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The Fair Housing Act: HUD Oversight, Programs, and Activities

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The Fair Housing Act: HUD Oversight, Programs, and Activities

The federal Fair Housing Act, enacted in 1968 as Title VIII of the Civil Rights Act (P.L. 90-284), prohibits discrimination in the sale, rental, or financing of housing based on race, color, religion, national origin, sex, familial status, and handicap. The Department of Housing and Urban Development (HUD), through its Office of Fair Housing and Equal Opportunity (FHEO), receives and investigates complaints under the Fair Housing Act and determines if there is reasonable cause to believe that discrimination has occurred or is about to occur.

State and local fair housing agencies and private fair housing organizations also investigate complaints based on federal, state, and local fair housing laws. If alleged discrimination takes place in a state or locality with its own similar fair housing enforcement agency, HUD must refer the complaint to that agency. Two programs administered by FHEO provide federal funding to assist state, local, and private fair housing organizations:

- The Fair Housing Assistance Program (FHAP) funds state and local agencies that HUD certifies as having their own laws, procedures, and remedies that are substantially equivalent to the federal Fair Housing Act. Funding is used for such activities as capacity building, processing complaints, administrative costs, and training. In FY2021, the appropriation for FHAP was \$24.4 million.
- The Fair Housing Initiatives Program (FHIP) funds eligible entities, most of which are private nonprofit organizations. Funds are used for investigating complaints, including testing (comparing outcomes when members of a protected class attempt to obtain housing with outcomes for those not in a protected class), education, outreach, and capacity building. In FY2021, the appropriation for FHIP was \$66.3 million, an additional \$20 million of which was provided in the American Rescue Plan Act (P.L. 117-2).

Another provision of the Fair Housing Act requires that HUD affirmatively further fair housing (AFFH). As part of this requirement, recipients of certain HUD funding—jurisdictions that receive Community Planning and Development grants and Public Housing Authorities—are to certify that they are affirmatively furthering fair housing. In July 2015, HUD issued a rule governing the process, called the Assessment of Fair Housing (AFH). The rule provided that funding recipients assess their jurisdictions and regions for fair housing issues (including areas of segregation, racially and ethnically concentrated areas of poverty, disparities in access to opportunity, and disproportionate housing needs), identify factors that contribute to these fair housing issues, and set priorities and goals for overcoming them.

Within two years of publication of the final rule, HUD suspended it indefinitely, in May 2018. Within another two years, HUD issued a different final rule, entitled “Preserving Community and Neighborhood Choice,” which became effective on September 8, 2020. Grant recipients are to certify that they have taken an action rationally related to “promoting one or more attributes of fair housing”—that it is “affordable, safe, decent, free of unlawful discrimination, and accessible as required under civil rights laws.” The Biden Administration has asked HUD to examine the effects of both repealing the 2015 rule and implementing the new one on the agency’s duty to affirmatively further fair housing.

Among other activities undertaken by HUD’s FHEO are efforts to prevent discrimination that may not be explicitly directed against protected classes under the Fair Housing Act. This includes issuing a regulation to prohibit discrimination in HUD programs based on sexual orientation and gender identity and releasing guidance in 2016 addressing several issues: the use of criminal background checks in screening applicants for housing, local nuisance ordinances that may disproportionately affect victims of domestic violence, and failure to serve people who have limited English proficiency.

FHEO also oversees efforts to ensure that clients with Limited English Proficiency (LEP) have access to HUD programs. Guidance from FHEO helps housing providers determine how best to provide translation services, and HUD also receives a small appropriation through the Fair Housing and Equal Opportunity account for the agency to translate documents and provide translation on the phone or at events.

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Introduction

The Fair Housing Act was enacted as Title VIII of the Civil Rights Act of 1968 (P.L. 90-284).¹ As initially enacted, the Fair Housing Act prohibited discrimination in the sale, rental, or financing of housing based on race, color, religion, and national origin. In 1974, Congress added sex as a protected category (the Housing and Community Development Act, P.L. 93-383), and in 1988 it added familial status and handicap (the Fair Housing Amendments Act, P.L. 100-430). The Fair Housing Act also prohibits retaliation when individuals attempt to exercise their rights (or assist others in exercising their rights) under the law.²

This report discusses the Fair Housing Act from the perspective of the activities undertaken and programs administered by the Department of Housing and Urban Development (HUD) and its Office of Fair Housing and Equal Opportunity (FHEO). For information about legal aspects of the Fair Housing Act, such as types of discrimination, exceptions to the law, and discussion of court precedent, see CRS Report 95-710, *The Fair Housing Act (FHA): A Legal Overview*.

