

Frequently Asked Questions

Interim Final Rule: Restoring Affirmatively Furthering Fair Housing Definitions and Certifications

HUD's Office of Fair Housing and Equal Opportunity (FHEO) provides the following frequently asked questions and answers regarding its recently issued rule, "Restoring Affirmatively Furthering Fair Housing Statutory Definitions and Certifications." This list is not exhaustive and may be updated. For more information, see HUD's AFFH Rule, 86 FR 30779.

Q. What is the AFFH Interim Final Rule (IFR)?

A. The AFFH interim final rule restores certain definitions and certifications that are grounded in legal precedent to HUD's regulations implementing the Fair Housing Act's requirement to affirmatively further fair housing (AFFH). The Fair Housing Act prohibits among other things, discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, because of "race, color, religion, sex, familial status,¹ national origin, or handicap."² See 42 U.S.C. 3604 and 3605. The Fair Housing Act extends beyond this non-discrimination mandate, requiring HUD to administer its programs and activities relating to housing and urban development in a manner that affirmatively furthers the purposes of the Fair Housing Act. 42 U.S.C. 3608(e)(5). While this mandate is directly imposed on HUD, HUD carries it out by extending the obligation to recipients of HUD funding. The rule also reinstates a process by which HUD will provide support and guidance to funding recipients that voluntarily seek the Agency's assistance in satisfying their duties, such as by undertaking fair housing planning in support of their AFFH certifications. No program participant will be required to participate in this process, which is for the benefit of those who want assistance in fulfilling their statutory obligations. The IFR repeals the Preserving Community and Neighborhood Choice (PCNC) rule which was promulgated in August 2020 and had redefined the AFFH obligation in a manner that was not consistent with the statutory requirement and longstanding judicial precedent.

Q. Why did HUD issue an IFR?

A. When an agency finds that it has good cause to issue a final rule without first publishing a proposed rule, it may issue an "interim final rule," or "interim rule." This type of rule becomes effective immediately upon its published effective date. HUD determined that it

¹ The term "familial status" is defined in the Fair Housing Act at 42 U.S.C. 3602(k). It includes one or more children who are under the age of 18 years being domiciled with a parent or guardian.

² Although the Fair Housing Act was amended in 1988 to extend civil rights protections to persons with "handicaps," the term "disability" is more commonly used and accepted today to refer to an individual's physical or mental impairment that is protected under federal civil rights laws, the record of such an impairment, and being regarded as having such an impairment. For this reason, except where quoting from the Fair Housing Act, HUD uses the term "disability."

had good cause to issue an Interim Final Rule in this instance for the reasons described in the preamble to the rule that is published in the Federal Register. Under the totality of the circumstances described in that preamble, HUD determined it was necessary to act promptly to remove the PCNC regulation and restore definitions upon which program participants can reasonably rely in certifying compliance with their statutory duty to AFFH. Among other things, as described in the preamble, HUD finds that the PCNC rule is at odds with the statutory AFFH duty as described in decades of judicial precedent and agency practice, the PCNC rule's redefinition of the AFFH obligation renders that statutory obligation virtually meaningless, and the PCNC rule was improperly promulgated.

The IFR seeks to remove regulations that promote confusion and noncompliance with the statutory AFFH obligation and replace them with regulations that properly state that obligation, which have already been subject to notice-and-comment.

Q. When does the IFR go into effect?

- A. The IFR will take effect on July 31, 2021. HUD has determined that it is necessary for this rule to go into effect by that date because HUD funding recipients must certify compliance with their duty to AFFH on an annual basis and HUD itself has a continuous statutory obligation to ensure that the Fair Housing Act's AFFH obligations are followed.

Q. What happens when the IFR goes into effect?

- A. When the rule goes into effect, Public Housing Agencies and state and local governments and insular areas that are required to submit consolidated plans to HUD will be subject to the AFFH certification requirements in the IFR, which incorporate the IFR's restored definitions, as a condition of receiving Federal funds from HUD. Certifications submitted after the effective date of the rule will incorporate and be subject to the IFR's requirements. Such funding recipients are also subject to the record-keeping requirements contained in the IFR. The IFR does not reinstate the obligation to conduct specific fair housing planning to support such certifications. Instead, it requires that covered program participants appropriately certify that they will AFFH, consistent with the definitions in the IFR, and provides for HUD support of voluntary fair housing planning to support certifications.

