

Overall Summary and Analysis of HUD's Proposed AFFH Rule

Ed Gramlich, NLIHC, January 9, 2020

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 on 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.

A detailed NLIHC summary and analysis is at: <https://bit.ly/39Wrsbc>

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