HUD and FHEO play a role in enforcing the Fair Housing Act by receiving, investigating, and making determinations regarding complaints of Fair Housing Act violations. FHEO also oversees federal funding to state, local, and nonprofit organizations that investigate fair housing complaints based on federal, state, or local laws through the Fair Housing Assistance Program and Fair Housing Initiatives Program.

The Fair Housing Act also requires that HUD affirmatively further fair housing (AFFH). While not defined in statute, affirmatively furthering fair housing has been found by courts to mean doing more than simply refraining from discrimination, and working to end discrimination and segregation.³ In July 2015, HUD released a rule to govern how certain recipients of HUD funding (those receiving Community Planning and Development formula grants and Public Housing Authorities) must affirmatively further fair housing. In 2018, HUD suspended enforcement of the 2015 AFFH rule, and on August 7, 2020, it issued a new rule that repealed and replaced the 2015 AFFH rule.

Additionally, under the Obama Administration, HUD and FHEO took steps to protect against discrimination not explicitly directed against members of classes protected under the Fair Housing Act—issuing a rule to prevent discrimination in HUD programs based on sexual orientation and gender identity (the equal access to housing rule), and providing guidance to prevent discrimination that may arise from criminal background checks, nuisance ordinances, and failure to provide housing to those who do not speak English. While the Trump Administration released a proposed rule to make changes to the equal access to housing rule, it did not become final. Further, under the Biden Administration HUD will consider discrimination based on sex to include sexual orientation and gender identity in all housing, an expansion of the protections in the equal access to housing rule, which applied only to HUD programs.⁴

¹ 42 U.S.C. §3601 et seq.

² 42 U.S.C. §3617.

³ For more information, see the section of the report entitled “Affirmatively Furthering Fair Housing”.

⁴ U.S. Department of Housing and Urban Development, *Memorandum: Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act*, February 11, 2021, <https://www.hud.gov/sites/dfiles/FHEO/documents/WordenMemoEO13988FHActImplementation.pdf> (hereinafter *Memorandum: Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act*).

After a brief summary of the Fair Housing Act, this report discusses each of these Fair Housing activities, as well as another initiative administered by FHEO, Limited English Proficiency.

A Brief Overview of the Fair Housing Act

The Fair Housing Act protects specified groups from discrimination in obtaining and maintaining housing. The act applies to the rental or sale of dwelling units with exceptions for single-family homes (as long as the owner does not own more than three single-family homes) and dwellings with up to four units where one is owner-occupied.⁵

Discrimination based on the following characteristics is prohibited under the act. In cases where the statute defines a protected characteristic, or there is additional relevant information on exemptions or how a protected category is interpreted, it is included here. The terms race, color, and national origin are not defined in the Fair Housing Act statute.

- Race
- Color
- Religion—The statute provides an exemption for religious organizations to rent or sell property they own or operate to members of the same religion (as long as membership is not restricted based on race, color, or national origin).⁶
- National origin
- Sex—In February 2021, HUD released a memo stating that it would begin accepting complaints for discrimination based on sexual orientation or gender identity, and that FHEO would conduct “all other activities involving the application, interpretation, and enforcement of the Fair Housing Act’s prohibition on sex discrimination to include discrimination because of sexual orientation and gender identity.”⁷ HUD issued this guidance in response to the 2020 decision, *Bostock v. Clayton County*, in which the Supreme Court held that Title VII of the Civil Rights Act of 1964 barred employers from firing an individual for being gay or transgender.⁸ HUD’s guidance explains that “the Fair Housing Act’s sex discrimination provisions are comparable to those of Title VII and that they likewise prohibit discrimination because of sexual orientation and gender identity.” Further, courts have found discrimination based on sex to include sexual harassment, and HUD regulations outline quid pro quo and hostile environment sexual harassment that violates the Fair Housing Act.⁹ Discrimination based on nonconformity with gender stereotypes may also be unlawful sex-based discrimination under the Fair Housing Act.¹⁰

⁵ 42 U.S.C. §3603. For more information about this exception, see CRS Report 95-710, *The Fair Housing Act (FHA): A Legal Overview*, by David H. Carpenter.