Q. Which HUD program participants are subject to the IFR?

- A. The IFR addresses the AFFH obligation of program participants that were subject to the requirements of the 2015 AFFH Rule. These program participants are jurisdictions and insular areas required to submit consolidated plans for the Community Development Block Grant (CDBG) program; the Emergency Solutions Grants (ESG) program; the HOME Investment Partnerships (HOME) program; and the Housing Opportunities for Persons With AIDS (HOPWA) program; as well as Public Housing Agencies (PHAs) receiving assistance under sections 8 or 9 of the United States Housing Act of 1937.

Under the IFR, all program participants, including Public Housing Agencies, as well as States and Local Governments and Insular Areas, will be certifying to the restored familiar and legally supportable definition of what it means to AFFH, *i.e.*, that they will take 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 or ethnically concentrated areas of poverty into areas of opportunities, and fostering and maintaining compliance with civil rights and fair housing laws. Consolidated plan program participants should also refer to their applicable program regulations for their specific certification requirements at 24 CFR part 91, and PHA Plan program participants should refer to their applicable program regulations for their certification requirements in 24 CFR part 903, both as amended by the IFR.

Q. Can I submit comments on the IFR?

- A. Yes. HUD will consider all comments. While HUD has determined that it is necessary for this rule to go into effect without advance notice and public comment, we request and encourage public comments on all matters addressed in this rule. HUD requests comments within 30 days of publication so that it may consider public views prior to the effective date. Comments may be submitted electronically through the Federal eRulemaking Portal at regulations.gov or via mail as described in the preamble to the IFR.

Q. What happened to the Preserving Community and Neighborhood Choice (PCNC) regulations?

- A. This rule rescinds and replaces the PCNC regulations at 24 C.F.R. Part 5 and within HUD program regulations, as indicated in the IFR, because HUD has determined that the definitions and accompanying certifications in the PCNC rule are inconsistent with the statutory AFFH duty as described in decades of judicial precedent and agency practice.

Q. How is the IFR different from the 2015 AFFH Rule?

- A. This IFR restores certain definitions and certifications from the 2015 AFFH rule. Under this rule, program participants will once again be certifying that they will take 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 or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with the civil rights and fair housing laws.

However, while the 2015 rule required a program participant to conduct an Assessment of Fair Housing (AFH) to support its certification (the AFH was an analysis of fair housing data, an assessment of fair housing issues and contributing factors, and an identification of fair housing priorities and goals submitted to HUD using the HUD-provided Assessment Tool), under the IFR, program participants are not required to undertake fair housing planning using any mandated format to support this restored certification. This means the IFR does not require program participants to conduct an AFH or an Analysis of Impediments to Fair Housing Choice (AI), which was the fair housing planning that program participants were previously required to develop until such time that they were subject to the AFH requirement of the 2015 AFFH rule, and prior to the PCNC rule. Under the IFR, program participants are not required to engage in any specific, mandated fair housing planning

process, and they are not required to submit their fair housing planning documents to HUD for review. Under the IFR, a HUD program participant may determine how best to engage in the fair housing planning process, so long as it can appropriately certify that it is meeting the AFFH obligation, consistent with the restored definition of AFFH. This means that a program participant that voluntarily engages in fair housing planning can choose to conduct or update an AFH or AI, continue to implement an AFH, or an AI, or engage in another form of fair housing planning.

In addition, to assist program participants in carrying out their obligation to affirmatively further fair housing, HUD is restoring various resources to support program participants in engaging in fair housing planning and developing fair housing goals and priorities. These restored resources include, for example, the AFH assessment tools, Fair Housing Planning Guide, the 2015 AFFH Rule Guidebook, and HUD's Data and Mapping Tool (AFFH-T). However, the IFR does not require program participants to use these tools when engaging in fair housing planning. Links to these resources can be found on FHEO's AFFH webpage, www.hud.gov/affh.

Moreover, while not required, a program participant may voluntarily submit its fair housing planning for FHEO feedback, and FHEO may provide technical assistance to assist in fair housing planning, such as by providing technical assistance with setting goals and undertaking meaningful actions to support identified goals.

Q. Why do program participants not need to submit their fair housing planning to HUD for review?

- A. Through the IFR, HUD acts expeditiously to restore an understanding of AFFH that is consistent with the statute and judicial interpretations and rescind the PCNC definitions of AFFH, which HUD determined were not consistent with this obligation. HUD is committed to implementing the AFFH obligation in a manner that further reduces the burden on program participants while also bolstering fair housing outcomes. Therefore, at a later date, HUD will solicit public comments through a separate Notice of Proposed Rulemaking (NPRM), to be published in the Federal Register, on how to amend the AFFH rule to achieve both burden reduction and material, positive change that affirmatively furthers fair housing. This IFR provides a variety of familiar tools that program participants can use on a voluntary basis to comply with their AFFH obligation, though it does not create any new burdens because it is narrowly focused to restore an understanding of AFFH that was previously promulgated subject to notice and comment rulemaking and is consistent with the Congressional mandate to AFFH and judicial interpretations of this mandate.

