

**Summary of Proposed
Affirmatively Furthering Fair Housing Regulations**
*Prepared by the National Low Income Housing Coalition
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The long-awaited proposed rule intended to improve the obligation to affirmatively further fair housing (AFFH) was published for comment on July 19, 2013. The Fair Housing Act of 1968 prohibits housing discrimination on the basis of race, color, religion, sex, familial status, national origin, or handicap – the “protected classes” of people. The Act also requires HUD’s program participants to take steps to actively overcome historic patterns of segregation and promote fair housing choice.

It is widely recognized that the current practice of affirmatively furthering fair housing choice has not been effective. It merely required localities, states, and public housing agencies (PHAs) receiving HUD funds (“program participants”) to certify that they were complying by having an Analysis of Impediments (AI), taking actions to overcome impediments, and keeping records.

Major features of the propose rule include:

- Replacing the current Analysis of Impediments (AI), for which no format or standards exist, with a standardized Assessment of Fair Housing (AFH).
- Providing comprehensive, nationally uniform data from HUD.
- Incorporating language in the Consolidated Plan (ConPlan) and PHA Plan regulations that directly ties those plans’ priority setting, commitment of resources, and specific activities to the AFH.
- Requiring the AFH to be submitted to HUD for review and approval (AIs were not submitted to or reviewed by HUD) well in advance of preparing a ConPlan or PHA Plan so that the AFH informs the priorities, strategies, and future activities covered by those plans.

According to the proposed rule, the purpose of the AFH is to “identify goals to affirmatively further fair housing and to inform fair housing strategies in the Consolidated Plan and PHA Plan, the public housing Capital Fund Plan, and community plans including but not limited to education, transportation, or environmental plans.”

The proposed rule provides an expansive definition of “affirmatively furthering fair housing.” It means taking proactive steps beyond simply combating discrimination. It means fostering more inclusive communities and access to community assets for all protected classes. Specifically, affirmatively furthering fair housing means taking proactive steps to:

- Address significant disparities in access to community assets.
- Overcome segregated living patterns.
- Promote and support integrated communities.
- End racially and ethnically concentrated areas of poverty.
- Foster and maintain compliance with civil rights and fair housing laws.

These ends are to be accomplished primarily by making investments with federal and other resources, instituting strategies, or taking other actions to mitigate or address fair housing issues that are identified in the AFH.

HUD Will Provide Data

HUD will provide each “program participant” with nationally uniform local and regional (or state-level) data on:

- Patterns of integration and segregation;
- Racial and ethnic areas of concentrated poverty (to be known as RCAPs and ECAPs);
- Disproportionate housing needs based on the protected classes;
- People with disabilities; and,
- Families with children.

HUD will also provide data related to education, poverty, transit access, employment, exposure to environmental health hazards, and other important community assets. Additional or better local or regional data may be used to supplement HUD data. HUD will also provide PHAs with site location data, the distribution of housing choice vouchers, and occupancy data.

The preamble to the rule elaborates on the data HUD will provide, including:

- Measures of segregation such as the dissimilarity index and the isolation index.
- Indications whether a census tract is an RCAP or ECAP.
- A poverty index indicating the depth and intensity of poverty.
- A neighborhood school proficiency index.
- A labor market engagement index.
- A job access index summarizing the accessibility of a neighborhood as a function of its distance to all job locations.
- A health hazards exposure index.
- A transit index reflecting a neighborhood’s proximity to transit stops.

Last year HUD demonstrated a fair housing data mapping tool. The proposed rule does not mention such a tool, but it does indicate that additional guidance and information will be provided later.

The Assessment of Fair Housing (AFH)

Unlike the AI, the proposed rule would set out a structure for the AFH, requiring it to:

- Have a fair housing analysis based on HUD-provided data, other local or regional data, and community input.
- Identify fair housing “issues” across the protected classes within the jurisdiction and region, issues such as:
 - Integration and segregation patterns and trends;
 - Racially or ethnically concentrated areas of poverty;
 - Significant disparities in access to community assets; and
 - Disproportionate housing needs.
- Identify the most significant factors (what HUD is calling “determinants”) influencing fair housing issues.
- Determine fair housing priorities and justify those priorities.
- Set goals for mitigating or addressing the most significant “determinants” causing fair housing disparities.
- Assess the program participant’s fair housing enforcement and outreach capacity.

