

Analysis of HUD's Proposed AFFH Rule

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Overview

With the passage of the Fair Housing Act in 1968, Congress first imposed on the U.S. Department of Housing and Urban Development (HUD) and recipients of HUD funds, the obligation to affirmatively further fair housing (AFFH). 42 U.S.C. §3608; *see also* 42 U.S.C. §§5304(b)(2), 5306(d)(7)(B)(Housing and Community Development Act of 1974, as amended); 42 U.S.C. §12705(b)(15) (consolidated planning); 42 U.S.C. §1437C-1(d)(16) (public housing). HUD has promulgated regulations implementing the AFFH requirements for entities receiving block grant and public housing funds. *See* 24 C.F.R. §§570.602; 91.225, 91.325, 91.425, 903.7(o).

HUD recently proposed new regulations to clarify and expand the AFFH obligations of HUD “program participants” (States and municipalities that receive HUD block grant funds and public housing authorities, or PHAs). *See* Proposed Rule on Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710-43743; July 19, 2013 (Proposed Rule). The Proposed Rule requires program participants to address “fair housing issues,” which are defined as “local or regional segregation..., racial or ethnic concentrations of poverty, disparities in access to community assets, disproportionate housing needs based on race [and other protected classes] and evidence of illegal discrimination...” §5.152. Comments are due on September 17, 2013.

The Proposed Rule’s revised definition of AFFH, at §5.152, frames all of a participant’s obligations:

“Affirmatively furthering fair housing means taking proactive steps beyond simply combating discrimination to foster more inclusive communities and access to community assets for all persons protected by the Fair Housing Act. More specifically, it means taking steps proactively to address significant disparities in access to community assets, to overcome segregated living patterns and support and promote integrated communities, to end racially and ethnically concentrated areas of poverty, and to foster and maintain compliance with civil rights and fair housing laws.

The rule’s preamble notes that “a program participant’s strategies and actions may include strategically enhancing neighborhood assets,” 78 Fed. Reg. 43716, but this strategy should not be implemented in a manner that perpetuates segregation. §5.152.

Recognizing that “[s]egregation carries a heavy social cost,” 78 Fed. Reg. 43714, the Proposed Rule replaces the Analysis of Impediments (AI) with a new framework—the Assessment of Fair Housing, or AFH—through which program participants must identify, analyze and mitigate barriers to fair housing choice, and ties it to other planning processes through which federal, state and local resources are allocated. In other words, it creates a fair housing lens for all of a participant’s decisions about housing and community development needs. Participants must submit AFHs to HUD, which can reject noncompliant AFHs, and impose a range of sanctions for noncompliance, up to and including withholding federal funds.

The new framework requires greater reliance on data (which will be supplied by HUD), greater transparency and public participation in the development of the AFH, and greater accountability with respect to expanding housing choice. Most importantly, it will require program participants to initiate and follow through on jurisdiction-specific community conversations about race, segregation and access to opportunity areas.

Finally, the Proposed Rule emphasizes that a participant’s AFFH obligation is not bounded by what it can do with the HUD funds it has received. The strategies and actions “will be accomplished primarily by making investments with federal *and other resources...*” §5.152; 78 Fed. Reg. 43716. This regulatory language reinforces a provision that has been in HUD’s *Fair Housing Planning Guide*, at p. 1-3, since 1996:

Applicability: Although the grantee’s AFFH obligation arises in connection with the receipt of Federal funding, its AFFH obligation is not restricted to the design and operation of HUD-funded programs at the State or local level. The AFFH obligation extends to all housing and housing-related activities in the grantee’s jurisdictional area whether publicly or privately funded.

Procedural Issues in the Proposed Rule

- HUD will provide uniform data sets to allow participants to identify fair housing issues. §5.154(c)
- Participants are required to develop and submit an initial AFH to HUD 270 days before the start of the block grant or PHA funding cycle. §5.160(a). If the AFH is not submitted by August 16 of the fiscal year for which funds were appropriated, a participant will automatically lose CDBG funds. §5.160(b). Participants will be required to submit an AFH every five years, §5.160(c), or when “a significant material change in circumstances occurs that calls into question the continued validity of the AFH...” §5.164.

- AFHs must be submitted to HUD, which will review them, and “may choose not to accept an AFH, or a portion of the assessment, if it is inconsistent with fair housing or civil rights laws or if the assessment is substantially incomplete.” §5.162(b). HUD can also turn down an AFH that is “developed without the required community participation or the required consultation.” §5.162(b)(1). HUD has 60 days from the date of submission to review, and an AFH is deemed “accepted” if HUD does not give the participant written notice to the contrary within that period. §5.162(a).
- HUD’s acceptance of an AFH “does not mean that HUD has determined that a jurisdiction has complied with its obligation to affirmatively further fair housing under the Fair Housing Act; has complied with other provisions of the Act; or has complied with other civil rights laws, regulations or guidance.” §5.162(a)(2)
- The Proposed Rule enhances the public participation and consultation requirements, §5.158, and aligns the AFH regulations on this topic with those relevant to the expenditure of block grant funds under the Consolidated Plan process. §§91.100, 91.105, 91.110, 91.115 and the PHA Plan process. §903.15. While there is no explicit complaint process established in the Proposed Rule, the public participation and consultation requirements are likely vehicles for community groups to lodge objections with HUD that an AFH does not meet HUD’s requirements.
- The proposed Rule leaves in place HUD’s enforcement powers with respect to the AFH and compliance with participants’ AFFH obligations. *See, e.g.*, 24 C.F.R. §§91.500(b) (HUD approval action); 570.304 (making of grants); 570.485(c)(making of grants); 570.601 and 570.602 (civil rights certification requirements); 570.904 (equal opportunity and fair housing review criteria); 570.910—570.913 (corrective and remedial actions).
- Proposed Rule encourages regional AFHs and collaboration between municipalities and PHAs. §5.156.

Substantive Issues in the Proposed Rule

- AFH must identify goals to AFFH and to inform fair housing strategies in other planning processes including, but not limited to housing, education, transportation, and environment. §5.154(d)
- AFH must consider all fair housing issues in a jurisdiction. §5.154(d)(1)
- Participants must use HUD data to identify the existence and extent of: (1) segregation, (2) racially or ethnically concentrated areas of poverty; (3) disparities in access to community assets, (4) disproportionate housing needs and (5) illegal discrimination. §5.154(d)(2)
- AFH must “identify the primary determinants influencing conditions” listed in previous point. §5.154(d)(3)

- AFH must set and prioritize goals for mitigating or addressing these determinants. §5.154(d)(4)
- The Proposed Rule requires the jurisdiction’s Consolidated Plan and related submissions to HUD to describe how the priorities and specific objectives of the jurisdiction will affirmatively further fair housing, and that the description should be done by setting forth strategies and actions consistent with the goals and other elements identified in an AFH. §§91.215, 91.220, 91.315, 91.320, 91.415, 91.420. This will ensure that fair housing planning drives decisions about how housing and community development funds will be spent.
- The Proposed Rule defines the AFFH certification to mean that a block grant recipient “will take meaningful action 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.” §§91.225, 91.325, 91.425.
- Although the Proposed Rule does not prescribe the specific strategies any participant must adopt, or actions it must take, it does emphasize that any strategies selected should “overcome segregated living patterns and support and promote integrated communities.” §5.152 The Proposed Rule directs participants “to examine relevant factors, such as zoning and other land-use practices that are likely contributors to fair housing concerns, and to take appropriate actions in response.” 78 Fed. Reg. 43716. .