While the IFR does not mandate fair housing planning or the submission of any fair housing planning, HUD retains its authority to review funding recipients' records and documents to confirm the validity of certifications submitted, consistent with existing requirements. HUD will only conduct a review when it has reason to believe the certifications submitted are not supported by the recipients' actions. If a review is necessary, HUD will provide appropriate notice to the recipient; however, HUD expects these instances to be rare.

Q. What definitions from the 2015 AFFH Rule are being restored in the IFR?

A. The AFFH definitions that are being restored can be found in § 5.151 of the rule. They are provided solely for purposes of §§ 5.150 through 5.152 of the rule and related amendments in 24 CFR parts 91, 92, 570, 574, 576, and 903. These definitions are as follows:

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 or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development.

Disability.

(1) The term "disability" means, with respect to an individual:

- (i) A physical or mental impairment that substantially limits one or more major life activities of such individual;
- (ii) A record of such an impairment; or
- (iii) Being regarded as having such an impairment.

(2) The term "disability" as used herein shall be interpreted consistent with the definition of such term under section 504 of the Rehabilitation Act of 1973, as amended by the Americans with Disabilities Act Amendments Act of 2008. This definition does not change the definition of "disability" or "disabled person" adopted pursuant to a HUD program statute for purposes of determining an individual's eligibility to participate in a housing program that serves a specified population.

Fair housing choice means that individuals and families have the information, opportunity, and options to live where they choose without unlawful discrimination and other barriers related to race, color, religion, sex, familial status, national origin, or disability. Fair housing choice encompasses:

- (1) Actual choice, which means the existence of realistic housing options;
- (2) Protected choice, which means housing that can be accessed without discrimination; and
- (3) Enabled choice, which means realistic access to sufficient information regarding options so that any choice is informed. For persons with disabilities, fair housing choice and access to opportunity include access to accessible

housing and housing in the most integrated setting appropriate to an individual's needs as required under Federal civil rights law, including disability-related services that an individual needs to live in such housing.

Housing programs serving specified populations. Housing programs serving specified populations are HUD and Federal housing programs, including designations in the programs, as applicable, such as HUD's Supportive Housing for the Elderly, Supportive Housing for Persons with Disabilities, homeless assistance programs under the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11301 et seq.), and housing designated under section 7 of the United States Housing Act of 1937 (42 U.S.C. 1437e), that:

- (1) Serve specific identified populations; and
- (2) Comply with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4) (Nondiscrimination in Federally Assisted Programs); the Fair Housing Act (42 U.S.C. 3601-19), including the duty to affirmatively further fair housing; section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Americans with Disabilities Act (42 U.S.C. 12101, et seq.); and other Federal civil rights statutes and regulations.

Integration means a condition, within the program participant's geographic area of analysis, in which there is not a high concentration of persons of a particular race, color, religion, sex, familial status, national origin, or having a disability or a particular type of disability when compared to a broader geographic area. For individuals with disabilities, integration also means that such individuals are able to access housing and services in the most integrated setting appropriate to the individual's needs. The most integrated setting is one that enables individuals with disabilities to interact with persons without disabilities to the fullest extent possible, consistent with the requirements of the Americans with Disabilities Act (42 U.S.C. 12101 et seq.) and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). See 28 CFR part 35, appendix B (2010) (addressing 28 CFR 35.130 and providing guidance on the American with Disabilities Act regulation on nondiscrimination on the basis of disability in State and local government services).

Meaningful actions means significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, increasing fair housing choice or decreasing disparities in access to opportunity.

Racially or ethnically concentrated area of poverty means a geographic area with significant concentrations of poverty and minority populations.