⁶ 42 U.S.C. §3607(a).

⁷ *Memorandum: Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act*.

⁸ For more information, see CRS Legal Sidebar LSB10496, *Supreme Court Rules Title VII Bars Discrimination Against Gay and Transgender Employees: Potential Implications*.

⁹ 24 C.F.R. §100.600.

¹⁰ For more information, see CRS Report 95-710, *The Fair Housing Act (FHA): A Legal Overview*.

- Familial status—The statute defines familial status to mean parents or others having custody of one or more children under age 18.¹¹ Familial status discrimination does not apply to housing dedicated to older persons.¹²
- Handicap¹³—The statute defines handicap as having a physical or mental impairment that substantially limits one or more major life activities, having a record of such impairment, or being regarded as having such an impairment.¹⁴ Regulations provide lists of conditions that may constitute physical or mental impairments.¹⁵ Major life activities means “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.”¹⁶

Note that states and localities may have fair housing laws with broader protections than those encompassed in the federal Fair Housing Act, including such protected classes as age, sexual orientation, or source of income (prohibiting discrimination against those relying on government subsidies to pay for housing).

The Fair Housing Act protects individuals in the covered classes from discrimination in a range of activities involving housing. Some of the specific types of activities that are prohibited include the following:¹⁷

- Refusing to rent or sell, refusing to negotiate for a rental or sale, or otherwise making a dwelling unavailable based on protected class.
- Discriminating in the terms, conditions, or privileges of sale or rental or in the services and facilities provided in connection with a sale or rental.
- Making, printing, or publishing notices, statements, or advertisements that indicate preference, limitation, or discrimination in connection with a sale or rental based on protected class.
- Representing that a dwelling is not available for inspection, sale, or rental based on protected class.
- Inducing, for profit, someone to sell or rent based on the representation that members of a protected class are moving to the neighborhood (sometimes referred to as blockbusting).
- Refusing to allow reasonable modifications or reasonable accommodations for persons with a disability. Reasonable modifications involve physical changes to the property while reasonable accommodations involve changes in rules, policies, practices, or services to accommodate disabilities.
- Discriminating in “residential real estate related transactions,” including the provision of loans and selling, brokering, or appraising property.¹⁸

¹¹ 42 U.S.C. §3602(k).

¹² 42 U.S.C. §3607(b).

¹³ Although the term “disability” has come to be preferred, the Fair Housing Act still uses the word “handicap.”

¹⁴ 42 U.S.C. §3602(h).

¹⁵ 24 C.F.R. §100.201.

¹⁶ *Ibid.*

¹⁷ Unless otherwise noted, prohibited activities are listed at 42 U.S.C. §3604.

¹⁸ 42 U.S.C. §3605.

- Retaliating (i.e., coercing, intimidating, threatening, or interfering) against anyone attempting to exercise rights under the Fair Housing Act.¹⁹

HUD's Involvement in Enforcement of the Fair Housing Act

HUD, together with state and local fair housing agencies and private fair housing organizations, investigates fair housing complaints. HUD receives complaints from individuals who believe they have been subject to discrimination or are about to experience discrimination. If the discrimination takes place in a state or locality with its own similar fair housing enforcement agency, sometimes referred to as a Fair Housing Assistance Program (FHAP) agency, HUD must refer the complaint to that agency.²⁰ (See the “Fair Housing Assistance Program (FHAP)” section of this report for more information about state and local agencies.) In addition, if a complaint involves a challenge to zoning or land use laws, then HUD must refer the case to the Department of Justice (DOJ).²¹ HUD also refers complaints with possible criminal violations or patterns or practices of discrimination to DOJ.²²

Once an individual has filed a complaint with HUD, or HUD has filed a complaint on its own initiative, a notice is served on the party alleged to have discriminated. That party, in turn, has the opportunity to file a response to the complaint.²³ HUD investigates complaints to determine if there is reasonable cause to believe a discriminatory practice has occurred or is about to occur.²⁴ While an investigation is ongoing, HUD may also engage in conciliation to try to reach an agreement between the parties.²⁵ Conciliation requires voluntary participation of both parties. Relief can be sought both for the aggrieved party and for the public interest. If parties do not reach an agreement, then HUD determines whether there is reasonable cause to believe discrimination occurred or was about to occur.²⁶

- **No Reasonable Cause:** If HUD finds no reasonable cause to believe that discrimination occurred, then it dismisses the complaint. While not part of the statutory process, HUD may allow the person submitting the complaint to ask for reconsideration of the denial.²⁷
- **Reasonable Cause:** If HUD finds reasonable cause to believe that discrimination occurred, it issues a charge—a written statement of facts on which the determination of reasonable cause is based.²⁸ Either party may request that the case be heard in court, but if neither party makes this election, then the case is

¹⁹ 42 U.S.C. §3617.

