



L.P. COOKINGHAM INSTITUTE OF URBAN AFFAIRS

# ISSUE BRIEF

## *Affirmatively Furthering Fair Housing: Understanding the New Rule*

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The U.S. Department of Housing and Urban Development (HUD) published a new rule for affirmatively furthering fair housing (AFFH) on July 16, 2015; it became effective August 17, 2015. The rule covers the 1,209 states, local governments, and insular areas that receive federal block grant funding, as well as the nation's more than 3,000 public housing agencies. Federal block grant jurisdictions and public housing agencies are known as program participants for the purpose of the new rule (HUD Guidebook 2015).

Federal block grants to states, local governments, and insular areas are important sources of community development funds. In federal fiscal year 2016, Congress approved more than \$6.6 billion in community-oriented block grant funding (HUD 2016). Each block grant jurisdiction receives funding from one or more of the following programs: Community Development Block Grant (CDBG), HOME Investment Partnerships Program (HOME), Housing Opportunities for Persons with Aids (HOPWA), and Emergency Solutions Grant (ESG). Allocations are made through a population-based formula, with many smaller jurisdictions receiving only CDBG. Public housing agencies receive funds under one or more programs, including the Public Housing Operating Fund, the Housing Choice Voucher

program (formerly known as Section 8), and others.

This *Issue Brief* provides an overview of the new AFFH rule in an effort to advance understanding of the rule among elected officials, public managers, planners, nonprofit community professionals, advocates, and citizens at large. It is arranged in the following sections: AFFH Definition, The New Rule's Purpose, AFFH in Historical Perspective, New Rule Requirements, and Implications for Practice.

### **AFFH Definition**

Although the requirement to affirmatively further fair housing has been a part of U.S. law since passage of the Fair Housing Act in 1968, the new rule provides the first specific definition of AFFH:

*Affirmatively furthering fair housing* 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 (AFFH Rule, § 5.152).

### **The New Rule's Purpose**

The purpose of the new rule is to strengthen fair housing planning and practice. It is also intended to better educate participating programs as to their responsibilities with regard to fair housing planning and implementation. The primary focus of the new rule is the replacement

of the previous fair housing planning process with a new, more comprehensive process. The new process requires a more extensive analysis of housing patterns, including regional issues. It also requires a more standardized approach to fair housing planning. Ultimately, the new rule is intended to result in more effective incorporation of fair housing priorities and goals into housing and community development planning, programs, and activities (AFFH Rule, § 5.152).

### **AFFH in Historical Perspective**

Congress passed the Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601 to 3619) following the assassination of Dr. Martin Luther King, Jr. (Smyth, Allen and Schnaith 2015, 232). The Fair Housing Act included a mandate that “[a]ll executive departments and agencies . . . administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further [fair housing].” (Fair Housing Act, § 3608). The mandate to affirmatively further fair housing requires the U.S. Department of Housing and Urban Development to administer its programs in a manner that works to diminish housing discrimination, promote fair choice in housing, and ensure compliance with the Fair Housing Act (GAO 2010). AFFH is viewed as a landmark feature of the Fair Housing Act, because it goes beyond simply banning discrimination. AFFH requires government to take affirmative action to combat such discrimination. No other civil rights legislation took this step (Hannah-Jones 2012). However, just what constitutes “affirmatively furthering” fair housing was not defined in the Fair Housing Act or in any of its subsequent amendments (Hannah-Jones 2012). It took passage of the 2015 rule to provide a specific definition for AFFH.

*Segregation and the Great Migration.* The Great Migration (1916-1970) of African Americans from the South to the cities of the

North, Midwest, and West, coupled with large numbers of newly arrived foreign immigrants, motivated previously homogeneous cities to engage in multiple practices that resulted in widespread patterns of hyper-segregation in American neighborhoods (Massey & Denton 1993). Initial efforts to enforce neighborhood segregation were based on sheer intimidation, but by the 1920s institutional methods were adopted to accomplish this aim (Massey & Denton 1998, 35). These methods included restrictive covenants, discriminatory zoning and lending practices, and racial steering of home seekers. Moreover, segregation resulted from past requirements in federal programs such as Federal Housing Administration (FHA) mortgage insurance (Drier, Mollenkopf, and Swanstrom 2014).

Racial segregation contributed to strong feelings of inequality and injustice among African Americans, culminating in urban riots across America in the 1960s (Sidney 2001). Rioting occurred in 60 cities in just a two-month period in 1967, prompting civil rights activists to shift their attention to the inequality of living conditions across the country, rather than only in the South (Sidney 2001). A strong realization emerged that residential segregation was a formidable mechanism of racial oppression and was likely the most prominent method deployed outside of the South (Sidney 2001).

