



NATIONAL LOW INCOME HOUSING COALITION

Preliminary Overview of Final Affirmatively Furthering Fair Housing Rule

July 13, 2015

On July 8, HUD released the long-awaited final rule implementing the Fair Housing Act of 1968's obligation for jurisdictions receiving federal funds for housing and urban development to affirmatively further fair housing (AFFH). The Fair Housing Act does not only make it unlawful for jurisdictions to discriminate; the law also requires jurisdictions to take actions that can undo historic patterns of segregation and other types of discrimination, as well as to take actions to promote fair housing choice and to foster inclusive communities. The protected classes of the Fair Housing Act are race, color, national origin, religion, sex, disability, or familial status.

HUD began planning for an AFFH rule in 2009 by meeting with a broad spectrum of stakeholders, mindful of vehement opposition that erupted in 1998 which ultimately doomed HUD's effort to publish a rule then. NLIHC was actively involved in the 1998 advocacy effort to establish a better AFFH regulatory process. On July 19, 2013, HUD published a proposed AFFH rule (see *Memo*, [7/19/13](#)). On September 26, 2014, HUD published a proposed Fair Housing Assessment Tool to help guide the AFFH planning process (see *Memo*, [9/26/14](#)). Another version of the Assessment Tool was not released with the final AFFH rule; that is yet to come.

The opening text of the final rule declares that the purpose of the AFFH rule is to provide "program participants" (cities, counties, states, and public housing agencies (PHAs)) "with an effective planning approach to aid them in taking meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination."

In the preamble, HUD stresses that the new AFFH approach does not mandate specific outcomes; rather, it establishes basic parameters to help guide public sector housing and community development planning and investment decisions. The rule encourages a more engaged and data-driven approach to assessing fair housing and planning actions. The rule establishes a standardized fair housing assessment and planning process to give jurisdictions and PHAs a more effective means to affirmatively further the purposes of the Fair Housing Act.

The final rule does not fundamentally change the AFFH system envisioned in the proposed rule; nor does it fundamentally alter the proposed rule. The final rule has many seemingly slight but helpful modifications based on comments HUD received. A preliminary review identifies a number of positive modifications and does not reveal any significant adverse changes. However, a number of suggestions offered by NLIHC and other were not accepted. The preamble to the final rule highlights 26 clarifications and changes, many in the definition section.

Dedicated solely to achieving socially just public policy that assures people with the lowest incomes in the United States have affordable and decent homes

The Need for the AFFH Rule

AFFH has been the law of the land since 1968, and it has been reinforced by the laws that created the Community Development Block Grant (CDBG) and HOME programs, as well as the Comprehensive Housing Affordability Strategy (the statutory basis for the Consolidated Plan, ConPlan). The Quality Housing and Work Responsibility Act (QHWRA) of 1998 articulated the obligation of PHAs to affirmatively further fair housing.

However, meaningful regulations to provide jurisdictions and PHAs with guidance on how to comply have not existed. The 1974 law creating CDBG required jurisdictions to certify that they would affirmatively further fair housing. Eventually, that certification was defined in CDBG regulations (and later in ConPlan regulations) to mean that the executive of a jurisdiction affirmed that the jurisdiction had an Analysis of Impediments (AI) to fair housing choice, that the jurisdiction would take appropriate actions to overcome the effects of the impediments, and that the jurisdiction would keep records of its actions.

The current system has not been effective, as noted by the General Accounting Office. There are numerous limitations of the current AFFH system, beginning with the absence of regulatory guidance. (HUD published a booklet in 1996, but it did not have the authority of regulation, policy notice, or policy memorandum.) Consequently, there was no authoritative source to suggest what might constitute impediments to fair housing choice, nor was there guidance to indicate what actions to overcome impediments might be sufficiently adequate. Public participation was not required in the preparation of an AI. As a result, many wholly inadequate AIs were drafted. While many AIs are quite extensive, they seemed destined to sit on a shelf in case HUD asked to see it. Without guidance, many jurisdictions did not take meaningful actions to overcome impediments to fair housing. A classic abuse on the part of some jurisdictions was to assert that they were taking actions to overcome impediments to fair housing by placing fair housing posters around public places during Fair Housing Month.

Additional limitations of the current AFFH system include:

- The AI is not directly linked to a jurisdiction's ConPlan or a PHA's 5-Year PHA Plan.
- The AI is not submitted to HUD for review.
- The AI has no prescribed schedule for renewal; consequently, many were not updated in a timely fashion.
- Public participation is not required when drafting an AI.

How Will the New AFFH System Differ From the Current System?

