

**CLPHA Member Call**

**HUD's Proposed Affirmatively Furthering Fair Housing Rule  
March 10, 2020 at 3pm EST**

**Background.** On January 14, 2020, HUD issued a notice of proposed ruling regarding Affirmatively Furthering Fair Housing (the "AFFH Proposed Rule") which proposes substantive revisions to the final AFFH rule issued in 2015. In addition to these substantive revisions, HUD has presented 30 specific questions for comment. Comments are due Monday, March 16, 2020.

**Issues for Discussion**

- Substantive changes to the definition of "Affirmatively Furthering Fair Housing"

Under the 2015 Rule, AFFH means "taking meaningful actions" that address disparate access to housing needs, segregated housing, and concentrated areas of poverty, and "fostering and maintaining compliance with civil rights and fair housing laws." HUD now proposes to define AFFH as "advancing fair housing choice," which consists of 3 components:

"(1) Protected choice, meaning the absence of discrimination.

(2) Actual choice, meaning not only that affordable housing options exists ... but that the information and resources are available to enable informed choices.

(3) Quality choice, meaning that the available and affordable housing is decent, safe, and sanitary, and, for persons with disabilities, accessible as required under civil rights laws."

The AFFH Proposed Rule effectively changes the focus of AFFH from actively addressing fair housing issues to addressing the economics of housing supply.

<b>Question 1 to members: do you support or oppose this change?</b>
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- Substantive changes to the AFFH certification requirement

To meet its AFFH certification requirement, jurisdictions must identify at least three goals intended to address fair housing choice or obstacles to fair housing choice that have "concrete and measurable outcomes or changes." Obstacles that are "inherent barriers" to "fair housing choice" include but are not limited to:

- Lack of a sufficient supply of decent, safe, and sanitary housing that is (a) affordable or (b) affordable *and* accessible to people with disabilities;

- Concentration of substandard housing stock in a particular area;
- Inflexible or unduly rigorous design standards or other similar barriers which unreasonably increase the cost of the construction or rehabilitation or impede the development or implementation of innovative approaches to housing;
- Lack of effective, timely, and cost-effective means for clearing title issues;
- Source of income restrictions on rental housing;
- Administrative procedures that restrict or otherwise materially impede approval of affordable housing development;
- High rates of housing-related lead poisoning in housing;
- Artificial economic restrictions on the long-term creation of rental housing, e.g. rent control;
- Unduly prescriptive or burdensome building and rehabilitation codes;
- Arbitrary or excessive energy and water efficiency mandates;
- Unduly burdensome wetland or environmental regulations;
- Cumbersome or time-consuming construction or rehabilitation permitting and review procedures;
- Tax policies which discourage investment or reinvestment;
- Arbitrary or unnecessary labor requirements.

**Question 2 to members: should any of the above factors be revised or removed? Are there other factors that should be considered inherent barriers to fair housing? [HUD Q4/5]**

- Scoring metrics for AFFH performance

HUD proposes to create a scoring metric that evaluates whether program participants are meeting their AFFH obligations and incentivizes improvement through various benefits. The proposed metric will utilize “a series of data-based measures to determine whether a jurisdiction (1) is free of adjudicated fair housing claims; (2) has an adequate supply of affordable housing throughout the jurisdiction; and (3) has an adequate supply of quality affordable housing.”

However, HUD has not provided any information about the specific metrics or the evaluation points. “HUD plans to publish a notice for public comment identifying the specific sources of data and the method for creating a jurisdiction’s metric score when the [AFFH Proposed Rule] *is finalized*” (emphasis added). As currently proposed, HUD is effectively proposing to bind jurisdictions to a final rule that uses a yet-to-be-determined scoring metric.

**Question 3 to members: are there specific data HUD should use for certain categories?  
[HUD Q8]**

**Question 4 to members: what process should HUD undertake for updating metrics, scoring, and weighting metrics and how often should these updates occur? [HUD Q9]**

**Regarding adjudicated fair housing claims**

**Question 5 to members: can HUD consider the adversely adjudicated fair housing claims without unduly influencing civil rights litigation? In other words, can HUD consider such claims without unduly incentivizing settlement of such claims to avoid an adjudicated finding? [HUD Q12]**

**Question 6 to members: are there circumstances in which a jurisdiction should not be held accountable for adversely adjudicated fair housing claims against a PHA? Are there ways to account for adjudications against PHAs without penalizing the entire jurisdiction?  
[HUD Q13]**

**Regarding affordability**

**Question 7 to members: other than housing prices, fair market rents, the burden housing costs place on very-low- to moderate-income families, the ability of tenants with housing choice vouchers to access housing throughout the jurisdiction, and the existence of excess housing choice voucher reserves, are there other data points HUD should use to measure affordability as it relates to fair housing choice? [HUD Q14]**

**Question 8 to members: are there other measures that HUD could use or create to encourage more affordable housing development throughout a jurisdiction? [HUD Q18]**

**Regarding quality**

**Question 9 to members: other than worse-case housing needs data, which documents lack of kitchen facilities and adequate plumbing and overcrowding, as well as the prevalence of housing with lead-based paint hazards, are there other data points HUD should include to measure housing conditions as they relate to fair housing? If so, are there any additional considerations in using those data points necessary to ensure an accurate measure? [HUD Q19]**

- Ranking and evaluation of program participants

Using the yet-to-be-determined scoring metric, HUD proposes to evaluate all program participants and rank them according to performance. High-scoring program participants and those showing improvement would be eligible for various benefits, including “preference points on Notices of Funding Availability (NOFAs) or eligibility to receive additional program funds due to reallocations of recaptured appropriated funds and other forms of regulatory relief.”

**Question 10 to members: HUD is considering ranking jurisdictions based on “by right” land use or the amount of additional burden local regulations place on the housing market by unduly increasing housing costs. Do such measures exist? How could HUD work to create one? [HUD Q17]**

**Question 11 to members: how should HUD determine ranking of high and low AFFH performers? Should a baseline percentage be used (for example, the top 20 percent and bottom 20 percent), or should some other ranking be used (for example, a “natural break” in the distribution where there is a material distinction between jurisdictions)? If a percentage, what is the appropriate percentage, and why? Would it be appropriate to set a percentage and then allow the Secretary to deviate from that baseline when the data warrants it? What would be the effects of using each type of approach? [HUD Q21]**

**Question 12 to members: should there be two tiers of rewards for high performing jurisdictions, such as “outstanding” and “high pass,” where “outstanding” performers receive regulatory relief and extra funding, while “high pass” performers receive just one category of relief, such as extra funding? What would be the effects of such an approach? [HUD Q22]**

**Question 13 to members: what other rewards should HUD consider for outstanding AFFH performers? Are there statutory or regulatory changes that HUD should pursue to increase the availability of such rewards? [HUD Q24]**

**Question 14 to members: are there specific forms of regulatory relief that HUD should consider for outstanding AFFH performers? [HUD Q25]**

**Question 15 to members: what remedies should HUD consider requiring of jurisdictions who are not improving on their AFFH score? [HUD Q26]**