



Overview of HUD's Proposed 2020 Affirmatively Further Fair Housing (AFFH) Regulation

February 26, 2020

The Affirmatively Furthering Fair Housing (AFFH) provisions of the Fair Housing Act were included in the law when it was passed in 1968. With these provisions, Congress recognized that government had played a significant role in creating and perpetuating racial and other forms of housing discrimination and segregation. It gave HUD the job of ensuring that its programs not only were free from discrimination, but were part of an active effort to tackle segregation and redress the harms it caused. HUD largely ignored this job until 2015, when it adopted an AFFH regulation carefully designed to carry out the Fair Housing Act's AFFH mandate. On January 14, 2020, HUD proposed a new AFFH rule to replace the one it adopted in 2015. Below is an overview of that proposed rule and the fair housing concerns that it raises. Comments on the proposed new AFFH rule are due March, 16, 2020.

This is Not a Fair Housing Rule

- Although it is presented as a fair housing rule, in fact this proposed AFFH regulation does nothing to address fair housing issues or advance a fair housing agenda. Rather, it is a poorly disguised effort to eliminate local housing and land use regulations.
- The rule gets the meaning of AFFH wrong. It's definition and approach are not in line with what the legislative history and court decisions tell us was Congress' intent with this provision of the Fair Housing Act. That was to ensure that HUD, through its programs, takes active steps to end discrimination, overcome segregation, and create equitable access to opportunity for all, including members of protected classes.
- The rule confuses and conflates fair housing and affordable housing, which are separate, albeit overlapping, issues.
- It discards the equity and opportunity lenses that were key features of the 2015 regulation.
- It takes a free market approach, essentially relying on the notion that if we remove the "barriers" to affordable housing development and let the market operate without constraints, it will solve our affordable housing problems and that, in turn, will solve our fair housing problems.
- The proposal discards the requirement in both the 2015 regulation and 1995 guidance for jurisdictions to perform some kind of analysis to fair housing barriers in their communities and identify ways to overcome them.
- It does not acknowledge systemic discrimination and segregation in any way.
- It has virtually no reference to the protected classes under the Fair Housing Act: race, color, religion, national origin, sex, family status or disability.

How the Proposed Rule Works

1. The proposed rule redefines AFFH as “advancing fair housing choice within the program participant’s control or influence.”
2. “Fair housing choice” is defined as allowing individuals and families to have the opportunity and options to live where they choose, within their means, without unlawful discrimination related to protected class status.
 - a. This is a major change from the 2015 regulation, which – consistent with the mandate of the Fair Housing Act – defined AFFH as taking “meaningful actions” to “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.”
3. Fair housing choice would consist of three components:
 - a. Protected choice – access to housing without discrimination.
 - b. Actual choice – affordable housing options exist, and people have the information and resources to make informed choices.
 - c. Quality choice – affordable housing options are decent, safe and sanitary, and for people with disabilities, accessible.
4. The rule requires jurisdictions, in conjunction with their Consolidated Plans, to certify that they will AFFH by identifying at least 3 goals to work toward ameliorating obstacles to fair housing choice. However, these must be “within their control or partial control.”
5. The goals must have concrete and measurable outcomes or changes, but the rule offers no guidance and sets no standards to help jurisdictions understand how HUD will determine what outcomes will be acceptable to HUD.
6. HUD provides a list of 16 obstacles that are deemed “inherent barriers” to fair housing choice.
 - a. Choices should reflect jurisdictions’ “practical experience and local insights.”
 - b. If goals are chosen from this list, they need not be based on any HUD-prescribed analysis or data.
 - c. If jurisdictions choose other goals or obstacles, they must include a brief narrative description of how accomplishing/ameliorating those would AFFH.
7. Of the 16 goals/obstacles offered by HUD, one deals with the availability of housing available and affordable to people with disabilities.
 - a. None of the others are directly related to protected classes.
 - b. They include, among others:
 - i. Lack of affordable housing;
 - ii. Lack of affordable housing accessible to people with disabilities;
 - iii. Source of income restrictions on rental housing;
 - iv. Concentration of substandard housing;
 - v. Inflexible or unduly rigorous design standards;
 - vi. High rates of lead poisoning;
 - vii. Artificial economic restrictions on the long-term creation of rental housing, such as rent control; and