The key differences from the current AFFH system include:

1. The Analysis of Impediments (AI) to fair housing choice is replaced by the Assessment of Fair Housing (AFH). There was no formal guidance for preparing an AI. The rule provides a standardized framework for program participants to use to identify and examine what HUD is calling “fair housing issues” and the underlying “contributing factors” that cause the fair housing issues.
2. HUD will provide each program participant with data covering not only the local jurisdiction, but also the surrounding region. Program participants must consider this data when assessing fair housing.
3. HUD did not receive or review AIs. HUD will now receive and review AFHs.
4. The fair housing goals and priorities that program participants set in the AFH will be incorporated into their ConPlans and PHA Plans.
5. Public participation is required in the development of the AFH.
6. The AFH must be submitted every five-years in synch with a new ConPlan or PHA Plan.

When Will the New AFFH System Begin?

The new AFFH system will not begin until HUD publishes a revised version of the proposed Assessment Tool and the public has 30 days to review and comment. HUD has not published a revised Assessment Tool reflecting public comment submitted by November 25, 2014.

Most program participants will not be required to use the new AFFH system until 2020 or after. CDBG entitlement jurisdictions receiving more than \$500,000 and that are required to have a new 5-year ConPlan on or after January 1, 2017 will be the first that must submit an initial AFH. According to information that HUD provided to NLIHC in 2013, out of 1,218 jurisdictions with ConPlans in 2013, only 8 new ConPlans are due in 2017 and only 52 are due in 2018. Sixty-four percent of all new ConPlans are due in 2015, and another 10% are due in 2016, meaning they will not be required to use the new AFFH system until after 2020.

A major change introduced in the final rule delays use of the new AFFH system for CDBG entitlement jurisdictions receiving less than \$500,000 per year and for states and Insular Areas. These jurisdictions do not have to begin using the new AFFH system until they are required to submit a new 5-year ConPlan due after January 1, 2018. According to the preamble to HUD’s proposed Section 3 regulations, there are 542 jurisdictions receiving less than \$500,000. These jurisdictions, plus the states, represent 48% of all ConPlan jurisdictions. These jurisdictions will not have to submit an initial AFH until well after 2020.

For PHAs with more than 550 units of public housing and/or vouchers, combined, use of the new AFFH system does not begin until their next 5-Year PHA Plan is due after January 1, 2018. For the others, called “qualified PHAS,” they only begin using the new AFFH system when their next 5-Year PHA Plan is due after January 1, 2019.

Until a program participant is required to submit an AFH, it must continue to follow the current AI process.

Summary of the New Assessment of Fair Housing (AFH)

The introduction to the Assessment of Fair Housing (AFH) in the regulation states that in order to develop a successful AFFH strategy, it is necessary to assess the factors that cause, increase, contribute to, or maintain fair housing problems such as segregation, racially or ethnically concentrated areas of poverty, and significant disparities in access to opportunity.

There are four basic components of the AFH. The first is an analysis of the HUD-provided data, as well as local data, local knowledge, and information gained through the required public participation process. The analysis must cover not only the geographic area of the program participant, but also the region in which it is located. The analysis must identify:

1. Integration and segregation patterns and trends.
2. Racially or ethnically concentrated areas of poverty.
3. Significant disparities in access to opportunity, such as quality education, employment, transportation, and environmental health.
4. Disproportionate housing needs.

The definition section of the rule explains each of these, and they will be further defined in the Assessment Tool.

The second component requires program participants to identify “fair housing issues” and “contributing factors.” Fair housing issues are conditions that restrict fair housing choice or access to opportunity, including the four conditions listed above. The Assessment Tool will offer more guidance. A contributing factor creates, contributes to, perpetuates, or increases the severity of one or more fair housing issues.

The third component requires a program participant to assign priorities to contributing factors and to justify the order of priority. Highest priority must be given to the factors that limit or deny fair housing choice or access to opportunity. Program participants must set goals for overcoming the effects of the priority contributing factors. For each goal, the AFH must identify one or more contributing factors that the goal is designed to address, and describe how the goal relates to overcoming the contributing factor(s) and related fair housing issue(s). The AFH must also identify the metrics and milestones for assessing achievement.

The fourth component, although written as one of the required elements to be a part of the content of an AFH, confusingly does not actually have to be reflected in the AFH. The strategies and actions that a program participant identifies to implement its AFFH goals and priorities must, however, be included in its ConPlan, Annual ConPlan Action Plan, or a PHA 5-Year Plan.

Public Participation

The rule states that 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 as well as in the incorporation of the AFH into the ConPlan or PHA Plan. Program participants should use means of communications designed to reach the broadest audience. To do so the rule suggests the means used by the ConPlan regulations, and adds (as suggested by NLIHC) making copies available on the Internet and on the program participant's official website.

