text is presented here so that advocates can assess what will be lost if the proposed rule goes into effect unchanged.

From the 2015 AFFH rule at §5.158 "Community Participation, Consultation, and Coordination":

> *(a) General. To ensure that the AFH is informed by meaningful community participation, program participants must give the public reasonable opportunities for involvement in the development of the AFH and in the incorporation of the AFH into the consolidated plan, PHA Plan, and other required planning documents. To ensure that the AFH, the consolidated plan, and the PHA Plan and any plan incorporated therein are informed by meaningful community participation, program participants should employ communications means designed to reach the broadest audience. Such communications may be met, as appropriate, by publishing a summary of each document in one or more newspapers of general circulation, and by making copies of each document available on the Internet, on the program participant's official government website, and as well at libraries, government offices, and public places. Program participants shall ensure that all aspects of community participation are conducted in accordance with fair housing and civil rights laws, including title VI of the Civil Rights Act of 1964 and the regulations at 24 CFR part 1; section 504 of the Rehabilitation Act of 1973 and the regulations at 24 CFR part 8; and the Americans with Disabilities Act and the regulations at 28 CFR parts 35 and 36, as applicable. At a minimum, whether a program participant is preparing an AFH individually or in combination with other program participants, AFH community participation must include the following for consolidated plan program participants and PHAs (as applicable):*
>
> *(1) Consolidated plan program participants. The consolidated plan program participant must follow the policies and procedures described in its applicable citizen participation plan, adopted pursuant to 24 CFR part 91 (see 24 CFR 91.105, 91.115, and 91.401), in the process of developing the AFH, obtaining community feedback, and addressing complaints. The jurisdiction must consult with the agencies and organizations identified in consultation requirements at 24 CFR part 91 (see 24 CFR 91.100, 91.110, and 91.235.*

The Proposed Public Participation Changes Pertaining to the ConPlan Rule

Curiously, the proposed rule would only revise §91.105(e)(1) of the Citizen Participation Plan rule (for **entitlement jurisdictions**). That would leave (a)-(l) unchanged – even though they reference the AFH. [This is not something we should remind HUD about, especially (b)(3) through (b)(5) which requires "…at least one public hearing during the development of the AFH or ConPlan (as applicable)," a 30-day period for public comment, and a jurisdiction's responses to public comments.

Proposed §91.105(e)(1) would eliminate (iii) which in the 2015 rule reads:

> *"(iii) Assessment of Fair Housing. To obtain the views of the community on AFH-related data and affirmatively furthering fair housing in the jurisdiction's housing and community development programs, the citizen participation plan must provide that at least one public hearing is held before the proposed AFH is published for comment."*

The proposed changes to the **state provisions** pertaining to public participation are at §91.115. Although subsections (a) and (b)(1) and (b)(2) reference the AFH, HUD does not propose amending them. The proposed rule would remove references to the AFH in subsection (c) though (h).

The major change is the proposed elimination of (b)(3)'s introductory text, which in the 2015 rule reads:

> *"(3) The citizen participation plan must provide for at least one public hearing on housing and community development needs and proposed strategies and actions for affirmatively furthering fair housing consistent with the AFH, before the proposed consolidated plan is published for comment. To obtain the public's views on AFH-related data and affirmatively furthering fair housing in the State's housing and community development programs, the citizen participation plan must provide that at least one public hearing is held before the proposed AFH is published for comment."*

CONSULTATION

As with public participation, HUD thinks that there is no need for special, separate consultation regarding AFFH; that the ConPlan regulation's consultation provisions are adequate. The 2015 rule expanded the types of entities that needed to be consulted; these types of entities were not previously included in the ConPlan regulations. The proposed rule at least retains that expanded list of types of entities that must be consulted (for example, organizations that represent protected class members, and fair housing organizations and other nonprofits funded under the Fair Housing Initiatives Program [FHIP]).

The consultation regulations in the ConPlan for **entitlement jurisdictions** are at §91.100. HUD proposes to remove reference to the AFH at subsections (a)(1), (c)(1), and(e). Paragraph (e)(1) would be modified at the end to correct in part for the proposed elimination of (e)(3), albeit without reference to an AFH or even the proposed AFFH certification:

> "Consultation must specifically seek input on how the goals identified in the jurisdiction's certification to affirmatively further fair housing will inform the priorities and objectives of the consolidated plan."

