

## **HUD Rule: Preserving Community and Neighborhood Choice**

By: Shaun McGann, Legislative Analyst II  
December 29, 2020 | 2020-R-0280

### **Issue**

This report describes the effects of the federal Department of Housing and Urban Development's final rule "Preserving Community and Neighborhood Choice." (The Office of Legislative Research is not authorized to provide legal opinions and this report should not be considered one.)

### **Summary**

On August 7, 2020, the Department of Housing and Urban Development (HUD) published a new final rule, Preserving Community and Neighborhood Choice (PCNC). PCNC generally repealed the requirements of HUD's 2015 Affirmatively Furthering Fair Housing (AFFH) final rule and 1994 Analysis of Impediments (AI) regulations, thus reducing HUD grantees' requirements to "affirmatively further fair housing." However, President-elect Biden's campaign has stated the new administration plans to revert to the requirements of the 2015 AFFH rule. Under state law, housing agencies and entities participating in programs administered by these agencies have an affirmative duty to promote fair housing.

### **Background**

Congress passed the [Fair Housing Act](#) (FHA) in 1968 prohibiting a broad range of discriminatory practices to ensure equal access to housing opportunities (see OLR Report [2013-R-0430](#) for more information on the FHA generally). The FHA requires HUD to administer housing programs in a manner affirmatively to further the policies of the FHA ([42 U.S.C. § 3608\(e\)\(5\)](#)).

On January 17, 1994, President Clinton signed [Executive Order 12892](#) requiring, among other things, that HUD promulgate regulations that "describe a method to identify impediments in programs or activities that restrict fair housing choice and implement incentives that will maximize the achievement of practices that affirmatively further fair housing." HUD's [AI regulations](#) subsequently took effect February 6, 1995, requiring grantees to submit a certification to affirmatively further fair housing, meaning grantees were required to conduct an analysis to identify impediments to fair housing choice, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions. Detailed information regarding AI requirements is available in HUD's [Fair Housing Planning Guide](#).

In September 2010, the U.S. Government Accountability Office (GAO) released a 53-page [study](#) of HUD's AI requirements, finding it was unclear as to whether AIs were an effective tool for grantees to identify and address impediments to fair housing; GAO pointed to HUD's limited regulatory requirements and oversight as key contributing factors. ([Connecticut's 2015 AI](#) is available via the Department of Housing's (DOH) website.)

[HUD's AFFH rule, first proposed in 2013](#), was revised and published as a final rule on July 16, 2015, taking effect on August 17, 2015. Acknowledging AI requirements had not been as effective as originally envisioned in affirmatively furthering fair housing, HUD crafted the AFFH rule with the intent of refining its prior approach by replacing AIs with an Assessment of Fair Housing (AFH). [According to HUD's overview of the rule](#), this approach "strengthens the process for program participants' assessments of fair housing issues and contributing factors and for the establishment of fair housing goals and priorities by requiring use of an Assessment Tool, providing data to program participants related to certain key fair housing issues, and instituting a process in which HUD reviews program participants' assessments, prioritization, and goal setting."

## **Affirmatively Furthering Fair Housing Rule**

[HUD summarized](#) the major provisions of the AFFH rule as follows:

1. replacing the AI with a more effective and standardized assessment (i.e., AFH) through which program participants identify and evaluate fair housing issues, and factors contributing to fair housing issues (contributing factors);
2. improving fair housing assessment, planning, and decision making by HUD providing data that program participants must consider in their assessments of fair housing—designed to aid program participants in establishing fair housing goals to address these issues and contributing factors;

3. incorporating, explicitly, fair housing planning into existing planning processes, the consolidated plan and public housing agency (PHA) Plan, which, in turn, incorporate fair housing priorities and goals more effectively into housing, and community development decision making;
4. encouraging and facilitating regional approaches to address fair housing issues, including collaboration across jurisdictions and PHAs; and
5. providing an opportunity for the public, including individuals historically excluded because of characteristics protected by the Fair Housing Act, to provide input about fair housing issues, goals, priorities, and the most appropriate uses of HUD funds and other investments, through a requirement to conduct community participation as an integral part of the new assessment of fair housing process.