Segregation means a condition, within the program participant's geographic area of analysis, in which there is a high concentration of persons of a particular race, color, religion, sex, familial status, national origin, or having a disability or a type of disability in a particular geographic area when compared to a broader geographic area. For persons with disabilities, segregation includes a condition in which the housing or services are not in the most integrated setting appropriate to an individual's needs in accordance with the requirements of the Americans with Disabilities Act (42 U.S.C. 12101, et seq.), and section

504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). (See 28 CFR part 35, appendix B (2010), addressing 25 CFR 35.130.) Participation in “housing programs serving specified populations” as defined in this section does not present a fair housing issue of segregation, provided that such programs are administered to comply with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4) (Nondiscrimination in Federally Assisted Programs); the Fair Housing Act (42 U.S.C. 3601-19), including the duty to affirmatively further fair housing; section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Americans with Disabilities Act (42 U.S.C. 12101, et seq.); and other Federal civil rights statutes and regulations.

Significant disparities in access to opportunity means substantial and measurable differences in access to educational, transportation, economic, and other important opportunities in a community, based on protected class related to housing.

The terms “consolidated plan,” “consortium,” “unit of general local government,” “jurisdiction,” and “State” are defined in 24 CFR part 91. For PHAs, “jurisdiction” is defined in 24 CFR 982.4.

Consolidated plan or (“the plan”). The document that is submitted to HUD that serves as the comprehensive housing affordability strategy, community development plan, and submissions for funding under any of the Community Planning and Development formula grant programs (e.g., CDBG, ESG, HOME, and HOPWA), that is prepared in accordance with the process described in this part.

Consortium. An organization of geographically contiguous units of general local government that are acting as a single unit of general local government for purposes of the HOME program (see 24 CFR part 92).

Unit of general local government. A city, town, township, county, parish, village, or other general purpose political subdivision of a State; an urban county; and a consortium of such political subdivisions recognized by HUD in accordance with the HOME program (24 CFR part 92) or the CDBG program (24 CFR part 570).

Jurisdiction.

- A State or unit of general local government.
- For PHAs: The area in which the PHA has authority under State and local law to administer the program. (see 24 CFR 982.4)

State. Any State of the United States and the Commonwealth of Puerto Rico.

Q. Does the rule contain any new provisions that were not part of the 2015 AFFH rule?

A. The interim final rule creates a new provision at 24 C.F.R. § 5.152, AFFH Certification and Administration, which cross-references the certification requirements in the applicable program regulations and details how HUD will provide resources and technical assistance to program participants in carrying out their obligations to affirmatively further fair housing, including in the form of feedback on their fair housing planning. The provision also identifies familiar forms of fair housing planning that a program participant may wish

to engage in to meaningfully support its certification, but also explains that program participants can engage in other forms of fair housing planning to support their certifications. In addition to the creation of this new provision, the IFR also makes minor technical changes made to the restored regulations to account for the lack of a mandatory AFH process.

Q. Are there any other new requirements that will be unfamiliar to program participants?

A. No, there are no other new requirements under the IFR. HUD believes the IFR returns the Agency, program participants, and the public to a familiar understanding and interpretation of AFFH and provides for program participants to voluntarily engage in familiar fair housing planning processes.

Q. What does it mean that the IFR has a voluntary submission component?

A. Program participants may submit their fair housing planning to FHEO for feedback and other technical assistance. However, they are not required to do so. The decision to submit fair housing planning for FHEO review is purely voluntary and is only intended to serve as a mechanism for FHEO to provide program participants with guidance and support.

Q. Can we continue to implement our completed Analysis of Impediments (AI) to Fair Housing Choice, update an existing AI, or conduct a new AI? Can we submit our AI for feedback?

A. Yes, you can continue to implement a completed AI, update an existing AI, or conduct a new AI. Program participants can voluntarily submit an AI to HUD for feedback.

Q. Can we continue to implement our completed AFH, update an existing AFH, or conduct a new AFH? Can we submit an AFH to HUD for feedback?

A. Yes, you can continue to implement a completed AFH, update an existing AFH, or conduct a new AFH. Program participants can voluntarily submit an AFH to HUD for feedback.

Q. What other types of Fair Housing Planning can program participants engage in and voluntarily submit for TA?

A. While the AFH and AI processes are the most familiar to program participants and the public, the rule also provides for a program participant to engage in other methods of fair housing planning that meaningfully supports its AFFH certification, which incorporates the updated regulatory definitions. This can take different forms. For example, some grantees, including States and local governments, have adopted similar processes as those set out in HUD's 2015 AFFH rule. This fair housing planning may be useful in meeting the revised AFFH certifications. Because this rule does not mandate a particular form of fair housing planning, jurisdictions can experiment with methods of fair housing planning that best enable them to satisfy their substantive obligation to AFFH.