It is important to obtain consultation regarding AFFH goals long before a jurisdiction begins thinking about its how those AFFH goals might fit in its ConPlan priorities and objectives.

HUD also proposes deleting paragraph (e)(3) from the 2015 rule:

> *"(3) Consultation must occur at various points in the fair housing planning process, meaning that, at a minimum, the jurisdiction will consult with the organizations described in this paragraph (e) in the development of both the AFH and the consolidated plan. Consultation on the consolidated plan shall specifically seek input into how the goals identified in an accepted AFH inform the priorities and objectives of the consolidated plan."*

The 2015 text for (e)(3) reflects the importance of developing an assessment of AFFH (with consultation) in a thoughtful, deliberative, multi-stage manner before embarking on preparing a ConPlan.

The consultation regulations in the ConPlan for **states** are at §91.110. HUD proposes removing references to the AFH at §91.110 (a) throughout. At (a)(2) HUD proposes substituting "the certification to AFFH" and "how the goals identified in the jurisdiction's certification to AFFH inform priorities and objectives of the ConPlan". In addition, at §91.110(a)(2) HUD proposes eliminating language in the 2015 rule that reads:

> *"Consultation must occur at various points in the fair housing planning process, meaning that, at a minimum, the jurisdiction will consult with the organizations described in this paragraph (a)(2) in the development of both the AFH and the consolidated plan."*

That 2015 text from (a)(2) reflects the reality that fair housing planning should be a thoughtful, deliberative, multi-stage process.

Changes Relating to PHAs

The preamble to the proposed rule indicates:

> "Public housing agencies would demonstrate their efforts to AFFH through their participation in the consolidated plan process" [page 1].

> "PHAs, already required to participate in the consolidated plan process, would be required to certify, in every applicable annual plan, that they have consulted with the jurisdiction on how to satisfy their obligations to AFFH. This participation and certification would fulfill their AFFH responsibilities" [page 17].

Similar language is on pages 14 and 26.

There is nothing in the PHA Plan or ConPlan regulations that require "active" participation in the development of the ConPlan. Both sets of regulations merely require "consultation", especially with regard to "public housing needs and planned programs and activities" (ConPlan regs at §91.100(c) for entitlement jurisdictions; there is no similar provision for states). It is not apparent in general practice that anything beyond perfunctory consultation might take place between a PHA and its jurisdiction when developing a ConPlan.

As a result of the inaccurate claim by HUD that PHAs actively participate with their jurisdictions in the ConPlan process the preamble adds that:

> "A PHA would not be required to submit a certification detailing AFFH goals and obstacles." [page 36]

> "This participation [consultation] and certification would fulfill their AFFH responsibilities." [page 17]

It is important for PHAs to develop and submit specific AFFH-sensitive goals and proposed actions unique to PHA operations, policies, and programs, such as project basing of vouchers, implementing required or voluntary Small Area Fair Market Rents (SAFMRs), proposals to develop mixed-finance projects, deciding which public housing projects to propose for demolition or disposition, and how the voucher program is administered (including portability).

Proposed Changes to PHA Plan Regulations

HUD proposes key changes to 24 CFR Part 903, the Public Housing Plan regulations, at several sections.

Changes to §903.7(o) Pertaining to Civil Rights Certifications

HUD proposes to significantly change paragraph (1) in two ways:

> "(1) The PHA must certify that it has consulted with the local jurisdiction on how to satisfy their obligations in common to affirmatively further fair housing,...and that it will affirmatively further fair housing in its programs and in areas under its direct control."

This deletes text in the 2015 rule that more specifically defines AFFH to mean the PHA:

> "will take meaningful actions to further the goals in the AFH…and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing, and that it will address fair housing issues and contributing factors in its programs."

The proposed rule then removes the 2015 rule's affirmative direction to:

> "address fair housing issues and contributing factors in its programs."

The key differences reflect the fact that a PHA's AFFH obligations are now really limited to the vague notion of obligations that the PHA has in common with the jurisdiction. If the proposed rule is implemented as drafted, it would eliminate the 2015 rule's requirement to take "meaningful actions" rather than token actions, and to not take actions that are not consistent with the obligation to AFFH. The proposed rule continues to insinuate that PHAs under the 2015 rule had to take actions beyond their control.

