

Recommendations for a Renewed Affirmatively Furthering Fair Housing Regulation

August 27, 2021

Below, we provide our recommendations for a renewed and improved Affirmatively Furthering Fair Housing (AFFH) regulation. We thank HUD for issuing its June 2021 Interim Rule restoring AFFH definitions and certifications. However, as we noted in our letter commenting on the Interim Rule, there is a pressing need for restoration of a standardized planning/review mechanism and for HUD to actively ensure that its recipients commit to and follow through on meaningful action steps that AFFH.¹ The recommendations below build on our collective experience in analyzing the 2015 rule and guidance in consultation with fair housing and civil rights groups; assisting localities, counties, states, public housing authorities, and community-based advocates with Assessments of Fair Housing and Analyses of Impediments; and litigating fair housing cases.

We believe that a better-tailored assessment process (in comparison to the 2015 guidance) is needed, but that such a process must retain core features of the 2015 rule – such as standardized analysis – while serving to sharpen accountability for fair housing results. Our specific recommendations include the following.

1) Definition; regulatory aims; and reinstatement of core planning/review requirement

- Regulatory aims should emphasize the development and documentation of needed actions and emphasize accountability. Whereas the Interim Rule (and the prior AI process) set the stage for voluntary fair housing planning, a standardized and mandatory planning requirement should be restored² – this not only aids recipients but is a mechanism for accountability by HUD and by fair housing groups.
- An important aim of the regulation is to set forth what it means, in practice, to AFFH, and to clarify the substantive expectations placed upon recipients to take active measures to address significant fair housing problems. We recommend including language that places a strong emphasis on action steps, both in the regulatory aims (as the 2015 rule did³) and throughout the body of the rule. It must also be clear from the outset that where there are multiple significant fair housing issues (for example, segregation and also cost pressure/need for preservation), the recipient is expected to respond to each of these.
- The Interim Rule's restoration of the 2015 definition was a positive and important step; the definition reflects the Act's history and the current need to remedy segregation,

¹ See the comments on HUD's interim final AFFH rule, Docket No. 2021-0031-0001, submitted by our organizations and others on July 12, 2021, available at <https://prprac.org/pdf/civil-rights-groups-comments-affh-lfr-071221.pdf>

² "Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans," available at <https://www.gao.gov/products/gao-10-905>.

³ See former 24 CFR § 5.150.

discrimination, and the closely related issues of disinvestment, lack of access to opportunity, and housing cost burden and inadequate housing conditions.

- In keeping with the need for accountability and actions, the 2021 proposed regulation should include a complaint process and a stronger standard of review by HUD, as well as re-tailoring the fair housing plan rubric to streamline the time spent on analysis and focus more strongly on planned and reported actions.
- The regulation should aim to advance regional coordination and coordination among PHAs and other entities.

2) Certification requirements

- Reinstate the certification standard language requiring that grantees not take any action materially inconsistent with their obligation to AFFH, in addition to language stating that they will affirmatively further fair housing. The definition of AFFH in the regulation is not sufficient to make this point. While it speaks to taking meaningful actions and fostering compliance with civil rights and fair housing laws, it fails to set forth, in a manner clear to grantees and the public, a bar on taking actions materially inconsistent with the obligation to AFFH.
- Section 5.152(d)(2) “Program Participant means” should add among the listed programs, the national Housing Trust Fund program.

3) Standard of review; review mechanisms; submission schedule

- The standard of review should focus on substantive outcomes and compliance, as well as process.
- HUD should consider changes to the former review schedule to avoid “traffic jams” of AFHs - for example, by adjusting Con Plan deadlines.
- The regulation should provide a complaint process for fair housing organizations or others to use in helping to ensure that recipients are meeting their AFFH obligations. This should be distinct from the process by which the public may request that HUD conduct compliance reviews of its grantees.
- HUD should also establish an audit process for determining which AFHs to review in depth. Such a process could factor in the level of fair housing risk associated with each grantee and complaints submitted to HUD by the public. It could be supplemented with random or other sampling of AFHs.