²⁰ 42 U.S.C. §3610(f).

²¹ 42 U.S.C. §3610(g)(2)(C).

²² U.S. Department of Housing and Urban Development, *Annual Report on Fair Housing, FY2012-2013*, November 7, 2014, p. 27, <http://portal.hud.gov/hudportal/documents/huddoc?id=2012-13annreport.pdf>.

²³ 42 U.S.C. §3610(a).

²⁴ 42 U.S.C. §3610(g).

²⁵ 42 U.S.C. §3610(b).

²⁶ 42 U.S.C. §3610(g), 24 C.F.R. §103.400.

²⁷ See HUD's website at https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process, accessed February 22, 2021.

²⁸ 42 U.S.C. §3610(g), 24 C.F.R. §103.405.

heard before an administrative law judge.²⁹ If the case goes to federal court, then HUD transfers the case to DOJ.³⁰

Aggrieved parties may seek actual monetary damages. The law also allows an administrative law judge to impose a civil penalty “to vindicate the public interest” (amounts vary based on whether there have been previous infractions) and to order injunctive relief.³¹

If an individual withdraws a complaint, no longer cooperates, or cannot be reached for follow-up, then HUD closes the complaint as an administrative closure.³²

For more information on complaints, see “HUD and FHAP Agency Complaint and Enforcement Data.”

HUD Funding for State, Local, and Private Nonprofit Fair Housing Programs

HUD oversees two programs that promote fair housing at the state and local level: the Fair Housing Assistance Program (FHAP) and the Fair Housing Initiatives Program (FHIP). FHAP funds state and local fair housing agencies, and FHIP funds eligible entities that largely include private nonprofit organizations.³³ These recipients in turn supplement HUD’s efforts to promote fair housing, detect discrimination, investigate complaints, and enforce the fair housing law. The following subsections describe FHAP and FHIP and provide funding levels for the programs.

Fair Housing Assistance Program (FHAP)

FHAP funds state and local agencies that HUD certifies as having their own laws, procedures, and remedies that are substantially equivalent to the federal Fair Housing Act.³⁴ The Fair Housing statute requires HUD to refer complaints that violate state and local fair housing laws to the certified agencies responsible for enforcing them (in jurisdictions that have such agencies).³⁵ At the time of the enactment of the Fair Housing Act, multiple states and local jurisdictions had enacted their own laws and established agencies for their enforcement.³⁶

Funding to assist state and local agencies in enforcing fair housing laws was first provided in the FY1980 Appropriations Act for HUD (P.L. 96-103) after a budget request from the Carter

²⁹ 42 C.F.R. §3612.

³⁰ *State of Fair Housing Annual Report to Congress, FY2018-FY2019*, p. 29, <https://www.hud.gov/sites/dfiles/FHEO/documents/FHEO%20Report%202020%20-%20Printable%20Version.pdf> (hereinafter, *FY2018-FY2019 Annual Fair Housing Report to Congress*).

³¹ 42 U.S.C. §3612(g)(3).

³² U.S. Department of Housing and Urban Development, *Handbook 8024.1, Title VIII Complaint Intake, Investigation, and Conciliation*, pp. 9-1, <https://www.hud.gov/sites/documents/80241c9FHEH.pdf>.

³³ Kenneth Temkin, Tracy McCracken, and Veralee Liban, *Study of the Fair Housing Initiatives Program*, U.S. Department of Housing and Urban Development, May 2011, p. 21, https://www.huduser.gov/portal/Publications/pdf/FHIP_2011.pdf.

³⁴ 42 U.S.C. §3610(f)(3).

³⁵ 42 U.S.C. §3610(f)(1).

³⁶ See, for example, Housing and Home Finance Agency, *Fair Housing Laws: Summaries and Text of State and Municipal Laws* (Washington, DC: U.S. Government Printing Office, 1964). See also U.S. Congress, Senate Committee on Banking and the Currency, Subcommittee on Housing and Urban Affairs, *S. 1358, S. 2114, and 2280 Relating to Civil Rights and Housing*, 90th Cong., 1st sess., August 21-23, 1967, pp. 491-496.

