

NLIHC Preliminary Highlights of Five Positive Overarching Features of the Proposed AFFH Rule

(February 7, 2023)

This “Preliminary Highlights of Five Positive Overarching Features of the Proposed AFFH rule” is based on HUD’s [preview version](#) of the proposed rule to implement the “Fair Housing Act of 1968” obligation to Affirmatively Further Fair Housing, AFFH (see *Memo*, [1/23](#)). The formal, [Federal Register version](#) was published on February 9. NLIHC issued a [media release](#) on January 23 applauding the Biden-Harris administration for developing the proposed rule. After an initial review of the actual text of the proposed rule, as distinct from the preamble ([summarized by NLIHC](#), see *Memo*, [1/23](#)), NLIHC is generally pleased with the proposed rule. NLIHC continues to study and assess the proposed rule and will provide a detailed, comprehensive summary and analysis at a future time. HUD will be accepting comments until April 10.

The five positive, overarching features are:

1. Greatly increased community engagement requirements;
2. Greater public transparency;
3. A more direct incorporation of the new fair housing Equity Plan’s goals, strategies, actions, and expected funding allocations into a jurisdiction’s Consolidated Plan and related Annual Action Plan, as well as into a public housing agency’s (PHA’s) Five-Year PHA Plan and Annual PHA Plans;
4. Annual evaluation of progress toward achieving fair housing goals; and,
5. Clarification and emphasis on the need for a balanced approach to affirmatively furthering fair housing – an approach that recognizes the need to both invest in disinvested neighborhoods and preserve existing affordable housing as well as to take actions that enable protected class residents to move to areas that already have better community infrastructure and assets.

The Fair Housing Act’s “protected classes” are: race, color, sex (which the proposed rule further elaborates to include sexual orientation, gender identity, and nonconformance with gender stereotypes), national origin, disability, familial status (in other words, households with children), and religion.

Even though NLIHC is generally pleased with the proposed rule, there will be suggestions and concerns that advocates should be aware of and that NLIHC will convey to HUD in a formal comment letter. For example, although there is frequent use of the expression “affordable housing” and even a detailed definition of “affordable housing opportunities,” the proposed rule does not define “affordable housing.” NLIHC will urge HUD to define “affordable housing” to cost no more than 30% of a household’s adjustable income for housing expenses (rent or mortgage) plus utilities – the “Brooke Rule.”

All page references in this paper are based on HUD’s preview version of the proposed AFFH rule, distributed by HUD on January 19.

Greatly Increased Community Engagement Requirements

As noted in the NLIHC [brief summary](#) of key points in the proposed rule based on the preamble’s “Executive Summary” and “Background” sections (see *Memo*, [1/23](#)), it is significant that HUD’s summary begins (page 8) with a discussion of improved community participation provisions – placing upfront, “community engagement” (as the proposed rule now terms community/citizen participation). In addition, all throughout the actual proposed text the rule reminds “program participants” of their community engagement obligations. (Program participants are jurisdictions – states, cities, and counties required to submit a Consolidated Plan, “ConPlan” – and public housing agencies, PHAs.)

The community engagement section of the text of the proposed rule is at §5.158 (starting on page 199). In general, subsection (a) requires program participants to “actively engage with a wide variety of diverse perspectives within their communities” and to “proactively facilitate” community engagement “during the development” of the “Equity Plan,” enabling the public to identify fair housing “issues” and set fair housing “goals,” taking into consideration views and recommendations received from the community. The Equity Plan (fully explained on pages 172-197 covering §5.154) is the streamlined replacement for the 2015 final rule’s Assessment of Fair Housing (AFH). Fair housing issues are defined on page 163 and fair housing goals are defined on page 162.

The public must have a reasonable opportunity to be involved in the program participant’s required incorporation of the Equity Plan’s “fair housing goals as strategies and meaningful actions into the ConPlan, Annual Action Plan, PHA Plan, and other required planning documents.”

Program participants must use communication methods designed to reach “the broadest possible audience,” and should make efforts to reach members of protected classes and “underserved communities.” The text provides examples of communication methods. The term “underserved communities” is defined on page 171 and notably provides as examples, people experiencing homelessness, LGBTQ+ people, survivors of domestic violence, persons with criminal records, and rural communities.

The proposed rule requires program participants to prioritize fair housing issues in each fair housing “goal category” prescribed by HUD (page 189). However, the community engagement provisions do not specifically require public involvement in setting which issues to prioritize. NLIHC is concerned that a program participant could just “listen” to public input about issues but ignore the public when setting which issues to prioritize.

§5.158(d) requires program participants to hold at least three public “meetings” at various accessible locations and at different times to ensure protected class groups and underserved communities are afforded opportunities to provide input during the development of the Equity Plan (page 203). At least one of these meetings must be held at a location in which underserved communities disproportionately live, and efforts must be made to obtain input from underserved communities who do not live in underserved communities.

It is important to note that the proposed AFFH rule uses the term “meeting” instead of the ConPlan’s and PHA Plan’s use of the term “hearing.” Hearings are formal proceedings governed by state and local law and hence can be limiting. However, because fair housing, ConPlan, and PHA Plan decisions are ultimately “political” in nature, there is value in having community engagement before elected officials (or politically appointed officials in the case of PHAs.) There are advantages to having “meetings” because they are less formal, more flexible, and might be less intimidating to community members.

