

NAHMAanalysis

NATIONAL AFFORDABLE HOUSING MANAGEMENT ASSOCIATION

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Affirmatively Furthering Fair Housing Final Rule

Background

On July 16, The U.S. Department of Housing and Urban Development (HUD) issued the final rule on affirmatively furthering fair housing (AFFH). The final rule comes after the proposed rule received over 1,000 public comments, when it was issued back on July 19, 2013. At that time, the proposed rule described the new assessment of fair housing (AFH) process that replaces the current Analysis of Impediments (AI) performed by States and Local Jurisdictions and extended the requirement to complete an AFH to Public Housing Authorities (PHAs). The final rule requires PHAs, States, and Local Jurisdictions to complete an AFH, once every five years. The goal of this NAHMAanalysis is provide an overview of Final AFFH Rule, which includes examining key terms, the AFH process, and HUD responses to comments provided by NAHMA on the proposed AFFH rule.

Key Definitions

As described in the final rule, the purpose of the AFFH is to provide program participants with an effective planning approach to aid program participants in taking meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination.

The rule states, “a program participant’s strategies and actions must affirmatively further fair housing and may include various activities, such as developing affordable housing, and removing barriers to the development of such housing, in areas of high opportunity; strategically enhancing access to opportunity, including through: Targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation.”

In addition to the purpose, HUD provided a robust definitions section which lays out the context for terms used frequently throughout the rule. Here are several key definitions from the rule:

- **Affirmatively Furthering Fair Housing (AFFH)** means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation 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, 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. The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development.

- **Disproportionate housing needs** refers to a condition in which there are significant disparities in the proportion of members of a protected class experiencing a category of housing need when compared to the proportion of members of any other relevant groups or the total population experiencing that category of housing need in the applicable geographic area. For purposes of this definition, categories of housing need are based on such factors as cost burden, severe cost burden, overcrowding, and substandard housing conditions, as those terms are applied in the Assessment Tool.
- **Fair housing issue** means a condition in a program participant's geographic area of analysis that restricts fair housing choice or access to opportunity, and includes such conditions as ongoing local or regional segregation or lack of integration, racially or ethnically concentrated areas of poverty, significant disparities in access to opportunity, disproportionate housing needs, and evidence of discrimination or violations of civil rights law or regulations related to housing. Participation in "housing programs serving specified populations," as defined in this section, does not present a fair housing issue of segregation, provided that such programs are administered by program participants so that the programs comply with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–4) (Nondiscrimination in Federally Assisted Programs); the Fair Housing Act (42 U.S.C. 3601–19), including the duty to affirmatively further fair housing; section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Americans with Disabilities Act (42 U.S.C. 12101, et seq.); and other Federal civil rights statutes and regulations.
- **Integration** means a condition, within the program participant's geographic area of analysis, as guided by the Assessment Tool, in which there is not a high concentration of persons of a particular race, color, religion, sex, familial status, national origin, or having a disability or a particular type of disability when compared to a broader geographic area. For individuals with disabilities, integration also means that such individuals are able to access housing and services in the most integrated setting appropriate to the individual's needs. The most integrated setting is one that enables individuals with disabilities to interact with persons without disabilities to the fullest extent possible, consistent with the requirements of the Americans with Disabilities Act and section 504 of the Rehabilitation Act of 1973
- **Protected characteristics** are race, color, religion, sex, familial status, national origin, having a disability, and having a type of disability.
- **Protected class** means a group of persons who have the same protected characteristic; e.g., a group of persons who are of the same race are a protected class. Similarly, a person who has a mobility disability is a member of the protected class of persons with disabilities and a member of the protected class of persons with mobility disabilities.
- **Racially or ethnically concentrated area of poverty** means a geographic area with significant concentrations of poverty and minority populations.
- **Segregation** means a condition, within the program participant's geographic area of analysis, as guided by the Assessment Tool, in which there is a high concentration of persons of a particular race, color, religion, sex, familial status, national origin, or having a disability or a type of disability in

a particular geographic area when compared to a broader geographic area. For persons with disabilities, segregation includes a condition in which the housing or services are not in the most integrated setting appropriate to an individual's needs in accordance with the requirements of the Americans with Disabilities Act, and section 504 of the Rehabilitation Act of 1973. Participation in "housing programs serving specified populations" as defined in this section does not present a fair housing issue of segregation, provided that such programs are administered to comply with title VI of the Civil Rights Act of 1964.

- **Significant disparities in access to opportunity** means substantial and measurable differences in access to educational, transportation, economic, and other important opportunities in a community, based on protected class related to housing.

The Assessment of Fair Housing (AFH) Process

In order to fulfill their AFFH obligation, program participants will be provided an Assessment Tool to use in assessing fair housing issues in its community. HUD will provide the data from nationally standardized datasets and technical assistance to aid program participants in submitting its AFH.