Administration. The FY1980 budget justifications discussed limitations in the ability of states to handle fair housing complaints referred from HUD, and that in many cases complaints had to be sent back to HUD for processing.³⁷ The President’s budget proposed funding for financial and technical assistance to assist states in handling fair housing complaints, with first-year funding provided for capacity building, and subsequent years’ funding based on the number of complaints processed by each agency. Funding continues to be based on the number of complaints handled by FHAP agencies. Congress followed the Administration’s FY1980 request and appropriated \$3.7 million for the program. The appropriation initially supported 31 state and local agencies.³⁸ At the end of FY2019, there were 77 state and local agencies, which represents a gradual reduction over recent years as agencies withdrew from the program; in FY2009, 113 FHAP agencies were funded.³⁹

Activities for which FHAP agencies receive funding include capacity building, processing complaints, administrative costs, training, and special enforcement efforts.⁴⁰ When a FHAP agency receives a fair housing complaint, it goes through much the same process as HUD.⁴¹ The agency conducts an investigation, and, as the investigation is ongoing, works on conciliation with the parties. For more information on complaints, see “HUD and FHAP Agency Complaint and Enforcement Data.”

Fair Housing Initiatives Program (FHIP)

The Fair Housing Initiatives Program (FHIP) was created as part of the Housing and Community Development Act of 1987 (P.L. 100-242) as a demonstration program and was made permanent in 1992 (P.L. 102-550). Through FHIP, HUD enters into contracts or awards competitive grants to eligible entities—including state and local governments, nonprofit organizations, or other public or private entities, including FHAP agencies—to participate in activities resulting in enforcement of federal, state, or local fair housing laws, and for education and outreach. The majority of FHIP grantees are private nonprofit organizations.

FHIP was added to the Fair Housing law in recognition of the fact that additional assistance was needed to detect fair housing violations and enforce the law. In particular, FHIP authorized funding for organizations to conduct testing whereby matched pairs of individuals, one with protected characteristics and the other without, both attempt to obtain housing from the same providers.

HUD funds three activities that are provided for under the statute:⁴²

³⁷ U.S. Department of Housing and Urban Development, *FY1980 Budget Justifications*, p. Q-2.

³⁸ U.S. Department of Housing and Urban Development, *FY1981 Budget Justifications*, p. P-7.

³⁹ *FY2018-FY2019 Annual Fair Housing Report to Congress*, p. 52; and *FY2009 Budget Justifications*, p. O-3, <http://archives.hud.gov/budget/fy09/cjs/ftheo1.pdf>.

⁴⁰ 24 C.F.R. §115.302 and §115.304.

⁴¹ HUD regulations spell out criteria that must be in state and local laws. 24 C.F.R. §115.204.

⁴² 42 U.S.C. §3616a. A fourth activity, the Administrative Enforcement Initiative, is not currently funded. U.S. Department of Housing and Urban Development, *Fair Housing Initiatives Program Application and Award Policies and Procedures Guide*, July 2015, p. 246, <http://portal.hud.gov/hudportal/documents/huddoc?id=fhipappguide729.docx>. The Administrative Enforcement Initiative funded state and local governments that administer laws that are substantially equivalent to the federal Fair Housing Act. 24 C.F.R. §125.201. However, these entities already receive funding under FHAP.

- **Private Enforcement Initiative:**⁴³ Provides funds for fair housing enforcement organizations to investigate violations of the federal Fair Housing Act and similar state and local laws, and to obtain enforcement of the laws. Fair housing enforcement organizations are private nonprofit organizations that receive and investigate complaints about fair housing, test fair housing compliance, and bring enforcement actions for violations.⁴⁴ Organizations may receive Private Enforcement Initiative funding if they have at least one year of experience participating in these activities.
- **Education and Outreach Initiative:**⁴⁵ The statute provides for awards to fair housing enforcement organizations, private nonprofit organizations, public entities, and state or local FHAP agencies to be used for national, regional, local, and community-based education and outreach programs. Such activities include developing brochures, advertisements, videos, presentations, and training materials.⁴⁶
- **Fair Housing Organization Initiative:**⁴⁷ Provides funding for existing fair housing enforcement organizations or new organizations to build their capacity to provide fair housing enforcement.