4) Assessment of Fair Housing – principles for better tailoring

A standardized process is critical to ensure that program participants and PHAs address and respond to key fair housing issues. The rule should still require a meaningful scope of public, well-presented data and policy analysis – so that the public, HUD, and the recipient all have

available the underlying information needed to assess where there are fair housing problems. However, the process can be improved over that created in 2015 in the following ways: an up-front focus on actions/goals; reducing time spent generating narrative descriptions of data; reduce redundancy in discussions of data and policies; redefine and restructure the “contributing factors” to align with policies and practices.

Contributing Factors

- Contributing factors (or a successor term) should be defined to focus on “policy and practices” of the recipient.
- Contributing factors should more squarely address well-defined policies and practices. These should also reflect the nature of the recipient/program participant (for example, PHAs should be asked to assess their redevelopment policies, siting practices, aspects of voucher administration, etc., rather than the more thematic “contributing factors” included in the 2015 guidance).
- With regard to states’ and entitlement jurisdictions’ analysis of subsidized-housing related contributing factors, those entities should be asked to examine how their own policies and practices can help to address fair housing issues faced by subsidized households – for example, does the state/local climate adaptation plan effectively include public and other assisted housing? Does the state/locality provide and enforce source of income protection? How does the state/locality support improvements to housing conditions and other needs of subsidized households?

Structure of fair housing plan

- The successor rubric to the AFH should provide a stronger emphasis on identifying and providing reasoning to support goals and actions (connecting these to the policies and practices analyzed in the document).
- The 2015 guidance called for repetitive analysis of contributing factors (with a discussion following each data section under the various fair housing issues). Each contributing factor could be discussed once (including the ways in which it contributes to the various issues).
- As noted above, the volume and time spent on narrative data description can be reduced with the use of improved data tools and guidance that focuses on problem identification, rather than rote description. In addition, there are a number of repetitive questions that could be consolidated to reduce redundancy.

Data

- HUD should provide as much relevant data as possible, in formats that are clear, concise and accessible, and that highlight relevant data points and trends. This would reduce the need for narrative generation and minimize the time that grantees have to spend on this

aspect of their fair housing plans. HUD may want to review the California AFFH Data and Mapping Tool for the type of data that state provides (<https://affh-data-resources-cahcd.hub.arcgis.com/>).

- HUD should encourage use of local data, and also more clearly guide recipients toward data that is not available in standardized form at the federal level but may be important to include – such as local school assignment zones.
- The process should acknowledge the usefulness of qualitative information, including information that illuminates residents' lived experiences.
- HUD should regularly assess what data is available from other government agencies that can be provided to participants. Examples include EPA data on Superfund sites, NFIP flood maps and federal education data on local school demographics and school district boundaries, among others. HUD should direct grantees to analyze mortgage lending patterns using HMDA data.
- The fact that particular datasets may not be available for all grantees should not be a reason not to provide that data to grantees for which it is available. HUD can make it clear that grantees for whom specific data sets are not available are not expected to analyze that data and will not be penalized for failure to do so.

Incorporation into planning processes

- AFFH goals and activities should be required to explicitly be incorporated in ConPlans and PHA Plans.
- HUD should provide guidance on how program participants can use the AFH to inform their various planning processes – including but not limited to Consolidated Plans and PHA Plans
- HUD should retain the requirements from the 2015 that program participants consult with other entities. These include both the broad consultation requirements of the ConPlan and PHA plans, and the specific AFFH-related requirement to consult with “public and private agencies that provide assisted housing, health services, and social services (including those focusing on services to children, elderly persons, persons with disabilities, persons with HIV/AIDS and their families, homeless persons), community-based and regionally-based organizations that represent protected class members, and organizations that enforce fair housing laws.”

5) Community engagement requirements

- The inclusion of community engagement requirements in the 2015 rule was a significant improvement over the previous regulatory framework, under which such engagement was often limited or altogether lacking; those requirements should be preserved and

strengthened. Robust and effective community engagement can help grantees identify fair housing issues they might otherwise overlook, develop more effective strategies for tackling those problems, and build community support for implementation of those strategies.

