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# Proposed Rule Would Alter Affirmatively Furthering Fair Housing Guidance Again

NICK DECICCO, SENIOR WRITER, NOVOGRADAC

The U.S. Department of Housing and Urban Development (HUD) published in the Feb. 9 Federal Register a proposed rule altering the implementation of the Affirmatively Furthering Fair Housing (AFFH) mandate launched 55 years ago in the Fair Housing Act of 1968.

Experts said the proposed rule is a streamlining and simplification of details of the rule introduced in 2015 under President Barack Obama's administration.

The AFFH mandate has since been a political football for both successive administrations. In 2020, under President Donald Trump's regime, HUD struck down the 2015 rule as "ineffective, highly prescriptive and effectively discouraged the production of affordable housing," according to a 2020 press release.

The proposal has gone to great lengths to restore and improve upon the spirit of the 2015 rule, said Jennifer Schwartz, director of tax and housing advocacy with the National Council of State Housing Agencies (NCSHA). Schwartz was one of several housing leaders who expressed optimism about the latest proposed rule, saying some of the red flags for NCSHA in the 2015 rule were alleviated.

"I'm glad they're moving forward with this," Schwartz said. "While I am still waiting for more input from NCSHA's state [housing finance agency] members, it is clear that HUD has considered and tried to address many of the concerns that NCSHA and other organizations raised about the burden of implementing the 2015 rule. It made me feel like they're really coming at this from the perspective of wanting to make this work."

Diane Glauber, director of the Fair Housing and Community Development Project for the Lawyers Committee of Civil Rights, echoed Schwartz's thoughts.

"They did listen to some of the complaints about the last rule and have improved it and at the same time, made it more streamlined and easier for jurisdictions to prepare an equity plan," Glauber said.

## Streamlining

Several sources who spoke to the Novogradac Journal of Tax Credits for this article about the proposed AFFH rule praised HUD for its efforts to streamline the equity and community plan processes.

Amy Glassman, a partner at the nationwide law firm Ballard Spahr, advises developers/owners and public housing authorities (PHAs) on fair housing and building new or preserving affordable housing developments. She expressed mixed thoughts about the rule itself, but was pleased to see the streamlining efforts.

"The amount of data and analysis required to complete planning was very concerning," under the 2015 rule, Glassman said, because it created an undue burden on developers. "I appreciate the work HUD has done to streamline what is required for the equity plans."

Schwartz said HUD took care in the proposed rule to coordinate equity plans with community plans rather than making the process duplicative. Some of the concerns NCSHA raised concerning the 2015 rule included the need to acknowledge the differences between state and local governments and their abilities to best assess the needs in a particular geographical area. One way the proposed rule seeks to improve the equity plan process for states is by allowing them to analyze fair housing issues on a county-by-county basis instead of by neighborhood or Census tract.

“This to me showed that HUD intends to treat states as states and not trying to fit a square peg into round hole,” Schwartz said. “HUD specifically seeks input into implementation at the state-level, so they are clearly trying to grapple with the differences between the types of jurisdictions that administer HUD programs.”

### Community Engagement

Ed Gramlich, senior adviser for the National Low Income Housing Coalition, was encouraged by the emphasis on community engagement throughout the proposed rule, including the stipulation to hold multiple community meetings at varying times of day and at different locations.

Furthermore, the proposed rule calls for annual engagement meetings with the public to provide feedback as to how jurisdictions or PHAs are meeting their goals.

“That really says you’ve got to get out into the community and have these meetings,” Gramlich said. “It’s a tremendous expansion of genuine public engagement.”

Gramlich said the guidance may serve to reach what HUD is defining as underserved communities, including protected characteristics within protected classes such as members of the LGBTQ+ community, domestic violence survivors, people with criminal records, those who have experienced homelessness and more.

“You have to figure out ways to engage those populations that have unique circumstances,” Gramlich said.

Gramlich also appreciated seeing submitted equity plans, major communications between HUD and jurisdictions and PHAs, as well as annual progress evaluations will be posted on the HUD website in a further effort toward transparency. Gramlich said this has the added bonus of allowing PHAs and jurisdictions to see what each other is doing and share information.

Glauber, too, likes the community engagement elements. “There’s a greater emphasis on goal setting, which should be helpful,” Glauber said.

### Data and Difficulties

Schwartz said a concern she hopes to address before adoption of a final rule is a desire to see HUD update its data and mapping tool.

“I think that that is really one of the important details we all understand because, do to this properly, we really need good data,” Schwartz said. “In some cases, that’s difficult. In rural areas, it’s hard to get data that’s statistically significant.”

Schwartz said with data being such an important driver, followers of the rule need to be able to answer questions for the mapping tool with information either provided by HUD or data that the program participant already has available so that they do not need to collect new data to conduct the analysis for the Equity Plan.

“If the data HUD provides isn’t enough and the grantee doesn’t have supplemental data, that could require significant new research,” Schwartz said. “We don’t want to be having to collect new data and find a way to pay for that in order to answer questions.”

### Tenant Protections

Glauber’s comments about the proposed rule noted no increased focus on tenant protections or displacement protections for which advocates have

asked. She noted this seems at odds with another Biden administration-related initiative published in January, “The White House Blueprint for a Renters Bill of Rights,” which aims to support the development of policies to promote fairness for Americans living in rental housing.

