

02.02.23 | Alerts & Publications

HUD Publishes Proposed AFFH Rule



On January 19, 2023, HUD published a long-awaited proposed Affirmatively Furthering Fair Housing (“AFFH”) rule. This proposed rule would restore the framework of an AFFH rule that was promulgated in 2015 by the Obama Administration (the “2015 Rule”), suspended in 2018 and later withdrawn in 2020 by the Trump Administration, and then partially restored in 2021 by the Biden Administration, as an interim final rule (read KH’s summary of the interim final rule [here](#)). HUD has published the proposed rule along with an op-ed by Secretary Fudge, a fact sheet and FAQ, and a quick reference guide, all of which are available to read [here](#). Comments on the proposed rule are due 60 days after its publication in the Federal Register, which is still forthcoming. The new proposed rule retains many features of the 2015 Rule, but with some key differences.

The AFFH mandate is codified in the Fair Housing Act at [42 U.S.C. § 3608\(d\)](#); the Fair Housing Act explicitly imposes the AFFH duty on HUD at [42 U.S.C § 3608\(e\)\(5\)](#). Federal courts have long found that HUD funding recipients are required, at a minimum, to collect and consider socioeconomic and demographic data when making housing policy decisions and to take proactive steps to address barriers to fair housing and undo historic patterns of segregation. Prior to the 2015 Rule, Program Participants (i.e., jurisdictions and PHAs) were required to certify that they were undertaking fair housing planning, including conducting an analysis of impediments to fair housing choice (“AI”), and taking appropriate actions to overcome the effects of barriers to fair housing. However, compliance with those certifications was inconsistently monitored.

The 2015 Rule replaced the AI with an “Assessment of Fair Housing” – an analysis with a regulatory framework, informed by HUD-provided and local data and public participation requirements, to be submitted to HUD for upfront review and approval. In place of just the certification, the 2015 Rule set out to make the fair housing planning process more transparent and accountable by integrating it into existing consolidated and PHA planning requirements. While the 2015 Rule marked a step forward in the oversight of AFFH, it also triggered significant concern about the capacity of Program Participants to meet new requirements – as well as HUD’s capacity to review the assessments and apply consistent standards. Unfortunately, the suspension of the implementation of the 2015 Rule in 2018 and its subsequent repeal in 2020 limited opportunities to learn from the new framework.



Nevertheless, HUD states that the new proposed rule is informed by the feedback that the agency received post-2015. Notably, the proposed rule would replace the Assessment of Fair Housing with an “Equity Plan,” provide for a longer HUD review timeline, and incorporate additional public participation into both planning and enforcement elements.

Core Similarities to 2015 Rule

Applicability. As with the 2015 Rule, the proposed rule would apply to the following Program Participants:

- States, local governments, and insular areas that receive HUD formula grant funding from one or more of the following programs: Community Development Block Grants (CDBG); HOME Investment Partnerships Program (HOME); Emergency Solutions Grants (ESG); Housing Opportunities for Persons With AIDS (HOPWA) program; and the Housing Trust Fund (HTF).
- Public housing agencies that receive assistance under Section 8 or Section 9 of the United States Housing Act of 1937

Purpose. The proposed rule seeks to implement HUD’s statutory obligation under the Fair Housing Act to ensure that Program Participants affirmatively further fair housing, proactively redressing patterns of segregation, housing discrimination, and discriminatory disinvestment. As under the 2015 AFFH Rule, HUD does not propose to mandate the adoption of specific policies. Program Participants would be required to identify fair housing issues within their jurisdiction and set meaningful goals that can be measurably implemented over three to five years.

Joint Plans. HUD proposes to maintain the option for Program Participants to pool resources and collaborate on a “joint Equity Plan,” while eliminating a separate (and, according to HUD, unnecessarily confusing) mechanism from the 2015 AFFH Rule for regional submissions.

Key Changes from 2015 AFFH Rule

“Equity Plan” replaces the Assessment of Fair Housing. The proposed rule would replace the Assessment of Fair Housing required by the 2015 AFFH Rule with the submission of an “Equity Plan.” As compared to the Assessment of Fair Housing, HUD describes the Equity Plan as reducing the extent of the data interpretation and written analysis that Program Participants are asked to undertake. The proposed rule, at Section 5.154(d), prescribes the specific questions to be addressed in an Equity Plan; in comparison, the 2015 Rule provided a general framework but left specific questions to sub-regulatory guidance. Inscribing the content of the Equity Plan in regulation represents a tradeoff: additional certainty for Program Participants about what is required, but less flexibility for HUD to adapt without going through a new rulemaking process.

