

# NOW & NEXT

## Affordable Housing Alert

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### HUD releases new Affirmatively Furthering Fair Housing proposed rule

By Nicholas P. Tsimortos, Richard Michael Price, Harry J. Kelly, and Deborah VanAmerongen

The AFFH proposed rule provides revised guidance on the requirements to promote fair housing choice, eliminate disparities in housing, and foster inclusive communities.



#### What's the Impact?

- / The proposed rule is intended to build and improve upon HUD's 2015 AFFH final rule
- / Underserved communities will be given a greater voice in shaping program participants' actions, and analysis requirements will be streamlined
- / HUD seeks feedback on this proposed rule and invites all interested parties to submit comments and recommendations for improvement

On January 19, 2023, the Department of Housing and Urban Development (HUD) published the [Affirmatively Furthering Fair Housing \(AFFH\) proposed rule](#), which provides revised guidance on the requirements for HUD and its program participants to affirmatively further fair housing, as required by the 1968 Fair Housing Act, which directs the government to promote fair housing choice, eliminate disparities in housing, and foster inclusive communities. This Alert gives a high

level overview of the rule, to be followed by further analysis of the implications for recipients of HUD funding.

## Comparing the AFFH proposed rule to the 2015 AFFH final rule

- / The proposed rule is intended to build and improve upon [HUD's 2015 AFFH final rule](#), adopted under the Obama administration; the Trump administration suspended and withdrew the 2015 AFFH rule and later promulgated the Preserving Community and Neighborhood Choice (PCNC) rule
- / The 2023 proposed rule keeps much of the 2015 AFFH framework intact with some changes based on lessons learned by HUD during the 2015 implementation and [stakeholder feedback](#)
- / The proposed rule provides underserved communities greater say in the actions that program participants take to address fair housing issues
- / This proposed rule streamlines the required fair housing analysis for local communities, states, and public housing agencies and requires them to set ambitious goals to address fair housing issues facing their communities

## The proposed rule's goals

Specifically, the proposed rule is designed to:

- / Simplify the required fair housing analysis
- / Emphasize goal setting
- / Increase transparency for public review and comment
- / Foster local commitment to addressing fair housing issues
- / Enhance HUD technical assistance to local communities
- / Provide mechanisms for regular program evaluation and greater accountability

Under the proposed rule, every five years, program participants would submit an Equity Plan for HUD's approval. An Equity Plan is similar to the Assessment of Fair Housing (AFH) required by the 2015 AFFH rule in that it requires an assessment of fair housing issues and their underlying causes, but it eliminates the contributing factors analysis required by the AFH and streamlines questions program participants would need to address in their plans. The plan, which must be developed following extensive community engagement, would contain an analysis of fair housing issues confronting their communities, their goals and strategies to remedy those issues in concrete ways, and a description of community engagement. Additionally, program participants would be required to conduct and submit to HUD annual progress evaluations that describe progress toward and/or any needed modifications of each goal in the Equity Plan. The proposed rule includes provisions that permit members of the public to file complaints with HUD if program participants are not living up to their AFFH commitments.

Unlike the 2015 AFFH framework that emphasized termination of funding as a method of enforcement, under this proposed rule, HUD sets out a more flexible framework that would

enable HUD to take additional steps that do not put funding immediately at risk but give a program participant a reasonable opportunity to address deficiencies and submit an acceptable fair housing plan. Under the proposed framework, HUD can reject a program participant's Equity Plan but accept its programmatic plan, allowing funding to continue so long as the program participant signs special assurances that require the program participant to submit and obtain HUD acceptance of an Equity Plan by a specific date. The proposal also includes a mechanism to allow for filing of complaints by individuals that would lead to compliance reviews, similar to the existing HUD process for compliance reviews under Title VI, with respect to discrimination based on race, color, and national origin for programs receiving federal financial assistance (FFA), and under Section 504, with respect to disability-based discrimination for FFA-funded programs.

## Looking ahead

HUD seeks public comment on this proposed rule and invites all interested parties to submit their comments and recommendations for improvement for this proposal. Nixon Peabody will also be doing further analysis of the proposed rule, and providing further guidance to recipients of HUD funding regarding compliance, in future Alerts. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, S.W., Room 10276, Washington DC 20410-0500, or electronically through [www.regulations.gov](http://www.regulations.gov).

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