A relatively positive idea is requiring PHAs to consult with their jurisdictions.

HUD proposes to significantly change paragraph (3) by eliminating the eight items a PHA would need to demonstrate to show that it is in compliance with its AFFH certification. One of the eight items that would be lost is "Specifies actions and strategies…"

Changes to §903.15 Pertaining to the Relationship of the PHA Plan to the ConPlan

The proposed rule eliminates the 2015 rule's §903.15 subsection (a), which lays out three options for a PHA to consider regarding whether to submit its own AFH, submit an AFH in partnership with a jurisdiction, or jointly participate with other PHAs in drafting and submitting an AFH.

The proposed rule introduces an opening paragraph to §903.15 that basically echoes the 2015 rule's subsection (d) referring to "fair housing requirements". The proposed rule subsection (a) echoes the 2015 rule's (d)(1).

The proposed rule's subsection (b), "Affirmatively Furthering Fair Housing", modifies the 2015 rule's (d)(2) opening text by eliminating important language such as "policies should be designed to reduce the concentration of tenants and other assisted persons by race, national origin, and disability." It would also eliminate, "Any affirmative steps or incentives a PHA plans to take must be stated in the admissions policy."

The proposed (b)(2) mostly echoes the 2015 rule's (d)(2)(ii), both discussing affirmative steps a PHA may take. The proposed rule suggests an improvement by adding, "engagement with landlords to promote acceptance of housing choice vouchers". On the other hand, the proposed rule changes the 2015 rule's "use of nondiscriminatory tenant selection and assignment policies that *lead to segregation.*" The reference to segregation acknowledged past and in some cases current policies that result in segregation. To avoid such an acknowledgement, the proposed rule substitutes "policies that lead to increased fair housing choice" – not otherwise inappropriate text.

The proposed rule adds two more minor but positive changes, referring not only to people with disabilities, but to aging populations, and adds that PHAs should "facilitate the provision of services [to enable people with disabilities to transfer from institutional settings] at PHA properties.

The proposed §903.15(c) mostly echoes the 2015 rule's (d)(3), both pertaining to "Validity of Certification". However, there are two key deletions from the 2015 rule – failing to take meaningful actions to further the goals in the AFH and taking action that is materially inconsistent with the obligation to AFFH.

PERFORMANCE REPORTS

The 2015 rule did not have an explicit provision for performance reports. It merely required each annual AFH to summarize "progress achieved in meeting a program participant's goals and associated metrics and milestones of the prior AFH and identify any barriers that impeded or prevented achievement of goals" [§5.154(d)(7)].

HUD proposes to slightly modify §91.520 of the ConPlan regulations. The preamble on page 35 indicates:

> "In the years between 5-year plans, jurisdictions would need to submit, in their annual performance reports under 24 CFR 91.520, annual progress updates to the goals or obstacles they submitted in their most recent AFFH certification…HUD would accept performance reports under 24 CFR 92.520, where the steps taken are each rationally related to the goal and obstacles identified in the jurisdiction's AFFH certification."

The preamble on page 35 adds:

> "This language is intended to follow the judicial definition of rational basis review closely".

Advocate attorneys explain that under the Constitution's Equal Protection provisions, "rational basis review" is the lowest level of judicial scrutiny required. Generally courts apply a "strict scrutiny" in cases regarding issues affecting Fair Housing protected classes. There is also an "intermediate level of scrutiny".

Recall that, as proposed, an AFFH certification should address at least three goals toward fair housing choice or obstacles to fair housing choice – and that 13 of 16 conditions that HUD would assume to be actions to alleviate obstacles are merely aimed at attempting to reduce the cost of developing housing and perhaps encourage the development of more housing (but not necessarily housing accessible by people in the protected classes or even housing that is affordable to low-income or extremely low-income people).

At §91.520(a) HUD proposes two slight changes:

- Replacing "AFH" with "actions taken pursuant to the jurisdiction's certification to affirmatively further fair housing"
- Followed by "and any measurable results of those actions" which is a slight improvement.