Regional AFHs

Regional AFHs are encouraged but not required. That is, two or more program participants are encouraged to work together to submit a single, joint AFH. Regionally collaborating program participants do not have to be contiguous, and they may cross state borders. One member of a regional AFH must be designated as a lead entity. Each participant in a regional AFH is still responsible for its own ConPlan and its obligation to affirmatively further fair housing.

Regionally collaborating program participants must have a plan for community participation that includes residents and stakeholders from all of the program participants, not just those of the lead entity. If the program participants have public notice and comment periods that differ, the longest period must apply to all.

PHAs Would Have Three AFH Options

A PHA may choose to participate with a local government in developing an AFH together. If so, then the PHA must work with the local government where 60% of the PHA's hard units are located. If the percentage of a PHA's hard units in a local government is closer to 50%, then the PHA may choose to participate with a local government with planning activities most similar to that of the PHA. If the PHA only administers vouchers, and it chooses the option of working with a local government, then it must coordinate with the jurisdiction that governs its operations. If a PHA disagrees with any aspect of the joint AFH, it may submit a dissenting statement or submit alternative views that become a part of the AFH.

Alternatively, a PHA may choose to conduct its own AFH. And, PHAs that are covered by a state agency will be bound by the state AFH, but may elect to work with the state in developing the AFH.

Public Participation in the AFH Process

To ensure that the AFH is informed by meaningful community participation, the proposed rule requires the public participation provisions of the ConPlan and PHA Plan be followed in the process of developing the AFH, obtaining community feedback, and addressing complaints.

A jurisdiction must describe its procedures for assessing residents' language needs, including any need for translation of notices and other vital documents. At a minimum, jurisdictions must take reasonable steps to provide language assistance to ensure meaningful access to participation by people with limited English proficiency.

The proposed rule adds to the ConPlan rule, which already requires jurisdictions to encourage participation by residents of public and assisted housing, a requirement that Resident Advisory Boards and resident councils be involved in developing and implementing the AFH.

At least one public hearing regarding AFH-related data and affirmatively furthering fair housing in a jurisdiction's housing and community development programs must be held before the proposed AFH is published for comment. In addition, the required minimum of two ConPlan hearings for entitlement jurisdictions (only one for states) must address the jurisdiction's proposed strategies and actions for affirmatively furthering fair housing consistent with the AFH.

Consultation in the AFH Process

ConPlan jurisdictions will have to consult with community and regionally-based (or state-wide) organizations, including:

- Organizations that represent protected class members;
- Organizations that enforce fair housing laws (including participants in the Fair Housing Assistance Program, FHAP);
- Fair housing organizations and nonprofits receiving funding under the Fair Housing Initiative Program (FHIP); and,
- Other public and private fair housing service agencies.

A Fair Housing Advisory Council or similar group that includes community members and advocates, fair housing experts, and other key stakeholders is acceptable for meeting the community consultation requirement.

ConPlan jurisdictions must consult with PHAs about the AFH, strategies for affirmatively furthering fair housing, and proposed actions to affirmatively further fair housing in the ConPlan. ConPlan jurisdictions are currently required to consult with adjacent local governments; the proposed AFH rule would add consulting agencies with metropolitan-wide planning and transportation responsibilities, particularly for problems that go beyond a single jurisdiction.

Consultation must occur throughout the fair housing planning process, meaning at a minimum, consultation in the development of both the AFH and the ConPlan. Consultation must specifically seek input regarding how the AFH goals inform the priorities and objectives of the ConPlan.

AFH Timing

HUD would require program participants to submit their initial AFH to HUD at least 270 calendar days before the start of the program year prior to the start of a new Consolidated Plan or PHA Plan planning process. Future AFHs would have to be submitted at least 195 days before the start of a program year prior to the start of a new ConPlan or PHA Plan process. The lead time emphasizes HUD's intent that the AFH inform the ConPlan and PHA Plan process.

