

# Overview of HUD's Proposed New AFFH Regulation

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## Background

Since its enactment in 1968, one of the goals of the federal Fair Housing Act has been to ensure that the resources of the federal government are aligned in favor of fair housing: that they work to ensure that all neighborhoods, regardless of who their residents are, offer access to the resources, amenities, and opportunities we all need to thrive. This goal is embodied in the Affirmatively Furthering Fair Housing (AFFH) provisions of the Act, which recognize that the federal government has played a major role in creating and perpetuating discrimination and segregation over many decades, and that the resulting inequities are harmful to our communities and our country's prosperity. We cannot correct the legacy of this past by simply ending discriminatory policies and practices, although that is necessary; in order to achieve the equitable society we claim to be, we must take deliberate steps to redress the harms caused by past actions.

Congress assigned the U.S. Department of Housing and Urban Development (HUD) a lead role in carrying out the AFFH mandate, although, in the 55 years since passage of the Act, HUD has largely declined to play a leadership role in this regard. During that time, HUD has taken a variety of approaches to this task, the most promising of which was embodied in the agency's [2015 AFFH regulation](#). That rule was only in effect for a brief period before being suspended in 2018 and later revoked. HUD has now published for public comment a proposed new AFFH regulation, which builds on the 2015 rule with some notable changes. What follows is a description of some of the key provisions of the proposed new regulation.

## HUD's 2023 Proposed AFFH Regulation

### Definitions (§ 5.152)

The definition of AFFH is central to the regulation and, in many ways, it both sets the tone and lays the foundation for the other provisions of the rule. The definition in the proposed new rule includes an important new element that was not included in the 2015 rule or the 2021 Interim Final Rule. The new language, which is underlined below, emphasizes that affirmatively furthering fair housing requires grantees to go beyond the planning that is outlined in the rule and take actions that lead to outcomes that remedy the harms caused by segregation and discrimination.

***Affirmatively furthering fair housing*** means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation, eliminate inequities in housing and related community assets, and foster inclusive communities free from

barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, reduce or end 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 well-resourced areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws and requirements. The duty to affirmatively further fair housing extends to all of a program participant's activities, services, and programs relating to housing and community development; it extends beyond a program participant's duty to comply with Federal civil rights laws and requires a program participant to take actions, make investments, and achieve outcomes that remedy the segregation, inequities, and discrimination the Fair Housing Act was designed to redress.

The proposed rule introduces several new terms that were not included in previous rules. Among others, these include:

**Balanced approach**, which “means and refers to an approach to community planning and investment that balances a variety of actions to eliminate the housing-related disparities that result from segregation, racially or ethnically concentrated areas of poverty (R/ECAPs), the lack of affordable housing in well-resourced areas of opportunity, the lack of investment in community assets in R/ECAPs and other high-poverty areas, and the loss of affordable housing to meet the needs of underserved communities. A balanced approach includes a combination of actions designed to address all these disparities.” The proposed rule requires grantees to use a balanced approach – one that is calibrated to local circumstances – in developing their fair housing goals. This is a more explicit statement of the “both/and” approach to community investment and housing mobility that was suggested in the 2015 rule. The definition goes on to list some of the strategies that might be incorporated into a balanced approach.

**Community assets**, which “means programs, infrastructure, and facilities that provide opportunity and a desirable environment.” The proposed rule lists examples of community assets, including schools, transportation, employment, recreation, and a healthy environment, among others. The list does not include any mention of climate resilience.

**Community engagement**, which “means a solicitation of views and recommendations from members of the community and other interested parties, consideration of the views and recommendations received, and a process for incorporating such views and recommendations into planning processes, decisions, and outcomes.”

**Equity or equitable**, which “means the consistent and systematic fair, just, and nondiscriminatory treatment of all individuals, regardless of protected characteristic, including concerted actions to overcome past discrimination against underserved communities that have been denied equal opportunity or otherwise adversely affected because of their protected characteristics by public and private policies and practices that have perpetuated inequality, segregation, and poverty.” The Equity Plans required by the rule are intended to ensure that all communities have equitable access to community assets.

**Underserved communities**, which “means groups or classes of individuals ( *i.e.*, underserved populations), that are protected classes or who share a particular characteristic, disproportionately include members of protected class groups, and have not received equitable treatment, as well as geographic communities ( *i.e.*, underserved geographic areas) where members of protected class groups do not enjoy equitable access to housing, education, transportation, economic, and other important housing and community-related opportunities, including well-resourced areas and community assets. Examples of underserved communities include communities of color, individuals experiencing homelessness, Lesbian, Gay, Bisexual, Transgender, Queer, + persons (LGBTQ+), low-income communities or neighborhoods, survivors of domestic violence, persons with criminal records, and rural communities.”