*Fair Housing Law Prior to 1968.* Some efforts were made to address housing segregation prior to passage of the Fair Housing Act

in 1968. New York City passed the first fair housing law in the U.S. in 1957. By 1968, 22 states had passed some version of fair housing law. These ground-breaking fair housing laws clearly influenced the form of the federal Fair Housing Act (Collins 2006).

*Fair Housing Act and Amendments.* The Fair Housing Act departed from previous civil rights legislation, which targeted practices of disenfranchisement and segregation in the South. Instead, the new fair housing law took



*Downtown Kansas City, Missouri*

aim at segregation practices throughout the country (Zasloff 2016). The Fair Housing Act had two broad objectives: (1) the elimination of housing discrimination; and (2) the racial integration of American society (Goetz 2015; Smyth, et al., 2015). The mandate to affirmatively further fair housing was included in the Fair Housing Act as a means of fulfilling the objective of racial integration of American neighborhoods (Smyth, et al. 2015).

Initially, the Fair Housing Act only included



race, color, religion, and national origin as protected classes (Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968)); sex was added in 1974 (Pub. L. No. 93-383, § 808, 88 Stat. 729 (1974)). The act was amended in 1988, and the amended act strengthened HUD's enforcement authority and provided for stiffer penalties for offenders (Fair Housing Act, §§ 3610-3612). Further, 1988 amendments also created two new protected classes by barring housing discrimination based on disability or familial status (Fair Housing Act, §§ 3604-3606).

*AFFH Implementation.* AFFH implementation is a complex process, and fulfillment of legislative intent has not been consistent. For instance, between 1974 and 1983, HUD never utilized its authority to withhold a block grant from a community for failing to affirmatively further fair housing (Hannah-Jones 2012). In the years since 1983, HUD has been criticized for only taking action in instances where they have been sued to compel action (Hannah-Jones 2012).

The requirement that program participants prepare an Analysis of Impediments to Fair Housing Choice (AI) was introduced in the mid-1990s. HUD designated the fair housing planning requirement represented by the AI as a devolution strategy. HUD's *Fair Housing Planning Guide* (1996) described devolution in fair housing planning as means to "empower American cities for years to come (HUD 1996; i)." The federal Consolidated Plan requirement was also introduced in the mid-1990s for jurisdictions receiving block grant funds. The AI was intended to inform the consolidated planning process and be revised on the same cycle as the Consolidated Plan, typically every five years. The AI was also required of public housing agencies along with their Public Housing Agency Plans.

Despite HUD's requirement that program participants prepare and submit AIs on a schedule to coincide with Consolidated or Public Housing Agency Plan submission, a 2010 GAO

review found many participants' AIs to be out of date or ineffective at identifying impediments to fair housing. Further, they often failed to provide time frames for correction of identified impediments. As a result, the GAO concluded that HUD oversight and enforcement approaches were inadequate to ensure program participants were taking steps to affirmatively further fair housing. Perceived deficiencies in the effectiveness of the AI and HUD's regulatory oversight of AFFH implementation eventually led to introduction of the new, stronger rule passed in July 2015.

### New Rule Requirements

The new rule replaces the AI with an Assessment of Fair Housing (AFH). It requires the incorporation of AFH findings and goals into all planning processes, programs, and activities. This requirement extends not only to plans, programs, and activities relying on federal funding, but to all plans, programs, and activities related to housing and urban development (HUD Guidebook 2015).

Further, HUD explicitly encourages a regional approach to fair housing, since a regional approach better reflects the realities of modern living and commuting patterns. Even those participants preparing the AFH without regional collaboration must include a regional analysis in their fair housing plans. New requirements will also result in an AFH that is more standardized than the old AI. Finally, the AFH places greater emphasis on citizen involvement in the fair housing planning process than did the previous process (AFFH Rule, § 5.152).

The AFH is meant to improve each participant's ability to identify, prioritize, and respond to fair housing issues (HUD 2015). The AFFH rule stipulates that HUD will review AFHs for compliance, and receipt of HUD-administered funds is conditioned on an accepted AFH (HUD Guidebook 2015). HUD has made a concerted effort to provide program participants with the

tools and information they need to complete an AFH in a timely and appropriate manner. Central to this approach are the HUD-created Assessment Tools. These tools provide program participants with a web-based portal for assistance in completing the AFH (HUD Guidebook 2015). The Assessment Tools provide prompts, questions, and instructions for completion of the AFH, as well as guidance on what HUD-provided AFFH data and maps should be utilized and where they should appear in the AFH (HUD Guidebook 2015).