At §91.520(i)(2) HUD proposes a new subparagraph:

> "(2) With the steps the jurisdiction has taken to affirmatively further fair housing, HUD will deem that portion of the performance report "satisfactory" if the steps the jurisdiction has taken are rationally related to the goals or obstacles identified in the jurisdiction's certification to affirmatively further fair housing."

HUD'S JUSTIFICATION FOR PROPOSED CHANGES

HUD Claim: On page 5 of the preamble HUD claims that the 2015 rule:

> Is "overly burdensome to both HUD and the grantees and are ineffective in helping program participants meet their reporting obligations for multiple reasons."
>
> "…the [assessment tools] are closely tied to the regulatory language, which HUD believes is too prescriptive in outcomes for jurisdictions. Therefore, HUD believes it is necessary to revise the codified regulation, not just the assessment tools."
>
> "First, the AFH required significant resources from program participants, and its complexity and demands resulted in a high failure rate for jurisdictions to gain approval for their AFH in the first year of AFH submission."

NLIHC Remarks

HUD returns to the extreme justification it gave for effectively suspending the AFFH rule on January 5, 2018 and for withdrawing the Assessment Tool on May 23, 2018.

HUD is basing its claim on the experience of only the first 49 AFH submissions. Eighteen of the 49 were accepted by HUD on initial submission, and according to HUD 32 were ultimately approved. The AFFH rule anticipated a learning curve and provided for an iterative process by which HUD would identify problems with a draft AFH that a jurisdiction could fix.

The May 23 *Federal Register* notice identified seven categories of problems with the Assessment Tool and gave an example problem for each. Based on the examples offered, most problems could have been addressed very easily by using the AFFH rule's provision for an iterative process requiring HUD to offer suggestions for curing a deficiency.

One of the problems HUD highlighted was an egregious violation of the public participation requirements by a jurisdiction; a violation that warranted rejection of the AFH until adequate public participation was provided. HUD blamed the example of inadequate community participation on the wording of the Assessment Tool, "…the questions in the Local Government Assessment Tool regarding community participation have resulted in confusion. The questions vaguely incorporate by reference the existing community participation requirements in HUD's Consolidated Plan regulations…"

However, jurisdictions should be expert at providing meaningful public participation because it has been a requirement since the Community Development Block Grant (CDBG) program was authorized in 1974 and elaborated on in subsequent CDBG and Consolidated Plan regulations. Nevertheless, over the decades advocates have encountered great disregard for genuine public participation. In such cases it is appropriate for HUD to not accept a recalcitrant jurisdiction's AFH. The notice itself cites a blatant violation of traditional public participation regulations, "For example, the regulation at 24 CFR 91.105(b)(4) requires a period of not less than 30 calendar

days for comment by the community; however, one community posted a draft AFH for public comment on a Friday and submitted the final AFH to HUD the following Monday, after providing only three days for public comment." Such behavior by a jurisdiction is not a reflection of vague Assessment Tool questions.

A second problem HUD refers to is "insufficient use of local data and knowledge" as required by the AFFH rule. HUD claimed the failure to use local data "resulted in an inability to address issues in a community that have not manifest themselves in the HUD-provided data." As an example, HUD pointed to a jurisdiction that did not identify multiple Superfund locations in their jurisdiction when discussing environmental health issues. HUD blamed this omission on the fact that the HUD-provided maps did not include Superfund sites. Identifying Superfund sites would seem to be easy for a jurisdiction to do. It would be equally simple for HUD to request, as part of the AFFH rule's iterative process, and for a jurisdiction to include in an AFH resubmission, a discussion of the impact of Superfund sites on people living in racial/ethnic areas of concentrated poverty.

A third problem claimed by HUD related to the identification of "contributing factors" to "fair housing issues." The example in the notice was of a jurisdiction that had three pages of detailed analysis of Home Mortgage Disclosure Act (HMDA) information outlining lending discrimination. The jurisdiction did not take the logical step of identifying lending discrimination as a "contributing factor." Again, the iterative HUD review process provided for in the AFFH rule could have readily corrected this shortcoming.

HUD Claim (page 6):

"Program participants attempted to prepare successful AFHs by hiring outside consultants, redirecting resources that could have been used to support affordable housing directly."