Each ConPlan program participant and each PHA participating with a local government in developing an AFH must submit an AFH at least once every five years. PHAs undertaking their own AFH will have to update their AFH annually.

HUD Review of the AFH

Unlike the AI, the AFH must be submitted to HUD for review and approval. The AFH will be considered accepted by HUD within 60 calendar days. However, if HUD does not approve an AFH, it must provide specific reasons and explain actions that must be taken to gain approval. Program participants then have 45 days to revise and resubmit an AFH. A revised AFH will be considered accepted after 30 calendar days, unless HUD does not approve the revised version.

HUD may decide not to accept an AFH, or a portion of one, if it is inconsistent with civil rights laws or if the assessment is substantially incomplete. The proposed rule offers two examples of substantially incomplete:

- The AFH was developed without the required community participation or required consultation.
- The AFH fails to satisfy the required elements of the regulation, which includes an assessment that has priorities that are materially inconsistent with data and other evidence.

In order for a ConPlan or PHA Plan to be approved, a program participant must have an approved AFH. If an AFH is not submitted in a timely manner, HUD may postpone the date a ConPlan may be submitted in order for an AFH to be accepted; however, failure to submit a ConPlan with an approved AFH by August 16 will automatically result in the loss of CDBG funds. If a PHA preparing its own AFH fails to submit one in a timely manner, the PHA must submit its AFH no later than 75 days before the beginning of its fiscal year in order to avoid an impact on its funding.

Revising the AFH

An AFH must be revised if there is a significant change in circumstances, including: a Presidentially-declared disaster; major demographic changes; substantial policy changes related to zoning, housing plans, or development plans; or, significant civil rights findings. HUD may also require a revision if it detects a significant change.

When there are revisions to the AFH, the ConPlan and PHA Plan public or resident participation regulations pertaining to significant amendments must be followed.

The AFH and the Consolidated Plan

The ConPlan's "Strategic Plan" (it's five-year plan) would have to describe how the jurisdiction's priorities and specific objectives will affirmatively further fair housing by setting forth strategies and actions that are consistent with the goals and other elements identified in the AFH. In addition, jurisdictions would be required to describe any additional objectives and priorities for addressing affirmatively furthering fair housing for issues not addressed by the Strategic Plan's priorities and objectives.

The ConPlan's Annual Action Plan would have to describe the actions a jurisdiction plans to carry out in the upcoming year to address fair housing issues identified in the AFH.

The proposed rule refines the current definition of "certifying" that a jurisdiction will "affirmatively further fair housing" by stating that the jurisdiction "will take meaningful actions to further the goals identified in the AFH...and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing."

The AFH and the PHA Plan

The proposed rule states that any affirmative steps a PHA intends to take through its policies (such as eligibility, tenant selection, or admissions policies) to reduce racial and ethnic concentrations, reduce segregation, and promote integration, must be consistent with the AFH. Any PHA plans for construction, rehabilitation, modernization, demolition, disposition, or designation as elderly or disabled, must be consistent with the AFH.

A PHA's civil rights certification will be challenged if it fails to meet the affirmatively furthering fair housing regulations. A certification that a PHA is affirmatively furthering fair housing means that it will:

- Take meaningful actions to further the goals in the AFH;
- Take no action that is materially inconsistent with its obligation to affirmatively further fair housing; and,
- Address fair housing issues.

Recordkeeping

Among various standard provisions, the proposed rule would require records:

- Demonstrating compliance with the community participation and consultation requirements, including: the names of organizations involved in the development of the AFH; summaries or transcripts of public meetings and hearings; copies of public notices; and other correspondence, distribution lists, surveys, or interviews.
- Demonstrating actions taken to affirmatively further fair housing.

Comments are due September 17, 2013.

The proposed rule is at <http://www.gpo.gov/fdsys/pkg/FR-2013-07-19/pdf/2013-16751.pdf>.

There is also a special HUD User page devoted to the proposed rule, currently offering instructions for using a prototype geospatial tool for the data HUD will be providing, along with a description of the methodology used to arrive at the data. Advocates should check the HUD User site periodically for new information, http://www.huduser.org/portal/affht_pt.html.