Organizations that receive FHIP funding investigate fair housing complaints brought to them by individuals and also initiate their own investigations. If there is evidence that discrimination occurred, then FHIP agencies can help individuals file complaints with HUD or a state or local FHAP agency, or bring a private action in court.

Funding for FHAP and FHIP

Appropriations for FHIP have not been authorized since FY1994 (P.L. 102-550), and FHAP was never separately authorized (Title VIII of the Civil Rights Act generally was authorized at such sums as necessary⁴⁸) but Congress has continued to provide funding for the two programs in every year through FY2021.

In FY2020, both programs received additional funding as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136), \$1.5 million for FHAP and \$1 million for FHIP, to address issues related to the COVID-19 pandemic. FHAP funds were available for education and outreach, technology needs, fair housing testing, and staffing related to increased complaints.⁴⁹ FHIP funds were directed to the Education and Outreach Initiative, with half of the funds set aside for a national media campaign and the other half awarded to applicants for general education and outreach around Fair Housing Act rights and responsibilities.

FY2021 FHIP funding also increased as a consequence of the COVID-19 pandemic. The American Rescue Plan Act (P.L. 117-2) appropriated \$20 million for FHIP grantees to address fair

⁴³ 42 U.S.C. §3616a(b), 24 C.F.R. §125.401.

⁴⁴ 42 U.S.C. §3616a(h).

⁴⁵ 42 U.S.C. §3616a(d), 24 C.F.R. §125.301.

⁴⁶ See, for example, U.S. Department of Housing and Urban Development, *FY2020 Fair Housing Initiatives Notice of Funding Availability*, May 11, 2020, https://www.hud.gov/sites/dfiles/SPM/documents/FHIP_Education_and_Outreach_TechnicalCorrection_5.6.2020_FR-6400-N-21A-TC.pdf.

⁴⁷ 42 U.S.C. §3616a(c), 24 C.F.R. §125.501.

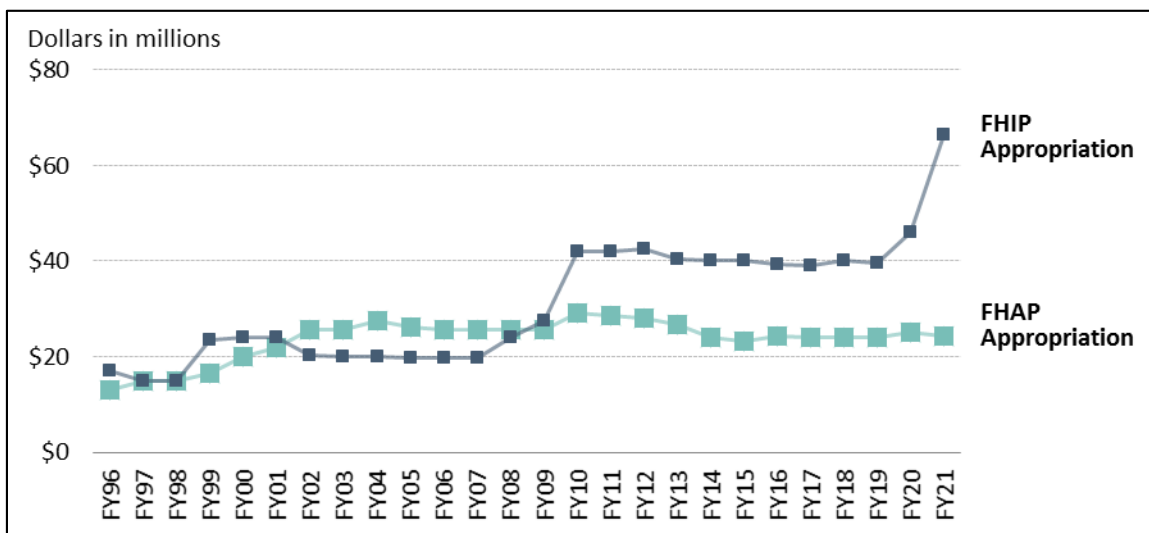
⁴⁸ 42 U.S.C. §3618.

⁴⁹ U.S. Department of Housing and Urban Development, *Notice: Fair Housing Assistance Program (FHAP) COVID-19 Funds*, April 20, 2020, <https://www.hud.gov/sites/dfiles/Main/documents/FHAP-COVID-19-Funds.pdf>.

housing complaints, conduct investigations, engage in education and outreach, and account for increased program delivery costs.