NLIHC Remarks

HUD provided all the data a jurisdiction needed and the questions in the Assessment Tool were sufficiently straight forward for a jurisdiction to respond to without resorting to outside consultants. As HUD was developing the 2015 rule and Assessment Tool (which was subject to multiple Administrative Procedure Act public comment opportunities) HUD declared its stated intent was to eliminate the expensive use of consultants that many jurisdictions resorted to in order to complete their Analyses of Impediments under the old, failed regime.

HUD Claim (page 7):

"A commenter [from a small PHA] on the advance notice of proposed rulemaking on AFFH regulations issued in 2018 noted that this jurisdictional analysis was simply too complex to be effectively completed by staff without specific statistical and mapping knowledge, as housing providers generally have staff with skills that lie in providing affordable housing services, but not in providing complex statistical data analysis. The same is likely true for many smaller jurisdictions."

NLIHC Remarks

HUD provided free mapping tools and guidance as well as all the data a jurisdiction might need. Sophisticated statistical analytical abilities nor expertise in online mapping were not needed. Smaller jurisdictions and smaller PHAs were afforded streamlined Assessment Tools.

HUD Claim (page 6): HUD refers to a *Federal Register* notice published on May 15, 2017 inviting comments regarding regulations that might be outdated, ineffective, or excessively burdensome (regarding Executive Order 13777).

> "Many commenters specifically indicated that, as program participants, they found the rule's requirements to be (or likely to be) extremely resource-intensive and complicated, placing a strain on limited budgets."
>
> "A representative of PHAs wrote that compliance with the "overly burdensome and impractical" rule would be expensive, with particular concern for PHAs with small housing portfolios, while other commenters stated that the rule did not provide enough consideration to the fact that jurisdictions are limited geographically in what they can do, even when a jurisdiction is in a regional partnership."

NLIHC Remarks

That comment came from the Idaho Chapter of the National Association of Housing and Redevelopment Officials (NAHRO). The proposed PHA assessment tool had a streamlined tool for small PHAs and state PHAs.

The notice HUD mentions was not specific to AFFH. In response to the notice, NLIHC urged HUD to protect and maintain the AFFH rule. However, the notice provided a forum for AFFH opponents to complain about the AFFH rule before most local jurisdictions had to consider implementing the rule. In addition, HUD wrote that small PHAs in particular wrote that compliance would be costly. However, PHAs in general had not yet been required to carry out the AFFH rule provisions. In addition, HUD had a streamlined "insert" to a PHA Assessment Tool for Qualified PHAs, those with 550 or fewer public housing units, or 1,250 or fewer public housing units and vouchers that were going to partner with a larger PHA. Furthermore, in a January 13, 2017 *Federal Register* notice, HUD committed to developing a special, streamlined Assessment Tool for Qualified PHAs that would chose to submit their own AFH.

In addition, the 2015 rule did not require jurisdictions to undertake activities that they had no power to affect beyond their boundaries; the 2015 rule merely recognized that fair housing obstacles do not stop at boundaries and that regional obstacles should be considered and that jurisdictions should consider attempting to work with others to diminish regional obstacles.

Finally, the preamble to the proposed rule only cites comments against the 2015 rule, and only five of them overall. On the other hand, HUD only devotes three

general sentences that indicate "Many expressed support for the 2015 final rule and urged HUD to continue to implement its requirements." HUD does not indicate how many of the 700 public comments were in support of the 2015 rule. Unlike other instances of an ANPR, HUD does not address the specific comments regarding the ANPR and the individual arguments in favor of the 2015 rule or individual arguments against the notions HUD put forward in the ANPR. Instead, it simply forges ahead ignoring those comments and largely proceeds along the lines of the direction the ANPR alluded to.

HUD Claim (pages 5 and 6):

"The number of questions, the open-ended nature of many questions, and the lack of prioritization between questions made the planning process both inflexible and difficult to complete."

NLIHC Remarks

- Every question did not need a detailed response or in some cases even any response.
- Open-ended questions allowed for flexibility and avoided being prescriptive.
- Because the questions were not given specific priority, the unique circumstances of each jurisdiction could be reflected; a question that might be of high priority in one locality will not necessarily be a priority at all in another locality.