“In light of all the federal government is trying to do to protect tenants, the absence of such in the proposed rule is not really congruent with that,” Glauber said.

Glauber said the lack of more progressive tenant protections such as just cause evictions, rent stabilization, rent control, right to cancel and others is problematic.

### Contributing Factors

Absent from the proposed rule, Glauber said, are approximately 45 “contributing factors” from the 2015 rule used as part of an assessment tool that “program participants were required to consider for each fair housing issue they identified,” the proposed rule said. Glauber called the absence a mixed bag, saying that while they could be “mind numbing and repetitive,” she also said it gave leeway to apply the assessment more widely.

“Without that guidance, there could be jurisdictions doing the lowest-common denominator, a ‘trees, not forest’ assessment,” Glauber said.

Schwartz said dropping the contributing factors analysis was a positive for the proposed rule.

“Contributing factors analysis would’ve been difficult and burdensome on the planning process,” Schwartz said. “Not having that in there was really a big step forward and allows HUD and its grantees to focus more on achieving fair housing goals.”

### Practical Application

While the 2020 rule from the Trump administration dismissed the Obama-era guidance, Glauber noted that California took efforts on a statewide level to maintain the 2015 rule. This made California distinct among states.

The complexities of place-based vs. people-based rulemaking added complexity to building and preserving housing in areas of California such as Oakland. Glassman said it’s a difficult balancing act between building in areas that need greater resources while also allowing people greater flexibility through voucher programs to relocate to areas that are designated as having more opportunities. Glassman noted the historic role of segregation in cutting off segments of population from opportunities.

Smitha Seshadri, executive vice president for BRIDGE Housing, which manages properties along the West Coast, including nine in Oakland, pointed to the city’s Fruitvale neighborhood, a predominantly Hispanic area which is not earmarked as a high-resource, high-opportunity area under AFFH given the high poverty rate, but needs a lot funding for affordable housing so families can stay housed in their communities.

“It’s those kinds of hurdles that we encounter where the policy is good to avoid a concentration of poverty, but the reality on the ground demonstrates a need to fund affordable housing in existing low-income communities to stem displacement,” Seshadri said.

Seshadri praised the creativity of people-based solutions, which often provide vouchers attached to a person that allows them to relocate but still receive the benefits of AFFH initiatives, but said that can sometimes be an unworkable solution to someone such as a longtime Fruitvale native who doesn’t want to leave their home.

“Don’t abandon the sites that are already there,” Seshadri said. “It makes a presumption that communities want to move someplace else. What about the community networks they have? What about other amenities, even a grocery store? In Fruitvale, there are a lot of Mexican grocery stores. These things take time. Those, in my opinion, are constraints.”

Christina Mun, director of Oakland Housing & Community Development, said the city does the best with the limited resources it has, including the recently passed Measure U, a bond measure that

passed in November 2022 that delivers \$350 million for affordable housing. Mun said that California Debt Limit Allocation Committee (CDLAC) and the California Tax Credit Allocation Committee's (CTCAC's) interpretation of AFFH, particularly the "incredibly problematic" way CTCAC's "opportunity map" for California overlaps with historically redlined communities, can serve to exacerbate rather than alleviate the goals of AFFH.

"AFFH is a good framework to ensure that historically exclusive communities do their fair share to advance affordable housing," Mun said. "It's important that these exclusive communities step up financially to shoulder their share of our housing challenges, and it's critical policymakers refrain from giving affluent communities any special advantage on housing funding investments."

Gramlich said the proposed rule helps to address the concerns raised by Seshadri because the text of the proposed rule, unlike the 2015 rule, provides a detailed definition of "balanced approach" to AFFH. It means an approach to community planning and investment that balances a variety of actions to eliminate housing-related disparities using a combination of place-based and mobility actions and investments. In the preamble to the proposed rule, HUD supports jurisdictions' choice to engage in place-based activities, such as preserving affordable housing in particular neighborhoods while making complementary investments in other infrastructure and assets in those neighborhoods, as well as those choices that promote mobility.

### Parting Thoughts

Schwartz said certainty about the rule and its future could bring stability to the housing market.

"I really think we need to come to a place where grantees feel comfortable with the mechanism being used rather than having this be a bouncing ball moving forward," Schwartz said. "If we can get something good that people aren't complaining about, we'll have something that lasts. I think that while we had a lot of concerns about Obama administration's iteration of this, the pendulum swung way too far in other direction under the Trump administration, and the product would not have gotten us to what we need to do under the Fair Housing Act."

Schwartz encouraged members of the housing community to think about the various applications of the rule, reminding them the proposed rule has an impact beyond HUD programs, including on the low-income housing tax credit.

Glassman's primary concern is enforcement of the proposed rule. She expressed concern about standards for situations that could give rise to such serious enforcement actions as eliminating HUD program funds from a government agency. There is discussion about what might not give rise to enforcement, she said, but the rule does not specify situations that could result in negative action against a participant. Glassman said the need to affirmatively further fair housing comes at all income levels.

"The concept of Affirmatively Furthering Fair Housing is near and dear to many of us. It's a core part of what we do," Glassman said. "We're talking about race, disability, sex, national origin and more. We shouldn't forget that our cities and our towns are segregated at all income levels. People with disabilities have access issues irrespective of their income. That's just two examples of protected classes." ◆

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