- Community engagement is significantly enhanced when resources are made available to ensure that stakeholders understand what AFFH means, its relevance to their work (for community-based organizations) and its impact on their communities, as well as to facilitate/enable participation in meetings, focus groups, hearings, etc. HUD should provide guidance to grantees on how best to maximize stakeholder engagement and should devote some of its TA resources to these constituencies. HUD may also want to provide guidance to community stakeholders on ways to participate in the AFFH process.
- Many grantees use surveys to gather feedback from community residents about issues covered by the fair housing plan, but there is wide variation in the length, content, structure, distribution strategies, language access provisions and response rates for such surveys and it is not clear how much grantees should rely on their results. This is an area in which guidance from HUD would be helpful to enable grantees that want to conduct community surveys to do so effectively.
- HUD should require public engagement at multiple points during the planning process, and should ensure that all materials are publicly available, including the final AFH or successor document.
- At §5.158(a), because the text is about making sure the public has a “reasonable opportunity for involvement in the *development* of the AFH...” then the text must clarify that the “copies” in the text must be the “complete” copies (not summaries as might be implied by the preceding text) of the *proposed* AHF. Also, the text should clarify that the complete copy is not simply “on the participant’s official government website” – it should be prominently placed on a logical webpage.
- §91.105 Citizen Participation Plan; local government

(b) Development of the AFH and ConPlan

- (b)(2) is about the “proposed” AFH (and ConPlan). The text should clarify that the “copies” in the text are the “complete” copies (not summaries as might be implied by the preceding text), and that the complete copy is not simply “on the participant’s official government website” – it should be prominently placed on an easily-located web location.
- (b)(3) requires at least one public hearing “during the development of the AFH (or ConPlan).” Public input should be required at least two stages: before a participant prepares a draft AFH (or ConPlan), and then getting public input about the draft/proposed AFH (or ConPlan) before submitting a final.

- (b)(4) In context it is apparent that (b)(4) refers to a proposed AFH (or ConPlan) – it should explicitly say so.
- Allowing only 30 days to receive comments is not adequate. Documents as detailed as a proposed AFH/ConPlan require considerable time to read and digest, especially if it is not part of one’s paid employment. Many individuals and advocates will want to/need to consult with others in their group, neighborhood, etc. Therefore, the time should be extended to 60 days (alternatively 45 days for all program participants, as currently required for PHAs).

(e) Public Hearings. As noted above, there should be two required junctures for public participation, both early in the formulation of the AFH and in finalized the AFH and goals before submission.

6) Considerations for different sizes/types of jurisdictions (small/large cities, counties, states)

- States: the next-generation AFH (or successor) for states should focus on *state-level* policies and practices, rather than echoing the local policies and practices of the tool used by entitlement jurisdiction. The state assessment should include an examination of state systems for disaster planning and recovery; as well as the effectiveness of state courts in vindicated rights relevant to housing (for example, in the context of evictions).
- Counties: Counties may cover a wide geographic area and contain tens of municipalities that are not entitlement jurisdictions themselves but nonetheless retain control over their zoning, land use and other policies. HUD must create a framework that ensures that counties address these policies thoroughly in their fair housing plans, but not at the level of detail that it would require of each municipality if it were an entitlement jurisdiction.

7) Training and technical assistance

- Training for jurisdictions should focus on equipping program participants with understanding how to analyze data, policies, and practices, and in turn how to set meaningful goals and action items that will work to affirmatively further fair housing. Training modules should emphasize working through the assessment framework established with real-world examples, as well as emphasizing strategies to increase community engagement and participation. HUD should develop sample completed assessments or analyses and share these with program participants.