More specifically, HUD's *Affirmatively Furthering Fair Housing Rule Guidebook* (2015) describes general requirements for program participants:

- Analyze data and other information and engage the community in fair housing planning;
- Conduct and submit to HUD an AFH that identifies, at a minimum, certain types of fair housing issues in the jurisdiction and region;
- Identify and prioritize significant contributing factors for each fair housing issue identified;
- Set fair housing goals for overcoming the effects of the prioritized contributing factors, and related fair housing issues;
- Integrate the goals and priorities established in the AFH into subsequent plans for the use of HUD funds (Consolidated Plans, annual action plans, and [Public Housing Agency] Plans) consistent with the statutory requirements and goals governing such programs; and
- Certify that the program participant will take meaningful actions to further the goals identified in its AFH and take no action that is materially inconsistent with its obligation to affirmatively further fair housing. (HUD Guidebook 2015, 5-6)

The time for submission of each program participant's first AFH is dependent on several factors described in the *AFFH Rule Guidebook* (HUD Guidebook 2015). Kansas City, Missouri, is one of the first HUD program participants to undertake preparation of a regional AFH. This AFH is due in early October 2016 and will feature collaboration between Kansas City and a number of other program participants in the region.





In general, the new rule requires a process in three phases: (1) fair housing planning during the preparation of an AFH; (2) HUD review and acceptance of the AFH; and (3) implementation of fair housing strategies with HUD review. Community participation is required during the fair housing planning phase (AFFH Rule, §§ 5.154(6), 5.158). During the review phase, HUD evaluates submitted AFHs to determine whether they comply with the AFFH Rule (AFFH Rule, § 5.162(a)). The AFH is automatically deemed accepted sixty days

AFH acceptance does not end the process. Program participants are required to implement their strategies to affirmatively further fair housing. After the initial AFH, each future AFH will require a review of progress achieved since submission of the prior AFH (AFFH Rule, § 5.154(d)(7)). Further, the rule requires program participants to maintain records that demonstrate the actions it takes to affirmatively further fair housing (AFFH Rule, § 5.168).

Although HUD does not prescribe specific strategies to affirmatively further fair housing,

it does provide information on place-based and mobility strategies that may be used as part of a balanced approach (HUD Guidebook 2015). Place-based strategies are intended to improve conditions in neighborhoods with high concentrations of minority, low-income households (Drier, Mollenkopf, and Swanstrom 2014), while mobility strategies focus on dispersal of minorities to higher-opportunity neighborhoods without a concentrated minority population (Goetz 2015). Thus, a balanced approach allows room for adopting both place-based and mobility strategies.



from the date HUD receives the AFH, unless HUD rejects the proposed AFH and gives specific reasons for the rejection (AFFH Rule, § 5.162(a)). Because the AFH is required with the Consolidated and Public Housing Agency Plans, a program participant may lose federal block grant or public housing funds if their AFH is found to be unacceptable (AFFH Rule, § 5.162(d)).

### Implications for Practice

While the AFFH Rule “does not prescribe, compel, or enforce concrete actions by local governments, . . . [t]he rule instead encourages a more engaged and data-driven approach to assessing the state of fair housing and planning actions” (Bostic & McFarlane 2013). Perhaps the most important implication for HUD

grant recipients is that the agency has demonstrated a strengthened commitment to affirmatively further fair housing. This strengthened commitment poses a credible risk that program participants failing to comply with the new rule will lose substantial funding.

HUD is providing increased assistance to program participants in fair housing planning through its Assessment Tools and data sets, but those charged with preparing the AFH face numerous hurdles. One hurdle is simply that of time; the fair housing planning process will require significant time commitments on the part of program participants' staff. To the extent that some jurisdictions may not have sufficient capacity to accomplish the fair housing planning process without external assistance, another hurdle may be posed by the need to devote financial resources to consultants who can provide needed capacity.

A continuing challenge to fair housing planning processes across the nation is that of involving a sufficiently diverse pool of citizens in analyzing conditions and making recommendations for action. Fair housing planning must involve members of historically under-represented groups such as racial and ethnic minorities, low-income persons, and persons with disabilities if a meaningful AFH is to be developed. Obtaining participation by members of these groups is a hurdle that must be overcome by skillful practice and a strong commitment to inclusive planning and decision making.

Beyond the details of how the work of fair housing planning will be accomplished under the new rule, the adoption of effective strategies for breaking up historic patterns of segregation must be supported by increased knowledge about what works. While some evidence is available on the outcomes of various strategies for increasing community inclusiveness, much more is needed. Scholars must work closely with practitioners in research that will produce empirical evidence useful for elected officials, public managers, planners, nonprofit

community professionals, advocates, and citizens in working toward a vibrant future where individuals are free from barriers to economic and social mobility regardless of where they live.

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