## The Equity Plan (§ 5.154)

The centerpiece of the proposed rule is the requirement for a new fair housing plan, called an Equity Plan, which replaces the Assessment of Fair Housing (AFH) from the 2015 rule and the Analysis of Impediments to Fair Housing Choice (AI) from the 1995 rule. The Equity Plan that would be required under this proposed rule bears many similarities to 2015’s AFH but has some significant differences.

**Format (§ 5.154):** The 2015 rule contained a requirement to conduct a fair housing plan but left the details about that plan – specific areas for analysis, questions for grantees to answer, fair housing goals, etc. – to a separate document, called an Assessment Tool. The creation of this standardized format for analysis responded to one of the Government Accountability Office’s (GAO) critiques of the AI. Under the 2015 rule, there was an assessment tool for local jurisdictions and one for public housing agencies (PHAs), each of which went through a notice and comment process under the federal Paperwork Reduction Act and was approved by the Office of Management and Budget for use for a specific period, after which it had to be renewed. HUD proposed, but never finalized, assessment tools for small PHAs and for states.

The current proposed rule does not contemplate a separate form for grantees to use to develop and document their Equity Plan. Instead, the specific areas of focus for the plan are outlined in the rule itself. The 2015 rule required grantees to assess a series of fair housing issues, determine what factors contributed to those issues (“contributing factors”), set priorities among the issues identified, and establish at least one goal to address those issues. The current proposed rule spells out several categories of fair housing issues that grantees must consider and requires them to establish goals for addressing the priority issues in each goal category, along with timelines and metrics for measuring progress and funding sources, if applicable. For each fair housing goal category, the rule outlines a streamlined set of questions that grantees must consider in developing their plans. There are separate sets of questions for Consolidated Plan (ConPlan) jurisdictions and PHAs. In addition, each Equity Plan must also describe the grantee’s community engagement process, any comments it received about its proposed plan, and its response to those comments.

**Areas of focus (§ 5.154(c)(3)):** In their Equity Plans, grantees must identify fair housing issues in each of the following fair housing categories, which are similar, but not identical to those in the 2015 rule. They include:

- (1) Integration and segregation;
- (2) Racially or ethnically concentrated areas of poverty (R/ECAPs);
- (3) Significant disparities in access to opportunity;
- (4) Inequitable access to affordable housing and homeownership opportunities;
- (5) Laws, ordinances, policies, practices, and procedures that impede the provision of affordable housing in well-resourced areas of opportunity, including housing that is accessible for individuals with disabilities;
- (6) Inequitable distribution of local resources, which may include State or municipal services, emergency services, community-based supportive services, and investments in infrastructure; and
- (7) Discrimination or violations of civil rights law or regulations related to housing and access to community assets.

Analysis of the fair housing needs of people with disabilities is folded into goal category #5 rather than being a separate area of analysis, as it was under the 2015 rule. And unlike the 2015 rule, these goal categories do not include an assessment of the jurisdiction's fair housing enforcement and fair housing outreach capacity, roles frequently filled by local fair housing organizations. Nor do they require a discussion of any unresolved violations of civil rights laws by the grantees themselves.

**Goals (§ 5.154(g)):** One of the challenges that grantees faced under the 2015 rule was setting goals that were appropriate and meaningful. This proposed rule attempts to correct that problem. It also sets higher expectations for the goals that grantees establish to address the barriers to fair housing and opportunity in their communities. Under the 2015 rule, grantees were required to set at least one goal in their AFHs: a very low bar. The current proposed rule requires grantees to set goals to address the priority fair housing issues in each goal category, acknowledging that a well-crafted goal may address more than one fair housing issue. The rule states that fair housing goals “are designed to achieve tangible, positive, and measurable fair housing outcomes.” No guidance is given on how to determine which or how many issues should be designated as priorities. Nonetheless, the formulation in the proposed rule should lead grantees to be more ambitious in setting goals. The rule also clarifies that goals may be either short-term or long-term, and while no single goal is expected to eliminate all the inequities that a community may face, each goal, when accomplished, should help the community achieve “material positive change toward overcoming fair housing issues.”