8) Specific considerations for PHAs

The continued inclusion of PHAs within the scope of the AFFH rulemaking is necessary and appropriate, including a continued requirement that PHAs engage in fair housing planning and assessment. HUD must center the forthcoming assessment process with respect to PHAs on an in-depth examination of PHA existing and proposed policies, including the Admissions and Continued Occupancy Policy, the PHA Plan, and the Section 8 Administrative Plan, and evaluating whether those documents (and other PHA planning documents, such language

access plans, VAWA emergency transfer policies, or affirmative marketing plans) contain policies that affirmatively further, or negatively impact, fair housing. The required assessment should direct particular focus on policies and practices where the PHA has discretion -- as exercising this discretion is a way for PHAs to potentially change their policies in a manner that better affirmatively furthers fair housing. Furthermore, the required analysis should focus primarily on the features of the programs that PHAs administer, including public housing and the HCV program, with a separate section on actions that are necessary to further fair housing for PHA families, but that are in the control of other state or local actors. This approach is more likely to produce tangible action items by PHAs, as opposed to goal-setting that is not committing to meaningful action. This approach would also address past PHA concerns that fair housing planning requires devising goals and strategies in areas where PHA has no control over decision making.

Evaluation of the resulting fair housing analysis/assessment by HUD must involve a joint collaboration between FHEO and PIH staff. Having PIH staff involved in the review will be particularly important in evaluating the extent to which stated goals and strategies will actually be efficacious with respect to affirmatively furthering fair housing. PIH staff will also be able to advise whether stated goals are realistic and achievable within a particular time frame.

A. HUD Should Require Consideration of Relevant Data to Frame Their Fair Housing Analysis

The data analysis portion of the required assessment for PHAs should focus on specific data points that implicate fair housing concerns, depending on the particular program at issue. HUD should work with advocates to determine ways to measure gentrification and risk of displacement for residents.

- For both public housing and HCV program, this should include:
 - Racial demographics and household size of eligible families in the housing market compared with families receiving assistance and families on the waitlist, by program
 - Degree of broadband access for public housing and HCV families
 - Total number of assisted housing units by census tract (including PHA properties and vouchers, plus LIHTC, PBRA, and any state housing programs)
 - Number of accessible units in the market area (including the PHA portfolio) and types of accessibility features (mobility features, sensory features, etc.) available
 - Percentage of limited English proficient families served by the PHA, compared with the broader service area
 - Number of requests for reasonable accommodations, including approvals and denials
 - Number of admissions denials for each program, broken down by race, sex, primary language, and disability, and categorized by reason
 - Number of evictions or subsidy terminations for each program, broken down by race, sex, primary language, and disability, and categorized by reason

- For the HCV program:
 - Degree of concentration of the HCV program by neighborhood race and poverty concentration (and concentration of HCV families with children); concentration of households with disabilities
 - Availability/percentage of units accessible to persons with disabilities in the market area; availability of funds for modifications
 - Portability in/out data (including numbers of requests and denials, as well as basis for denial)
 - Number of requests for exception payment standards and percentage granted
 - Search times by race/extensions by race, household size, and disability
 - Success rates by race / family size/ disability
 - Current payment standards in relation to Small Area FMRs; estimate of # of available units in low poverty neighborhoods with and without exception payment standards based on SAFMR

- For public housing:
 - Property conditions by neighborhood, including number of units near contaminated sites, how many units near public infrastructure, how many units near public transportation, etc.
 - Number of Violence Against Women Act emergency transfers requested, granted, and denied
 - Data on housing overcrowding
 - Lead based paint abatements and remediations

- For Project-Based Vouchers:
 - Occupancy and application data for project-based vouchers
 - Number of PBVs by census tract, including tract poverty concentration and racial demographic data

B. HUD Should Focus PHAs' Required Fair Housing Analysis on Policies and Practices that Implicate Fair Housing

PHAs should be required to evaluate their specific policies and practices that can either further fair housing objectives or perpetuate segregation and discrimination. PHAs should be asked to evaluate their policies in a variety of their planning documents, such as ACOPs, Administrative Plans, reasonable accommodation policies, MTW Annual Plans and Reports, Rental Assistance Demonstration (RAD) and other public housing conversion relocation plans. As noted above, a focus on policies and practices where PHAs have discretion can be a means of ensuring that PHAs are focusing on action items that are within the scope of their control and authority.