Using the HUD data, local data and knowledge, the required community participation process, and the assessment tool, program participants will evaluate the state of fair housing in their community, identify the primary contributing factors perpetuating fair housing issues, and establish fair housing goals, strategies, and actions to address these issues. Once completed, the AFH is submitted to HUD.

HUD must review each AFH within 60 days after receipt to determine whether the program participant has met the requirements for providing its analysis, assessment, and goal setting. HUD either accepts the AFH or provides the program participant written notification of why the AFH was not accepted and guidance on how the AFH should be revised in order to be accepted. HUD will not accept an AFH if HUD finds that an AFH or a portion of the AFH is inconsistent with fair housing or civil rights requirements or is substantially incomplete.

The goals identified in the AFH must inform the strategies and actions of the Consolidated Plan, the Annual Action Plan, or the PHA Plans. Program participants must submit their AFHs to HUD within nine months before the start of the program year that begins after Jan. 1, 2017. Some smaller agencies were granted additional time. Program participants have flexibility to partner locally and regionally to complete an AFH.

HUD Responses to NAHMA comments on the AFFH Proposed Rule

During the proposed rule phase, NAHMA offered the following recommendations in an effort to improve the final rule. As required by law, HUD provided responses to NAHMA comments in the Final Rule. The NAHMA comments and HUD responses are provided below.

- **NAHMA Comment:** HUD must clarify the rule to ensure that preservation of existing rental housing is encouraged. In its current form, the rule casts doubt on grantees' ability to invest in neighborhoods with ethnic and racial concentrations of poverty. Much of the housing stock in need of revitalization is currently located in distressed areas. The final rule should make clear that

grantees' investments to preserve, rehabilitate and revitalize properties in distressed neighborhoods does affirmatively further fair housing.

HUD Response: The duty to affirmatively further fair housing does not dictate or preclude particular investments or strategies as a matter of law. Under HUD's rule, program participants will identify fair housing issues and contributing factors, prioritize contributing factors (giving highest priority to those factors that limit or deny fair housing choice or access to opportunity or negatively impact fair housing or civil rights compliance), and propose goals to address them. Program participants have latitude, if they so choose, to prioritize their goals and strategies in the local decision making process based on the information, data and analysis in the AFH.

HUD's rule recognizes the role of place-based strategies, including economic development to improve conditions in high poverty neighborhoods, as well as preservation of the existing affordable housing stock, including HUD-assisted housing, to help respond to the overwhelming need for affordable housing. Examples of such strategies include investments that will improve conditions and thereby reduce disparities in access to opportunity between impacted neighborhoods and the rest of the city or efforts to maintain and preserve the existing affordable rental housing stock, including HUD-assisted housing, to address a jurisdiction's fair housing issues. Preservation activities such as the Rental Assistance Demonstration (RAD) or the Choice Neighborhoods Initiative may be a part of such a strategy.

There could be issues, however, with strategies that rely solely on investment in areas with high racial or ethnic concentrations of low-income residents to the exclusion of providing access to affordable housing outside of those areas. For example, in areas with a history of segregation, if a program participant has the ability to create opportunities outside of the segregated, low-income areas but declines to do so in favor of place-based strategies, there could be a legitimate claim that HUD and its program participants were acting to preclude a choice of neighborhoods to historically segregated groups, as well as failing to affirmatively further fair housing as required by the Fair Housing Act.

A balanced approach would include, as appropriate, the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, effective housing mobility programs and/or concerted housing preservation and community revitalization efforts, where any such actions are designed to achieve fair housing outcomes such as reducing disproportionate housing needs, transforming RCAPs/ECAPs by addressing the combined effects of segregation coupled with poverty, increasing integration, and increasing access to opportunity, such as high performing schools, transportation, and jobs.

In addition, place-based and mobility strategies need not be mutually exclusive; for instance, a regional AFH could conclude that additional affordable housing is needed in higher opportunity areas and thus new construction should be incentivized in those places. At the same time, while such efforts are being implemented, preserving the existing affordable rental stock can also still be a priority based on the fair housing issues identified in the AFH, which may include the disproportionate housing needs analysis in the AFH or the need to avoid displacement of assisted residents from areas that may be experiencing economic improvement. Program participants have latitude to adjust their goals, priorities, and strategies in the local decision making process based on

the information, data and analysis in the AFH, so long as the goals, priorities, strategies, and actions affirmatively further fair housing.

- **NAHMA Comment:** NAHMA strongly urges HUD to clarify the proposed certification requirement that grantees “will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.” HUD should clarify what is meant by “materially inconsistent” so that the rule does not inadvertently discourage preservation, rehabilitation or recapitalization of properties in distressed areas. Under this standard, a PHA may be hard-pressed to justify capital improvements on a property that exists in a neighborhood lacking community assets. Similarly, a PHA could struggle to explain how lowering their voucher payment standard in order to be able to stretch their budget and continue to serve the same number of families meets the definition of AFFH.