For each goal a grantee sets, its Equity Plan must include “a description of progress-oriented, specific measurable steps, including timeframes for achievement, and a description of the amount of and potential sources of funds (if any) needed to implement the goal.”

## HUD Review (§ 5.162)

After an initial phase-in process, grantees will be required to submit their Equity Plans once every three to five years (depending on their ConPlan or PHA plan schedule), 365 days in advance of the date on which their next ConPlan or five-year PHA plan is due. HUD will have 100 days to review the plans and either accept or reject them. If HUD rejects a grantee's Equity Plan, it will provide detailed feedback about changes that need to be made in order for the plan to be acceptable, and grantees will have 60 days to make the necessary revisions and resubmit their plans. The rule describes what may be an iterative process through which grantees will be able to develop a plan that is acceptable to HUD and explains the reasons for which HUD may reject a plan. As with the 2015 rule, this rule states that acceptance of a plan does not mean the grantee has fulfilled its AFFH obligations; rather it means that the grantee's Equity Plan has met the basic requirements of the rule. HUD will accept comments from the public during its review of a grantee's Equity Plan, a provision that was not included in the 2015 rule.

## Certifications and Assurances (§ 5.160(i))

The rule requires grantees to certify, when submitting their Equity Plans and before receiving federal funding, that they will affirmatively further fair housing (engage in fair housing planning and take meaningful actions in accordance with the rule and take no action materially inconsistent with their AFFH obligation) during the period for which the funding is extended. It also creates procedures for challenging the validity of a grantee's certifications.

In addition, grantees must submit to HUD, along with their Equity Plans, an assurance that their programs, activities, and services are operated in compliance with the requirements of the AFFH rule, in a manner that affirmatively furthers fair housing, and in compliance with federal fair housing and civil rights nondiscrimination requirements.

## Annual Progress Reports (§ 5.154(i))

Grantees will be required to submit to HUD an annual progress evaluation describing the progress they have made toward achieving the goals in the Equity Plan. In conjunction with these evaluation reports, grantees may seek to modify their goals, either because unforeseen circumstances will prevent them from achieving a goal or because they have achieved the goal ahead of schedule. Grantees are required to hold at least two public meetings to solicit input from the community on their annual progress evaluations.

## Links to Other Plans (§ 5.156)

The proposed rule requires grantees to incorporate the strategies and meaningful actions from the Equity Plans into their ConPlans or PHA plans and their annual action plans, and to identify the resources – from HUD and other sources – that will be allocated to achieving those goals. Failure to do so may result in enforcement action by HUD, including disapproving a ConPlan or rejecting a PHA plan. The rule further states that the strategies and meaningful actions from the Equity Plan must also be incorporated into planning documents that are required in connection with funding from any other federal agency or department.

## Revisions Due to Material Changes in Local Conditions (§ 5.164(a)(1)(i))

The proposed rule requires grantees to revise their Equity Plans when there is “a material change in circumstances in a program participant's jurisdiction that affects the information on which the Equity Plan is based to the extent that the analysis and fair housing goals of the Equity Plan no longer reflect actual circumstances.” It cites the example of a Presidentially-declared disaster but provides that there may be other circumstances in which HUD may determine that a material change has occurred that requires grantees to revise their Equity Plans. In the event of a Presidentially-declared disaster, grantees must update their Equity Plans within two years of the disaster declaration. The rule does not link such revisions to the plans that grantees may be required to develop in order to receive disaster recovery or mitigation funds. Nor does it address the local impact of circumstances like the significant infusions of funding that jurisdictions received in response to the pandemic, or that will flow from recently-enacted legislation such as the Inflation Reduction Act and the infrastructure bill.

### Public Access to Equity Plans (§ 5.154(j))

HUD is proposing to facilitate public access to information relevant to the Equity Plan process by maintaining a website dedicated to Equity Plans and related documents. Specifically, HUD proposes to post, “among other things, a dashboard to track the status of a program participant's AFFH planning and implementation-related activities and access to Equity Plan submissions, annual progress evaluation reports, and related notifications from the Department.” Although the rule requires grantees to make their draft Equity Plans available to the public during the plan development process, it does not require grantees to maintain their final Equity Plans or related documents on their own websites.

### Community Engagement (§ 5.158)

The most successful AFHs developed under the 2015 rule benefited from robust and strategic efforts to engage community stakeholders in the AFH process. This proposed rule attempts to ensure that grantees undertake such efforts in the development and implementation of their Equity Plans. In developing their plans, grantees must conduct broad outreach and hold at least three public meetings (not hearings) at different times and places, with at least one of those being in an underserved community. Those meetings must take place prior to and during the development of the plan. The purpose of these meetings is to solicit information from community members about fair housing issues they face and input on the content of the plan. Notably, the rule does not specify that community members should play a role in setting priorities among fair housing issues, which will determine what goals will be incorporated into the plan.