HUD solicits feedback as to whether the redesigned submission would adequately alleviate administrative burdens for smaller Program Participants while appropriately scaling expectations for those with more content to analyze and more resources at their disposal.

Increased Emphasis on Public Participation/Transparency. While the 2015 Rule already placed significant emphasis on public participation, the new proposed rule requires Program Participants to provide more detail about the community engagement efforts surrounding the development of an Equity Plan. Community members would also be newly empowered to submit Equity Plan feedback directly to HUD for up to 60 days after its submission. The proposed rule

requires Equity Plans, annual progress updates, “any written feedback” on accepted Equity Plans, as well as notifications of non-acceptance, and related notifications/communications to be published on HUD’s website.

Extended HUD Review Process. The new proposed rule provides for a 100-day HUD review period that can be extended for “good cause” compared with a 60-day review period without extension under the 2015 Rule. The proposed rule further provides for a process by which Program Participants may provide “special assurances” that gives an additional 180 days for an Equity Plan to be accepted after the consolidated plan/PHA plan review. In addition, the proposed rule provides that if that deadline is not met, the Secretary “shall promptly initiate termination of funding” and not grant additional funds until the Program Participant comes into compliance.

New Administrative Complaint Process. HUD proposes to create a new administrative complaint mechanism through which the agency could investigate the potential noncompliance of a Program Participant with the AFFH rule or the Participant’s own Equity Plan commitments. The proposed rule would allow for different possible enforcement outcomes, including funding termination, although HUD notes that the agency would seek to tailor enforcement remedies to avoid negatively impacting individuals and families who receive assistance.

With this proposal, HUD responds to fair housing and civil rights advocates seeking a formal avenue to make complaints, providing additional “teeth” for HUD’s enforcement of AFFH obligations. While HUD has existing authority to enforce AFFH through regular program oversight processes, investigations of discriminatory housing practices or False Claims Act lawsuits, the agency’s proposal further signals that its door is open to dedicated AFFH complaints.

HUD states that it does not intend the new “complaint and compliance review process to supplant the planning process as the principal means by which HUD and its program participants will implement the AFFH obligation and by which the community will have input into how AFFH compliance takes place.” Nonetheless, Program Participants may be concerned that the new complaint process could lead to contentious outcomes.

Balanced Approach. In Section 5.152, HUD proposes a regulatory definition of “Balanced Approach,” intended to address the tension between so-called “place-based” and “mobility” strategies to further fair housing. Place-based strategies generally involve investment in high poverty neighborhoods to address affordable housing and community development needs. Mobility strategies, on the other hand, seeks to create more options for affordable housing in “areas of opportunity.” In the 2015 Rule, HUD laid out a “balanced approach” that described both place-based and mobility strategies as potential means to affirmatively further fair housing. In the new proposed rule, HUD appears to place its thumb on the mobility side of the scale by stating that a Program Participant with the “ability to create to create greater fair housing choice outside segregated, low-income areas should not rely on solely place-based strategies,” without a corresponding directive in the other direction.

Proposed Implementation

HUD proposes a tiered submission schedule that provides for larger Program Participants to make up the first cohort to submit an Equity Plan (in addition to keying deadlines to different program years).

- For public housing agencies, the submission tiers would be tied to the aggregate number of units and vouchers the PHA administers.



- For other Program Participants, the submission tiers would be tied to the aggregate amount of formula funding that the Participant receives.

This housing alert is intended as a source of information for clients and friends of Klein Hornig LLP. The content should not be construed as legal advice, and readers should not act upon information in this publication without professional counsel. This housing alert may be considered advertising under certain rules of professional conduct. Copyright © 2023 Klein Hornig LLP. All rights reserved.

Authors



Emily J. Blumberg
Partner
eblumberg@kleinhornig.com
202.926.3409



Adam G. Norlander
Partner
anorlander@kleinhornig.com
202.926.3410



Claudia Wack
Associate
cwack@kleinhornig.com
617.224.0654