HUD Claim (page 8):

> "Third, the 2015 rule's scope was particularly burdensome because HUD did not tailor the rule depending on the program participant, other than through creating broad categories. Every jurisdiction, regardless of their size, civil rights record, or current housing conditions, had to go through the same AFH process, without the flexibility to identify their locality's most relevant issues or to adapt their process to the unique conditions of the jurisdiction. Commenters [City of Winston-Salem] expressed concerns that they lacked the capacity to analyze the several contributing factors prescribed by HUD and requested that HUD allow grantees flexibility in identifying issues and developing a course of action."

NLIHC Remarks

- Part of the intent of the 2015 rule was to provide a basic standard framework for all jurisdictions. One of the problems HUD cited at the time was that jurisdictions did not like the lack of guidance and uncertainty that came with the failed AI process.
- The 2015 rule afforded jurisdictions the flexibility to identify their own fair housing issues and develop their own priorities and methods for taking action to address those fair housing issues. It is not true that the 2015 rule forced jurisdictions to adhere to set issues or solutions.

- The 2015 rule did not prescribe any "contributing factors", it merely offered 39 examples to stimulate consideration, to help jurisdictions understand what the new term "contributing factors" might mean. Jurisdictions could also indicate contributing factors that were not on the sample list.

HUD Claim (pages 8 and 9):

> "Fourth, HUD determined that the 2015 rule focused too much on planning and process, and not enough on either the jurisdiction or HUD evaluating fair housing results."
>
> "This uniform, process-based approach discouraged innovation, allowed the process to substitute for actual results, and made it difficult to evaluate and compare jurisdictions over time."

NLIHC Remarks

- How can a jurisdiction accomplish appropriate results without first conducting, within a broad but standardized framework, a reasoned analysis of underlying conditions and the factors and forces that cause those conditions? How else can jurisdictions set priorities for deciding which results to strive for, in what order, and in what timeframe?
- HUD does not explain how the 2015 rule discouraged innovation. NLIHC does not see how the 2015 rule would discourage innovative actions to address fair housing issues or contributing factors.
- Comparing jurisdictions is meaningless. It also is contrary to the notion that each jurisdiction's situation is unique (and therefore not comparable).

HUD Claim (page 9):

> "Finally, the completion of the AFH required grantees to use specific data sets and HUD-provided tools, including extensive mapping data, locally available data, and data from various interest groups."
>
> "For local jurisdictions, the tool was difficult to learn and operate and did not include all factors that jurisdictions deemed relevant, such as low-income housing tax credit supported projects."

NLIHC Remarks

- One of the hallmarks of the system underlying the 2015 AFFH rule was that HUD provided data from national sources and a free mapping tool to make it easier for jurisdictions to prepare an AFH. This was intended, in part, to lessen if not totally eliminate dependency on procuring expensive outside consultants, as was done under the AI protocol. The publicly available data and mapping tool also enabled the public to verify a jurisdiction's analysis and/or to offer additional analytical input. The 2015 AFFH rule also requires program participants to use local information and

knowledge, including that suggested during the public input process, to complement the standard data provided by HUD.

There must be a minimum, uniform standard set of data that program participants should use. All recipients of federal housing and community development assistance should be required to attempt AFFH analysis based on the same data considerations. Allowing a program participant to selectively choose which data to use can lead to jurisdictions creating overly optimistic AFHs and/or establishing easy-to-achieve fair housing goals and accomplishments.

- As stated earlier, HUD prematurely suspended implementation based on the inaugural experiences of only 49 jurisdictions. Given more time and a bit more technical assistance (not all TA available was used) jurisdictions could become comfortable with the mapping tools and HUD-provided data.
- In HUD's formal explanation of why it suspended the rule on January 5, 2018, HUD pointed to a jurisdiction not indicating it had superfund sites, blaming the Assessment Tool for not including superfund sites. As NLIHC commented, jurisdictions are fully aware of superfund sites and upon HUD's review comment the jurisdiction could have easily amended its AFH.

HUD Claim (page 9):

"For PHAs and states, no tools were ever provided because of the challenge in developing appropriate data sets for both relatively large and small geographies, i.e., states and particular housing developments."

NLIHC Remarks

Assessment Tools were in fact provided, separately, for states and PHAs. Thanks to the APA public review and comment process, HUD agreed that those Assessment Tools needed to be significantly modified and was in the process of engaging states and PHAs to learn how best to amend the Tools.