- viii. Unduly burdensome building codes/environmental regulations/energy and water efficiency mandates, and labor requirements.
- 8. Once jurisdictions have identified their fair housing goals, they must include in their Consolidated Plan a description of what they're going to do to achieve them and how they are going to monitor their activities.
 - a. Annual action plans will have to say what the jurisdictions plan to do in the upcoming year to further the goals identified in their certifications.
 - b. Annual reports submitted to HUD within 90 days of close of program year Consolidated Annual Performance and Evaluation Report (CAPERs) will report on outcomes.
 - c. AFFH actions will be deemed satisfactory if the steps taken are "rationally related" to the previously identified goals. This is an extremely low bar.
- 9. PHAs will no longer be required to conduct a fair housing analysis (AFH). Instead, they must certify that they:
 - a. Have consulted with the local jurisdiction about how to AFFH;
 - b. Will carry out their plans in conformity with applicable civil rights laws; and
 - c. Will AFFH in programs and areas under their direct control.
- 10. Meaningful community engagement on fair housing issues is eliminated.
 - a. There is no separate fair housing planning process or plan.
 - b. There is no requirement for a separate community engagement process designed to identify fair housing problems, set priorities and develop strategies to address them.
 - c. The rule mimics some of the community participation requirements of the 2015 rule, such as consultation with FHIP agencies, organizations that represent members of protected classes and other constituencies. However, this consultation is folded into the Consolidated Plan process, which has very different objectives and often involves different stakeholders.
 - d. Consultation must seek input on how AFFH goals in the certification will inform priorities and objectives of the Consolidated Plan. It does not seek input on what goals and strategies are needed to address major barriers to fair housing and how those inform and influence the Consolidated Plan.
 - e. Jurisdictions are required to hold two (2) public hearings per year, at different stages of the program year to get resident input, including input on strategies and actions to AFFH.
- 11. Jurisdictional Risk Analysis
 - a. HUD will conduct an analysis and ranking of jurisdictions each year to determine which are doing an outstanding job and which are failing at AFFH and need enhanced review.
 - b. HUD will divide jurisdictions into six buckets:
 - 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.
 - c. HUD will look at publicly available data on (proposed) nine indicators
 - i. One indicator is the availability of housing accessible to people with disabilities.

- ii. None of the other indicators is directly related to protected classes or disaggregated by protected class.
- d. Outstanding jurisdictions get potential benefits for the next 24 months, including:
 - i. Additional points to applicants located within those jurisdictions for competitive funding programs, including the Fair Housing Initiatives Program and;
 - ii. Eligibility for additional funds (recaptured or reallocated from various programs).
- e. Jurisdictions considered “outstanding” will lose that designation and its related benefits if they have been found in violation of civil rights law adjudicated by a court or administrative law judge in a case or complaint brought by HUD or DOJ. Despite the fact that most enforcement actions are brought by other parties, and most result in settlements rather than formal adjudications, no other enforcement action outcomes can be used as justification for the removal of a jurisdiction’s “outstanding” designation.
- f. Low-ranking jurisdictions may have their certifications questioned, opening the door to increased HUD review and oversight, including potential loss of funding. HUD states its belief that jurisdictions who fall short on the “neutral metrics” incorporated into its jurisdictional risk analysis may need help in other areas of compliance as well. Therefore, it proposes to target low AFFH performers for enhanced oversight in grant administration and regulatory compliance, not just civil rights enforcement.

Conclusion

1. Adoption of this rule by HUD would constitute a significant setback to efforts to ensure non-discrimination in programs funded by HUD, tackle systemic housing discrimination, dismantle segregation and expand fair and equitable access to opportunity for all.
2. HUD should abandon this proposal, reinstate the 2015 AFFH rule and immediately resume implementation of that rule.

Resources

The text of the proposed rule is available at <https://www.regulations.gov/document?D=HUD-2020-0011-0001>. Comments may also be submitted through that site.

Additional resources and commenting portals are available at:

www.nationalfairhousing.org/affh

www.fightforhousingjustice.org/affh

www.allianceforhousingjustice.org/affh

COMMENTS ON THIS PROPOSED RULE ARE DUE MARCH 16, 2020.

For more information, contact Debby Goldberg (dgoldberg@nationalfairhousing.org), Jorge Soto (jsoto@nationalfairhousing.org), or Morgan Williams (mwilliams@nationalfairhousing.org).