Additionally, in its [Affirmatively Furthering Fair Housing Rule Guidebook](#) (see pages 5 and 6), designed to help program participants and the public understand AFFH and the corresponding AFH obligation, HUD outlines a number of AFH requirements. Under AFFH, program participants were required to, among other things:

- 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 PHA 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.

For the full regulations under AFFH, see [24 C.F.R. §§ 5.150-168](#). Additionally, HUD's AFFH Fact Sheets on [The Duty to Affirmatively Further Fair Housing](#) and [The Fair Housing Planning Process Under the AFFH Rule](#) provide summary information on AFFH requirements.

## **Preserving Community and Neighborhood Choice Rule**

After [extending](#) the deadline for the submission of AFHs (January 5, 2018), [withdrawing](#) the local government assessment tool related to conducting and submitting an AFH (May 23, 2018), and

[returning](#) to AI requirements (May 23, 2018), HUD ultimately issued its [PCNC final rule](#), generally [repealing](#) prior AFFH and AI requirements where they appear in regulation (effective September 8, 2020). According to HUD, PCNC marked a return to the original understanding of statutory AFFH certification prior to the 1994 AI requirements: a general commitment that grantees will use funds to actively promote fair housing.

The rule, among other things, repealed all AFFH regulations and replaced them with three provisions:

[24 C.F.R. § 5.150\(a\)](#) defines “fair housing” as “housing that, among other attributes, is affordable, safe, decent, free of unlawful discrimination, and accessible as required under civil rights laws.”

[24 C.F.R. § 5.150\(b\)](#) defines “affirmatively further” to mean “to take any action that is rationally related to promoting any attribute or attributes of fair housing....”

[24 C.F.R. § 5.151](#) states that a grantee’s certification “that it will affirmatively further fair housing is sufficient if the participant takes, in the relevant period, any action that is rationally related to promoting one or more attributes of fair housing as defined in section 5.150(a).”

In sum, under the new PCNC rule, a grantee can presumably meet its obligation to affirmatively further fair housing by certifying it has taken any action related to promoting the fair housing attributes described in 24 C.F.R. § 5.150(a). The new rule represents a broadening of "affirmatively furthering fair housing," thus lowering the bar for meeting this requirement in comparison to the specific guidelines and procedures established under the AFFH rule.

## Outlook Under Biden Administration

President-elect Biden's [campaign platform on housing](#) states the administration plans to roll back the PCNC rule and implement the prior AFFH rule. [According to Politico](#), due to the 2015 AFFH rule previously being on the books, the Biden administration may revoke the replacement regulation and revert to AFFH without going through the process of promulgating a new rule.

## State Law

Similar to the FHA's mandate to affirmatively further fair housing, state law requires DOH, the Connecticut Housing Authority, and the Connecticut Housing Finance Authority (CHFA) to affirmatively promote fair housing choice and racial and economic integration in all programs the agencies administer or supervise ([CGS § 8-37cc](#)). Entities participating in any program these housing agencies administer have an affirmative duty to promote fair housing in all housing

developments assisted or supervised under any provision of [CGS Title 8](#) (Zoning, Planning, Housing, and Economic and Community Development) ([CGS § 8-37ee](#)). Additionally, any entity applying for financial assistance under a program administered by an agency created under this title must submit to the agency and implement, an affirmative fair housing marketing plan. Plans must include provisions for recruiting an applicant pool containing residents of municipalities with relatively high concentrations of minority populations. The recipient agency must periodically review plans to confirm creation of such applicant pools. It may require revisions to plans.

## Additional Reading

- Gurjal, Tushar. ["Final AFFH Rule Released."](#) *The National Association of Housing and Redevelopment Officials: The NAHRO Blog*. July 27, 2020.
- Kelly, Harry J. ["New HUD Rule Repeals Obama-Era Affirmatively Furthering Fair Housing Rule."](#) *Nixon Peabody: Affordable Housing Alert*. August 10, 2020.
- Russo, Megan. ["Preserving Community and Neighborhood Choice?"](#) *The Penn Program on Regulation: The Regulatory Review*. November 17, 2020.

SM:kl