The rule amends the ConPlan regs to insert references to the AFH in appropriate sections, particularly the consultation and public participation sections. Unique to the AFH, the rule requires ConPlan jurisdictions to consult with community-based organizations that represent protected class members, organizations that have relevant knowledge or data to inform the AFH, and that are independent of the jurisdiction. Consultation must occur at various points in the fair housing planning process, and at a minimum in the development of both the AFH and the ConPlan. Consultation on the ConPlan must seek input into how the goals in the AFH inform the priorities and objectives of the ConPlan.

Other AFH-unique aspects of the revised ConPlan regulations include:

- Jurisdictions must make available to the public as soon as feasible after the start of the public participation process for the development of the AFH, HUD-provided data and other data and information the jurisdiction intends to incorporate in the AFH.
- There must be at least one public hearing during the development of the AFH.
- One of the two ConPlan required hearings must address the proposed strategies and actions for affirmatively furthering fair housing consistent with the AFH.
- To obtain public comment on affirmatively furthering fair housing needs and priority housing and community development needs, at least one of the two required ConPlan hearings must be held before the proposed ConPlan is published for comment.
- To obtain public comment on AFH-related data and on affirmatively furthering fair housing in the jurisdiction's housing and community development programs, at least one public hearing must be held before a proposed AFH is published for comment.

HUD Review and Acceptance of an AFH

Unlike the current AI process, the AFH process requires program participants to submit their AFH to HUD for review. The rule states that the intent of this review is to determine whether the program participant has met the requirements for providing its data analysis, assessing fair housing issues and contributing factors, and setting goals. An AFH will be considered accepted after 60 calendar days, unless HUD notifies the program participant in writing that there are problems, explains those problems, and indicates what can be done to resolve the problems.

HUD will not accept an AFH if it or a portion of it is “inconsistent” with fair housing requirements, or if it is “substantially incomplete.” This section of the final rule is a significant improvement from the proposed rule.

The rule offers two examples of “inconsistent”:

- HUD determines that the AFH analysis of fair housing issues, contributing factors, goals, or priorities would result in policies or practices that discriminate.
- The AFH does not identify policies or practices as fair housing contributing factors, even though they result in the exclusion of a protected class from areas of opportunity.

The rule offers two examples of “substantially incomplete”:

- The AFH was developed without the required community participation and consultation.
- The AFH assessment has priorities or goals that are materially inconsistent with the data or other evidence, or that are not designed to overcome the effects of contributing factors and related fair housing issues.

If a program participant does not have an accepted AFH, HUD will not approve a ConPlan or a PHA Plan. Unchanged from the 1994 ConPlan regulations is the provision stating that failure to submit a ConPlan by August 16 will automatically result in the loss of CDBG funds.

The AFH and Public Housing Agencies

The final rule makes amendments to the PHA Plan regulations. It is substantially different than the proposed rule. This summary does not describe the many details that were eliminated or substantially revised. NLIHC’s preliminary assessment is that all of the changes represent improvements.

The final rule requires PHAs to prepare an AFH once every five years. PHAs have three options for meeting their AFH requirements:

- Option 1 allows a PHA to work with a local government or a state government agency in preparation of the AFH. The proposed rule did not include the state as part of Option 1. If a PHA serves residents of two or more jurisdictions, the PHA may choose the jurisdiction that most closely aligns with its planning activities.
- Option 2 was not available in the proposed rule. It allows a PHA to participate with one or more PHAs in the planning, public participation, and preparation of the AFH. One of the PHAs must be designated the lead PHA.
- Option 3 allows a PHA to conduct its own AFH. Unlike the proposed rule, a PHA choosing to conduct its own AFH is not required to update the AFH annually; rather, as with Option 1 and Option 2, an Option 3 PHA must prepare an AFH once every five years.

HUD Supports a Balanced Approach to AFFH

In the final rule, HUD clarifies that it supports a balanced approach to AFFH. NLIHC and many others expressed concern about the proposed rule's language. The proposed text seemed to imply that AFFH could be interpreted to prohibit use of federal funds to preserve affordable housing or to revitalize areas of racial or ethnic concentrations of poverty that had suffered disinvestment, but were housing developments and neighborhoods where long-time residents wanted to continue living while benefitting from improvements. NLIHC and others stated that the final rule must clarify that program participants are expected to use an AFFH strategy of stabilizing and revitalizing neighborhoods that had concentrations of racially and ethnically concentrated poverty, as well as a strategy of enhancing mobility and expanded access to existing community assets.