HUD Response: The commenters concerns about the certification provisions largely arise from concerns that HUD’s rule did not assure a balanced approach and that participation in HUD or other Federal housing programs serving specified populations may be viewed as a violation of the duty to affirmatively further fair housing. HUD has already addressed both of these concerns in this preamble by advising of revisions in this final rule to the “purpose” section of the regulation and to the definition of “affirmatively furthering fair housing,” and by inclusion of a definition of “housing programs serving specified populations.” HUD does not believe the standard of material inconsistency is overly broad. The obligation to affirmatively further fair housing is a statutory obligation, and the certification provisions simply restate the fact that a participant cannot act in a way that is inconsistent with its legal obligation.

Unrelated types of actions would not be materially inconsistent; there would have to be some relationship between the action and the obligation to affirmatively further fair housing. HUD would review the AFH and certification and determine if the actions planned to address the goals in the AFH, or the actions that are taken by the program participant, including those based on the AFH, are materially inconsistent with the obligation to affirmatively further fair housing. If they are, HUD would review the certification under existing procedures in 24 CFR part 91 or the procedures in § 903.15(d)(3) to determine whether the statutory duty is violated. HUD believes that the certification language is appropriate and consistent with statutory requirements and, therefore, makes no change in this final rule.

- **NAHMA Comment:** NAHMA strongly urges HUD to add a “safe harbor.” The proposed rule provides no assurances that grantees have sufficiently met their AFFH obligations. The rule should be amended to include a safe harbor provision that would recognize grantees’ efforts and hold them harmless for factors outside of their control.

HUD Response: As stated earlier in this preamble, this rule does not assess whether a program participant has carried out its statutory obligation to affirmatively further fair housing. As also stated earlier in this preamble, an AFH will be deemed accepted after 60 calendar days from the date HUD receives an AFH unless HUD has provided the program participant(s) with notification that HUD does not accept the AFH.

- **NAHMA Comment:** It is critical that HUD provide an opportunity for a more thorough review of the nationally uniform data that “will be the predicate for and help frame program participants’ assessment activities.

HUD Response: HUD will keep program participants advised as to updates to the data it provides and any other data-related enhancements to the AFH Assessment Tool. HUD declines to specify an interval for periodic updating of data—in part, because it does not always control the source of data and, in part, because enhancements to the data are likely to occur without particular regularity.

- **NAHMA Comment:** Finally, HUD should continue working with grantees to achieve the goals of the proposed rule through the most cost effective and least administratively burdensome means. Before finalizing the rule, the Department should carefully evaluate the administrative and compliance costs to the grantees in the context of sequestration and other federal budget cuts.

HUD Response: In the notice published in the Federal Register on September 26, 2014, soliciting public comment on the AFH Assessment Tool (79 FR 57949), HUD stated, “With the data that HUD provides for use with the Assessment Tool supplemented by available local data and local knowledge, HUD does not anticipate the need for any program participant to turn to outside consultants to collect data and conduct the assessment.” However, HUD appreciates the commenters’ concern about the new AFH process and acknowledges that, in some cases, program participants may hire consultants, as they had when conducting the AI. HUD believes that by providing the data in a more systematic and accessible manner, most program participants will not require consultants.

To this end, HUD commits to tailor its AFHs to the program participant in a manner that strives to reduce burden and create an achievable AFH for all involved. HUD intends to provide, in the Assessment Tool, a set of questions in a standard format to clarify and ease the analysis that program participants must undertake. The Assessment Tool, coupled with the data provided by HUD, is designed to provide an easier way to undertake a fair housing assessment. With respect to concerns about data, the final rule invites program participants to supplement HUD’s data with local data or with local knowledge.

This final rule adopts new definitions of the terms “local data” and “local knowledge” to clarify that these terms refer to readily available information that requires little or no cost to obtain. In addition, HUD has committed to provide technical assistance with preparation of the AFH. These features and the approach of the AFH should result in an effective but not costly or burdensome assessment.

Conclusion

In the coming months, HUD is expected to release different versions of the Assessment Tool for public review and comment, specifically versions for Local Jurisdictions, States, and PHAs will be released. The final rule primarily encourages a more engaged and data-driven approach to evaluating fair housing issues and establishing substantive planning actions to overcome them. If successful, this would be an improvement of the current AI process. Only time will tell if the new AFFH regulation will improve the lives of protected classes who face barriers to fair housing choice. It is important for NAHMA members and the public at large to understand the fair housing issues impacting their respective communities.

Additional Information

A copy of the Final Rule can be found [here](#).

A copy of the Regulatory Impact Analysis that accompanied the Final Rule can be found [here](#).

For additional resources for grantees click [here](#).