

HUD Abandons Its Mandate to Dismantle Segregation and Systemic Discrimination

An Overview of HUD's Preserving Community and Neighborhood Choice Regulation (formerly known as Affirmatively Furthering Fair Housing)

On July 23, 2020, HUD [announced](#) that it was issuing a new, final Affirmatively Furthering Fair Housing (AFFH) regulation, [the "Preserving Community and Neighborhood Choice" regulation](#). This is a final rule, which will take effect 30 days after it is published in the Federal Register. It will replace the AFFH rule that HUD adopted in 2015, which in turn replaced a previous rule adopted in 1995. This is not the final version of the rule that HUD proposed in January and about which more than 19,000 comments were submitted by the public, overwhelmingly opposing HUD's proposal. This is an even weaker rule, previously unseen, which HUD says it drafted at the behest of President Trump to reduce the burden on jurisdictions and reduce "federal control of local housing decisions."

I. Background of AFFH

Congress included the mandate for HUD to use its programs to "affirmatively further" fair housing (AFFH) in the Fair Housing Act when it was passed in 1968. With this provision, Congress intended for HUD to take active steps to end housing discrimination, dismantle housing segregation and tackle systemic racism to expand access to opportunity for everyone. HUD did not adopt regulations to implement the AFFH mandate until 1995. The 1995 rule proved to be ineffective and in 2015, after years of study and input from a wide variety of stakeholders, HUD adopted a [new AFFH rule](#) designed to give local jurisdictions and community stakeholders a roadmap for fully considering local barriers to fair housing.

The 2015 rule provided jurisdictions with a framework for analyzing barriers to fair housing, including patterns of segregation and inequities in access to community resources and emphasized robust community engagement that centered the voices of residents facing those barriers daily. It guided jurisdictions to set goals that addressed their top local fair housing priorities and tied those to their housing and community development plans. The rule required jurisdictions to submit their fair housing plans (known as Assessments of Fair Housing, or AFHs) to HUD for review and acceptance once every 3-5 years, based on the Consolidated Plan schedule. The new HUD regulation does not include any of these elements.

In a move that was improper and likely illegal, HUD used a procedural ploy to adopt this as a final rule without public notice and comment. To avoid the standard public notice and comment period, HUD invoked a provision of the Administrative Procedure Act that allows certain grant-related actions to be made final without notice and comment. In doing so, HUD violated its own policy of providing public notice and the opportunity for public comment on such actions. HUD states that the Secretary has the discretion to violate HUD policy this way. As a result, a rule that has not been subject to public scrutiny and input will take full effect very soon.

This rule takes a radical new approach to affirmatively furthering fair housing that is fundamentally inconsistent with Congressional intent, the legislative history and the judicial record on AFFH. HUD's new "Preserving Community and Neighborhood Choice" regulation jettisons the fundamental concepts that underpin the AFFH provisions of the Fair Housing Act, as described in the Act's legislative history and in numerous court decisions over a period of decades. Those include the imperatives of taking active steps to end segregation, promote integration and ensure that all neighborhoods are well-resourced and their residents have access to opportunity. The current pandemic demonstrates all too clearly how important it is for all of us that each of us has the chance to be healthy and thrive.

Instead, this new rule takes a very different approach, redefining what fair housing means, all but eliminating any requirements for jurisdictions to take any meaningful steps to fulfill their fair housing obligations, and removing all oversight by HUD. Here are the key provisions of the new rule.

II. Key Provisions of HUD's New "Preserving Community and Neighborhood Choice" (AFFH) Rule

1. It adopts a **new definition of fair housing**, which is "housing that is safe, decent, affordable, free of unlawful discrimination and accessible in accordance with applicable civil rights statutes." [Sec. 5.150(a)] This definition ignores issues of residential segregation and structural racism that are central to the true meaning of AFFH.
2. It **defines affirmatively furthering** as, "takling] any action rationally related to promoting any attribute or attributes of fair housing," as defined above. [Sec. 5.150(b)] The "rational relationship" standard is a very low bar.
3. It maintains the requirement for jurisdictions to certify that they will affirmatively further fair housing, and states that the jurisdiction's **certification will be sufficient** if "the participant takes, in the relevant period, any action that is rationally related to promoting one or more attributes of fair housing," as defined above. [Sec. 5.151] Given the rule's definition of fair housing, these actions could be unrelated to discrimination or segregation.

4. Jurisdictions will be required merely to **maintain records documenting that they have filed the AFFH certification**. No other AFFH-related record-keeping will be required.
5. **HUD will not conduct any monitoring or oversight** of jurisdictions' AFFH activities, although it retains the right to investigate and take enforcement action against any jurisdiction that fails to comply.
6. **HUD has removed any reference to the Assessment of Fair Housing**, the fair housing plan that was required under the 2015 rule, from the public participation requirements of the Consolidated Plan. Under this new rule, jurisdictions will not create any fair housing plan to help shape the spending decisions contained in their Consolidated Plans. Similarly, this rule overrides the pre-2015 requirement for jurisdictions to conduct an Analysis of Impediments to Fair Housing Choice (AI).

III. Analysis

Under this rule, jurisdictions will no longer be required to undertake any kind of fair housing planning. They will not be asked to consider any data, analysis or public input on local patterns of segregation and integration, disparities in access to community resources and amenities, discrimination and systemic racism or the like. Actions they take that perpetuate segregation will not be deemed to conflict with their AFFH obligations. They will not have to establish fair housing goals, chart a strategy for achieving them or keep records that document those efforts. HUD will not monitor their performance or oversee their compliance with their fair housing obligations. In other words, with this regulation, HUD has effectively abdicated its responsibility to ensure that its programs affirmatively further fair housing, as intended by Congress and interpreted by the courts.

As with the rule that HUD proposed in January, this rule conflates fair housing and affordable housing and implies that the creation of new affordable housing will fulfill the AFFH mandate of the Fair Housing Act. This rule does not require jurisdictions to take action to end housing discrimination, eliminate segregation and expand access to opportunity; nor does it require jurisdictions to address affordable housing needs in meaningful way.

Under this rule, a jurisdiction could locate all of its affordable housing in poor, highly segregated neighborhoods, starve those neighborhoods of resources, and inundate those neighborhoods with harmful, pollution-producing facilities, but undertake basic code enforcement aimed at housing safety and be in compliance with its AFFH certification. In fact, a jurisdiction could take all of those steps to perpetuate discrimination and inequality and hold a fair housing poster contest and HUD would likely deem it to have met its AFFH obligations (if, that is, HUD were monitoring compliance, which it does not intend to do).

IV. Next Steps

This new rule is a travesty. Both its complete lack of substance and the end run around normal administrative procedure by which it was adopted suggest that it is more about the optics and the politics than about ensuring that HUD's programs are used to meet the very real fair housing needs of our communities. The recent unrest across the country has cast a bright light on the pervasive structural racism and persistent wealth disparities in our society and underscores the importance of ultimately achieving Congress' AFFH vision. The current pandemic, which has hit under-resourced communities of color the hardest and has demonstrated how our strength as a society depends on ensuring that all communities are safe and healthy, reinforces the urgency of addressing segregation and systemic racism. Doing so is a long-term effort that will involve much work beyond the scope of this or the next administration alone. However, this rule is a step in the wrong direction, and will only hinder our efforts.

NFHA and our partners and allies [call on HUD](#) to withdraw this rule and reinstate the 2015 AFFH regulation.