The public will be able to file complaints directly with HUD regarding a program participant’s AFFH-related activities, and this in turn will enable HUD to open a compliance review in response to a complaint (page 226).

Additional community engagement opportunities are reflected in the various regulation provisions that provide greater public transparency of program participant and HUD actions.

Greater Public Transparency

The proposed rule provides the public with more opportunities to directly engage with HUD and provides HUD with regulatory ability to respond to the public and to encourage program participants to take necessary actions. All Equity Plans submitted to HUD for review will be posted to a HUD webpage (page 196). The public will be able to directly provide HUD with additional information about an Equity Plan still under HUD review, information that HUD will use in its review of an Equity Plan (page 197). Also to be posted on the HUD website will be the reasons HUD accepted an Equity Plan *or* HUD’s communications with a program participant indicating why an Equity Plan was not accepted, along with actions a program participant can take to resolve the non-acceptance. The HUD review, non-acceptance, offering of recommended corrective actions, and program participant adoption or non-adoption of the recommendations can go back and forth many times, as long as necessary to arrive at HUD acceptance. In addition, a program participant’s Annual Progress Evaluations (discussed after the next paragraph) will be posted on the HUD website, along with any important HUD communications regarding them.

More Direct Incorporation of the New Fair Housing Equity Plan into ConPlans and PHA Plans

Program participants will have to incorporate their Equity Plan fair housing goals, strategies, and actions into their ConPlan, Annual Action Plan of their ConPlan, or their PHA Plan (page 197). The purpose is to ensure that a program participant’s programs, activities, and services, as well as its policies and practices, are consistent with the obligation to affirmatively further fair housing. In addition, program participants must identify specific, expected allocations of HUD funds (as well as other federal, state, local, and charitable funds) that will be used to carry out a program participant’s programs, activities, and services in ways consistent with the obligation to affirmatively further fair housing. This more direct inclusion of an Equity Plan’s fair housing goals, strategies, and actions, as well as fund allocations, in a program participant’s ConPlan, Annual Action Plan, or PHA Plan is an improvement over the 2015 AFFH rule which was less clear.

Annual Evaluation of Progress Toward Achieving Fair Housing Goals

While an Equity Plan is in effect, program participants will be required to conduct and submit to HUD for posting on the HUD website, Annual Progress Evaluations regarding the status of each fair housing goal (page 203). Program participants must assess whether to establish a new fair housing goal(s) or whether to modify an existing fair housing goal because it cannot be achieved in the amount of time previously anticipated.

Program participants must engage the public at least annually through at least two public meetings, one of which must take place in an area in which underserved communities predominately live. This community engagement activity is separate from the three public meetings required during the development of the Equity Plan. The purpose of these meetings about the Annual Progress Evaluation is to receive public input indicating whether the program participant is “taking effective and necessary actions to implement the Equity Plan’s fair housing goals.”

In addition, an Equity Plan must include a summary of a program participants’ progress in meeting its fair housing goals set in prior-year Equity Plans. This is distinct from the requirement to have an Annual Performance Evaluation. Subsequent Equity Plans may have a compilation of previous years’ Annual Performance Evaluation summaries.

Clarification and Emphasis on the Need for a Balanced Approach

The text of the proposed rule, unlike the 2015 rule, provides a detailed definition of “balanced approach” to affirmatively furthering fair housing (page 158). It means an approach to community planning and investment that balances a variety of actions to eliminate housing-related disparities using a combination of place-based and mobility actions and investments. Examples of place-based strategies include preserving existing affordable housing in racially or ethnically concentrated areas of poverty (what HUD calls “R/ECAPs”) while also making substantial investments designed to improve community living conditions and community assets in those disinvested neighborhoods. Examples of mobility strategies, those that enable households to seek greater affordable housing opportunities by moving to areas that already have better infrastructure and community assets, include removing barriers (such as zoning ordinances) that prevent people from obtaining affordable housing in well-resourced neighborhoods.

Reference to the need for a balanced approach is also included at three places in the text. One, regarding a program participant’s fair housing goals, requires those goals, when taken together, to be designed and reasonably be expected to result in material positive change and be consistent with a balanced approach (page 190). Another states that a program participant’s fair housing goals “may not require residents of racially or ethnically concentrated areas of poverty to move away from those areas if they prefer to stay in those areas as a matter of fair housing choice” (page 193). The third, pertaining to the incorporation of fair housing goals, strategies, and actions in a ConPlan, Annual Action Plan, or PHA Plan, states that strategies and meaningful activities may include “place-based strategies and meaningful actions that are part of a balanced approach, including the preservation of existing HUD-assisted housing and other affordable housing” (page 198).

HUD's preview version of the proposed AFFH rule is at, <https://bit.ly/3wWsRLH>

The *Federal Register* version of the proposed AFFH rule is at <https://bit.ly/3RIYfa1>

NLIHC's brief summary of the key provisions from the preamble of the proposed AFFH rule at:
<https://bit.ly/3QSVzPM>