The provisions of the proposed rule that detail the types of community organizations and stakeholders with whom grantees must engage are split between the rule itself and amendments to the rules regarding community participation for ConPlans and PHA plans. Further, the rule uses different language in each place. The resulting requirements are confusing, and do not make it clear that grantees must engage with fair housing organizations, housing and service providers, and groups representing members of protected classes at critical points before, during and after the development of the Equity Plan.

The rule also suggests that grantees may be able to combine community engagement efforts related to the Equity Plan with those required for the ConPlan or PHA plan. However, given the purpose and content specified for the meetings required for the Equity Plan, it is not clear that the two processes are compatible enough to be combined effectively and in a way that yields the necessary results for each plan.

The rule states that HUD may reject an Equity Plan if it was developed without the required community engagement.

### Data (§ 5.154 and Preamble)

In developing their Equity Plans, grantees are required to use HUD-provided data, as well as local data and knowledge that is provided by community stakeholders or otherwise reasonably available. In the preamble to the rule, HUD commits to continuing to make available the kind of raw data that it made available in conjunction with the 2015 rule. It also says it plans to improve its current data and mapping tools and to build additional tools and data products. It does not specify what these might be or when they would be made available but seeks feedback from the public about what kinds of data and data tools would be most useful for the Equity Plan process.

### Complaint Process (§ 5.170)

The proposed rule establishes a process by which members of the public can file complaints with HUD if they believe a grantee has failed to comply with the regulation, failed to carry out the commitments made in its Equity Plan, or has taken actions that are materially inconsistent with its obligation to affirmatively further fair housing. Complaints must be filed within 365 days of the last alleged violation. HUD will investigate and take steps to resolve any complaints that it finds have merit. There is currently no formal procedure for filing this type of complaint with HUD, although advocates had urged HUD to include one in the 2015 rule, so this is an important new tool for ensuring AFFH compliance. However, the proposed rule does not provide for complainants to receive policy changes, injunctive relief, damages or attorneys' fees.

### Enforcement (§§ 5.170 & 5.172)

The rule describes the procedures that HUD will follow to ensure compliance, similar to those it follows under Title VI of the Civil Rights Act of 1964. When HUD finds a violation of this or any other rule, it always tries to work with grantees to obtain voluntary compliance. The proposed AFFH rule provides that, where HUD is unable to obtain voluntary compliance, it may refer the matter to the Department of Justice for appropriate action, initiate an administrative complaint seeking suspension or termination of funding, or initiate debarment proceedings, which would prevent the grantee from receiving funds from any federal agency.

### Timeline for Implementation (§ 5.160(b)(c) & (d))

The rule lays out a multi-year schedule for initial implementation of the Equity Plan requirement. HUD has divided grantees required to submit ConPlans and grantees that are PHAs into four categories each, based on the amount of funding they receive under five formula grant programs (the largest of which is the CDBG program) or – for PHAs – the number of housing

units or vouchers they administer. The largest grantees (a group of three cities, four states and four PHAs) will be required to submit Equity Plans first, either two years after the effective date of the AFFH rule or 365 days before their next ConPlan or PHA plan is due, whichever comes first. In each of the three subsequent years (which we anticipate will be 2025, 2026, and 2027), a new group of grantees will be required to create Equity Plans 365 days before their next ConPlan or PHA plan is due. Given the submission schedule for ConPlans and PHA plans, the result is that the first set of grantees will likely be required to create Equity Plans in 2024 or 2025, and for most jurisdictions and PHAs the requirement will kick in in 2029 – 365 days before their ConPlans or PHA plans that are due in 2030.

In the interim, the rule instructs jurisdictions that are not required to submit Equity Plans within 24 months of the effective date of the rule, and whose AIs are more than three years old, to update or conduct new AIs and submit those to HUD for possible review. The rule is silent on the question of what circumstances would prompt HUD to review a grantee's AI, and it does not impose any requirement to report to HUD or the public on progress made toward goals in the AI or on any other actions taken to affirmatively further fair housing.

### [How to Submit Comments](#)

The full text of the proposed regulation [can be found here](#). Comments can be submitted to HUD using the same link. **Comments are due by April 10, 2023.**