- Both public housing and HCV program:
 - PHA admission screening policies, including: PHA criminal records policy, screening for prior landlord-tenant history and references (including nonpayment of unaffordable rents and evictions), screening for negative credit history and prior debts owed to the PHA
 - First-come, first served waitlist policies and lack of strong affirmative marketing efforts

- Admissions preferences
 - Lack of language access or reasonable accommodations policies
 - Description of any efforts to increase access when admissions process has moved online, in order to address language access, unequal access to internet, and the needs of older adults
 - Use of MTW flexibilities to adopt policies that negatively impact tenants (e.g., tiered rents, work requirements, increase in the minimum rent)
 - The PHA's process for calculating utility allowances, and whether allowances account for climate change (e.g., need to cover air conditioning due to extreme weather)
 - Ensuring the PHA's hearing policies are accessible and consider the totality of a household's circumstances
 - Examining and expanding the circumstances a participant can seek a hearing.
 - Require residents have access to their tenant file throughout their tenure as a participant in the program
- HCV program:
 - Limited PHA service area – barriers to improved access of families to higher opportunity areas outside of PHA area of operation
 - Excessively long inspection times and delays in approval of RFTA
 - HCV search times and policy on extensions
 - Payment standards too low to reach lower poverty neighborhoods (lack of exception payment standards or SAFMR)
 - Residency preferences
 - Landlord or unit listings predominantly in high poverty neighborhoods (e.g. online listing services)
 - Reasonable rent determinations (i.e., are the reasonable rent determinations resulting in overpayment of landlords in softer markets, and underpayment of landlords in higher-demand markets?)
 - No or insufficient mobility counseling
 - Porting barriers or lack of information on porting to tenants
 - Public Housing:
 - Unreasonable house rules and whether enforcement disproportionately impacts protected class residents
 - Security or police presence within public housing
 - Policies to address harassment based on a protected class (sexual harassment, harassment based on race, national origin, disability, etc.) by staff or other tenants
 - Failure to comply with VAWA, and lack of partnership with DV/SA organizations
 - Guest policies

C. Identify other impediments to fair housing faced by PHA families, that are not in the direct control of the PHA but that need to be addressed

- Location of community amenities and investments (parks and other natural amenities, infrastructure investments, public transit, etc.)

- Presence of harmful community features (high crime rate, polluting facilities, dangerous pedestrian locations, heavy police presence, etc.)
- Schools with unequal resources and sub-par performance; local school assignment policies that deny PHA children access to high performing schools
- Lack of public transportation to access higher opportunity areas
- Exclusionary zoning practices that keep affordable rental housing out of some communities
- Discrimination by property owners on the basis of Section 8 participation

D. HUD Should Focus on Guiding the PHAs to Craft Specific, Meaningful, and Actionable Goals that Address Fair Housing Concerns

Below we list examples of the types of goals that PHAs may want to adopt that could create material positive changes on the state of fair housing within their service areas. HUD should focus on equipping PHAs with guiding principles to get them to this point and provide example meaningful goals that are specific to what is within PHA authority to accomplish.

- Both public housing and HCV program:
 - Strong affirmative marketing program with language access for multiple languages used in client population
 - Incorporate goals into PHA plan/Section 8 Admin plan/ACOP
 - Develop partnerships with community organizations servicing marginalized communities (specifically targeting populations underrepresented in programs due to historic discrimination and lack of language access), including schools, community health centers, victim service providers, legal aid organizations, etc.
 - Independent-tenant groups representing all PH properties and voucher families
- HCV program:
 - Enter into inter-agency agreements with neighboring PHAs and CoCs that do not require ports
 - Exception payment standards based on SAFMRs
 - Adopt housing mobility program (counseling, search assistance, and landlord recruitment) with trained staff who have demonstrated success in creating and operationalizing housing mobility
 - Remove financial barriers to moves (assistance with security deposit and moving expenses and utility deposits in high opportunity areas); offer holding payments for units in high opportunity areas
 - Improve inspection times / and online signing options for HAP contract, etc.
 - Partner with legal aid and fair housing agencies in support of source of income discrimination cases

E. List specific goals that other state and local partners should consider adopting to address fair housing concerns, for the benefit of PHA families

- Identify specific actions that PHA will take to seek changes in policies in other state or local agencies (including other PHAs), or to modify behavior of private actors in the local housing market.
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