At several places in the preamble to the final rule, HUD stresses that the final rule supports a balanced approach to AFFH.

- “The duty to affirmatively further fair housing does not dictate or preclude particular investments or strategies as a matter of law.”
- “HUD’s rule recognizes the role of place-based strategies, including economic development to improve conditions in high poverty neighborhoods, as well as preservation of the existing affordable housing stock, including HUD-assisted housing, to help respond to the overwhelming need for affordable housing. Examples of such strategies include investments that will improve conditions and thereby reduce disparities in access to opportunity between impacted neighborhoods and the rest of the city or efforts to maintain and preserve the existing affordable rental housing stock, including HUD-assisted housing, to address a jurisdiction’s fair housing issues.”
- “A balanced approach would include, as appropriate, the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, effective housing mobility programs and/or concerted housing preservation and community revitalization efforts, where any such actions are designed to achieve fair housing outcomes such as reducing disproportionate housing needs, transforming RCAPs/ECAPs by addressing the combined effects of segregation coupled with poverty, increasing integration, and increasing access to opportunity, such as high-performing schools, transportation, and jobs.”
- “In addition, place-based and mobility strategies need not be mutually exclusive; for instance, a regional AFH could conclude that additional affordable housing is needed in higher opportunity areas and thus new construction should be incentivized in those places. At the same time, while such efforts are being implemented, preserving the existing affordable rental stock can also still be a priority based on the fair housing issues identified in the AFH, which may include the disproportionate housing needs analysis in the AFH or the need to avoid displacement of assisted residents from areas that may be experiencing economic improvement. Program participants have latitude to adjust their goals, priorities, and strategies in the local decision making process based on the information, data and analysis in the AFH, so long as the goals, priorities, strategies, and actions affirmatively further fair housing.”

- “The concept of affirmatively furthering fair housing embodies a balanced approach in which additional affordable housing is developed in areas of opportunity with an insufficient supply of affordable housing; racially or ethnically concentrated areas of poverty are transformed into areas of opportunity that continue to contain affordable housing as a result of preservation and revitalization efforts; and the mobility of low-income residents from low-opportunity areas to high-opportunity areas is encouraged and supported as a realistic, available part of fair housing choice.”
- “Barriers that inhibit community improvements are as costly as barriers that prevent people from settling in their preferred community. The assets offered by a neighborhood can influence the number and profile of people and families who want to live in such a neighborhood. These assets include good schools; safe streets; access to good jobs; a good health infrastructure; available services such as childcare, parks and open space; diverse and healthy food choices; and a range of transportation options (including accommodations for disabilities). As an alternative, increasing a neighborhood’s appeal to families, families with different income and ethnic profiles, can encourage a more diversified population and reduce isolation, thus advancing fair housing goals.”
- “Increasing a neighborhood’s appeal to families with different income and ethnic profiles can encourage a more diversified population and reduce isolation, thus advancing fair housing goals. A key challenge in transforming neighborhoods and promoting integrated communities is preserving their affordability and highlighting their appeal without radically changing their character. Transformation, particularly of lower income neighborhoods, can induce gentrification, which can help advance fair housing goals and integration, but it can also change the ethnic mix to the extent that the minorities who originally populated the neighborhood are no longer present, and thus do not accrue the benefit of the initial investments. The rule strives to establish a balanced approach, as discussed earlier in this rule, to avoid such outcomes that could negate the progress strived to be achieved by the new regulations.”
- “...the use of various strategies including the development or preservation of existing affordable housing is not necessarily at odds with the planning requirements in this regulation.”

Beyond the informal discussion reinforcing HUD’s support for a balanced approach, the final rule revised three sections of the proposed rule.

At the very beginning of the rule [§5.150], HUD establishes the purpose of affirmatively furthering fair housing. That section concludes:

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

The section of the rule describing the required elements of an AHF, which includes the strategies and actions to implement the AFH that must be included in a ConPlan or PHA Plan [§5.154(d)(5)] reads, in part:

“Strategies and actions must affirmatively further fair housing and may include, but are not limited to, enhancing mobility strategies and encouraging development of new affordable housing in areas of opportunity, as well as place-based strategies to encourage community revitalization, including preservation of existing affordable housing, including HUD-assisted housing.”

HUD’s preamble asserts that the final rule amended the definition of affirmatively furthering fair housing in order to address the balance issue, but NLIHC is not clear about how the following text clearly endorses balance:

“Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.”

NLIHC will prepare a detailed outline of the final rule in the weeks ahead.

The final AFFH rule is at http://www.huduser.org/portal/affht_pt.html#final-rule

NLIHC’s AFFH webpage is <http://nlihc.org/issues/affh>