

August 16, 2018

HUD Reopens Rule on Affirmatively Furthering Fair Housing

Earlier today, HUD published an advance notice of proposed rulemaking in the Federal Register titled “Affirmatively Furthering Fair Housing: Streamlining and Enhancements.” The purpose of the notice is to solicit public comment on changes to the Affirmatively Furthering Fair Housing (AFFH) rule. Comments will be due on **October 15, 2018**. NAHRO is interested in members’ thoughts on whether and how the rule should be changed; please contact Tushar Gurjal at tgurjal@nahro.org to share your thoughts.

The Department has decided to reopen rulemaking on the Affirmatively Furthering Fair Housing rule for two reasons. First, the Department found that the current assessment tools (used to complete the Assessment of Fair Housing [AFH] required for the AFFH rule) were ineffective. None of the tools are currently in use. Second, many entities submitted comments on regulatory reform to HUD, in which many commenters--though not all--were critical of the rule because of its complexity and the cost of implementation. The commenters wrote that the final rule failed to consider critical factors for program participants, including the scarcity of available resources and other program priorities.

The tools are not being currently used for several reasons. The final state and insular area assessment tool was never completed by HUD. The PHA tool was completed, but HUD never published the data necessary to use the tool. The local government tool was completed, but HUD became aware of “significant deficiencies” with the tool that prevented jurisdictions from properly completing their assessments and prevented HUD from accepting their assessments. The Department found that the tool was unworkable because of a high failure rate of initial submissions (63 percent of the initial AFH submissions were not accepted on initial submission) and the level of technical assistance HUD provided to this initial round of AFHs could not be scaled to accommodate the increase in the number of program participants that would be using the tool.

Given the problems with the implementation of the rule and tools, HUD has chosen to begin the process of amending the AFFH rule. In amending the rule, HUD would like to ensure that the final rule be governed by certain principles: 1) administrative burdens should be minimized, while legal obligations are still met; 2) the process should be more focused on results, rather than the analysis of community characteristics; 3) there should be greater innovation and local control; 4) housing choice should be increased, through greater housing supply; and 5) HUD’s resources should be used efficiently.

The Department provided the following list of questions for which it is seeking responses (reproduced from the notice):

1. **What type of community participation and consultation should program participants undertake in fulfilling their AFFH obligations? Do the issues under consideration in affirmatively furthering fair housing merit separate, or additional, public participation and**

consultation procedures that those already required of program participants in preparing their annual plans for housing and community development (i.e., the Consolidated Plan, Annual Action Plan, or PHA Plan)? Conversely, should public input on AFFH be included as part of the Consolidated Plan/PHA Plan public involvement process?

2. How should the rule weigh the costs and benefits of data collection and analysis? Should the proposed rule allow program participants to develop or use data of their choice? Alternatively, should HUD require the use of a uniform data set by all program participants in complying with their AFFH obligation? Should it vary by the nature of the program participant? Instead of a data-centric approach, should jurisdictions be permitted to rely upon their own experiences? If the latter, how should HUD assess this more qualitative approach?
3. How should PHAs report their AFFH plan and progress? Should jurisdictions be required to provide a detailed report of the analysis performed or only summarize the goals? How often should program participants be required to report on their AFFH efforts? Should the proposed rule retain or revise the current timeframes for required AFFH submissions? Should program participants continue reporting annually on their AFFH actions and results in their program plans and annual performance reports or, given the long-term nature of many AFFH goals, should the reporting period be longer? Should planning and/or results be integrated into existing report structures, such as Consolidated Plans and Consolidated Annual Performance and Evaluations Reports (CAPERs), or utilize an alternative structure?
4. Should the proposed rule specify the types of obstacles to fair housing that program participants must address as part of their AFFH efforts, or should program participants be able to determine the number and types of obstacles to address? Should HUD incentivize program participants to collaborate regionally to identify and address obstacles to affirmatively furthering fair housing, without holding localities accountable for areas outside of their control? Should HUD incentivize grantees and PHAs to collaborate in the jurisdiction and the region to remove fair housing obstacles? What are examples of obstacles that the AFFH regulations should seek to address? How might a jurisdiction accurately determine itself to be free of material obstacles?
5. How much deference should jurisdictions be provided in establishing objectives to address obstacles to identified fair housing goals, and associated metrics and milestones for measuring progress?
6. How should HUD evaluate the AFFH efforts of program participants? What types of elements should distinguish acceptable efforts from those that should be deemed unacceptable? What should be required of, or imposed upon, jurisdictions with unacceptable efforts (other than potential statutory loss of Community Development Block Grant, HOME, or similar funding sources)? How should HUD address PHAs whose efforts to AFFH are unacceptable?
7. Should the rule specify certain levels of effort on specific actions that will be deemed to be in compliance with the obligation to affirmatively further the purposes and policies of the Fair Housing Act (i.e., “safe harbors”), and if so, what should they be?
8. Are there any other revisions to the current AFFH regulations that could help further the policies of the Fair Housing Act, add clarity, reduce uncertainty, decrease regulatory burden, or otherwise assist program participants in meeting their AFFH obligations?

NAHRO is interested in our members' thoughts on changes that should be made to the AFFH rule. If you have suggestions for how the rule can be improved, please contact Tushar Gurjal at tgurjal@nahro.org.

The full notice can be found [here](#).