Q. Does the IFR require that we engage in community participation?

A. The interim final rule does not contain a community participation requirement related to fair housing planning. However, community or public participation is still required for the Consolidated Plan and PHA Plan processes. Program participants are nonetheless

encouraged to engage the community during the course of their fair housing planning to better enable them to meet their substantive AFFH obligations.

Q. What can I do to receive Technical Assistance to meet my obligations under the IFR?

A. Visit www.hud.gov/AFFH to get more information about AFFH TA. This website is the hub where grantees can find links to all TA materials and resources, as well as information about the history of AFFH and its legal mandate.

For general inquiries about AFFH or technical assistance, email: AFFH@hud.gov

Q. What types of technical assistance will be available?

A. HUD is reinstating its TA program for program participants that voluntarily seek HUD's assistance in satisfying their AFFH obligations. HUD will continue to release new resources over time, so program participants and the public are encouraged to check FHEO's AFFH webpage for the most updated information. FHEO will make available an array of TA resources, many of which are already available at www.hud.gov/AFFH, including:

- **AFFH Data and Mapping Tool (AFFH-T)** – HUD released an AFFH Data and Mapping Tool (AFFH-T) as it implemented the 2015 AFFH rule. Information about the tool can be found on www.hud.gov/AFFH. The tool is available at <https://egis.hud.gov/affht/>. This publicly available, interactive tool provides access to HUD-provided data that can be used to support fair housing planning and assess and analyze fair housing issues in jurisdictions. Data is currently available for local government jurisdictions and some PHAs.
- **HUD-Provided AFH Assessment Tools** – The Assessment Tools for use by local governments, PHAs, and States and Insular Areas that conducted an AFH pursuant to the 2015 AFFH rule are available for program participants that choose to conduct an AFH. These Tools can also be adapted and used to guide other fair housing planning that a program participant chooses to conduct. Use of these tools is not mandatory under the IFR.
- **AFFH Rule Guidebook** – The AFFH Rule Guidebook provides guidance regarding ways communities can affirmatively further fair housing, as well as how to use the Assessment Tools and the AFFH Data and Mapping Tool issued in connection with HUD's 2015 AFFH Rule. The Guidebook contains helpful information for meeting the AFFH obligation both for program participants that choose to conduct AFHs and for program participants that choose to engage in other fair housing planning.
- **Fair Housing Planning Guide, Volumes 1 and 2** – Published in March 1996, the Fair Housing Planning Guide, volume 1, provides guidance on how to conduct an Analysis of Impediments to Fair Housing Choice. Originally published in May 1996, the second volume of the Fair Housing Planning guide provides guidance on grantee activities undertaken in connection with an Analysis of Impediments to Fair Housing Choice and

how to affirmatively further fair housing. These guides may assist program participants that choose to engage in fair housing planning.

- **2015 AFFH Rule Fact Sheets** – HUD released a series of fact sheets in connection with the 2015 AFFH rule that may be useful to program participants and their communities as they engage in fair housing planning.

Q. Is the AFFH Data and Mapping Tool (AFFH-T) still available to use?

A. Yes, the Data and Mapping Tool (AFFH-T) is still available for use. It is available at <https://egis.hud.gov/affht/>. This publicly available, interactive tool provides access to HUD-provided data that can be used to support fair housing planning and assess and analyze fair housing issues in jurisdictions. Data has continually been updated and is currently available for local government jurisdictions and some PHAs.

Q. Is the AFFH User Interface (AFFH-UI) still available?

A. The AFFH User Interface (AFFH-UI) is not available for program participant use. Program participants who choose to voluntarily submit a fair housing planning document to HUD or who seek TA should visit www.hud.gov/AFFH to get more information or, for general inquiries about AFFH or technical assistance, email: AFFH@hud.gov

Q. Can we collect, identify, and analyze our local data and local knowledge for our plan?

A. Yes, you can use local data and local knowledge to conduct your fair housing planning. HUD encourages the use of such local data and local knowledge because it can be a valuable and important means of supplementing HUD-provided data when engaging in any fair housing planning.

Q. How does this rule fit within HUD's long-term plans to implement the AFFH mandate?

A. HUD intends to undertake a separate rulemaking to improve upon the 2015 AFFH rule. In the near future, HUD will issue a Notice of Proposed Rulemaking (NPRM) that will be published in a separate notice in the *Federal Register* and will solicit public comments on its proposed rule. Through this new rule, HUD will seek to create a new AFFH framework that helps program participants achieve improved fair housing outcomes while reducing burden and challenges associated with engaging in the fair housing planning process.