Figure 1, below, shows funding for FHAP and FHIP since FY1996. (For exact amounts appropriated since FY1996, see **Appendix A**.)

Figure 1. FHAP and FHIP Funding Trends, FY1996-FY2021



Source: For dollar amounts and data source, see **Table A-1**.

Note: Additional funding was appropriated for both FHIP and FHAP in FY2020 and FY2021 to respond to the COVID-19 pandemic.

HUD and FHAP Agency Complaint and Enforcement Data

A Note About Fair Housing Data

HUD issues annual reports that contain the number of fair housing complaints it receives and investigates, as well as the number received by FHAP agencies. Agencies that receive FHIP funds also investigate fair housing complaints, but HUD does not include FHIP agency complaints and investigations in its reports. The National Fair Housing Alliance (NFHA), a nonprofit organization, collects data from its member organizations (some of which receive FHIP funds) about the number of fair housing complaints investigated.⁵⁰ The NFHA data include organizations in addition to those that receive FHIP funding, and also include complaints that are eventually referred to HUD and FHAP agencies, so some numbers in the NFHA reports may duplicate those in the HUD reports. In addition, NFHA data may include complaints based on state and local laws with protected categories not covered by the federal Fair Housing Act (such as discrimination based on source of income or age). As a result, NFHA data are not included in this section.

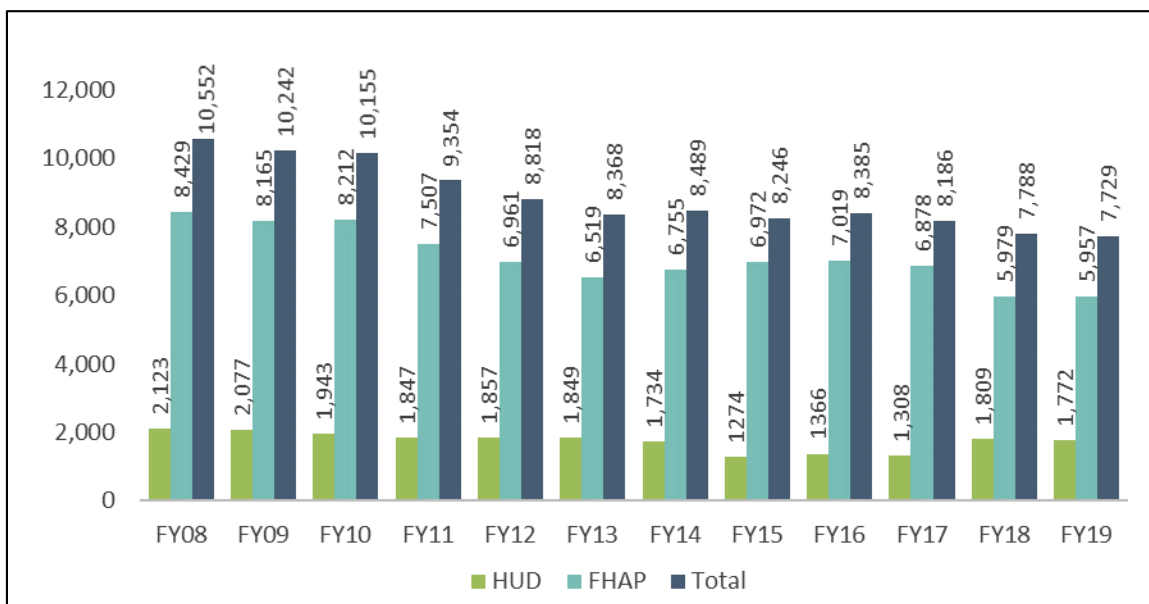
FHIP agencies receive thousands of complaints a year, likely exceeding HUD and FHAP complaints combined, so the data presented here are not a complete picture of fair housing complaints.⁵¹

⁵⁰ The National Fair Housing Alliance reports data on complaints in its annual Fair Housing Trends Report, available at <https://nationalfairhousing.org/reports-research/>.

⁵¹ For example, in its 2020 Annual Fair Housing Trends Report, the National Fair Housing Alliance reported more than 21,000 complaints investigated by nonprofit fair housing organizations in FY2019.

HUD reports the number of fair housing complaints it receives as well as those received by FHAP agencies. In recent years, the number of complaints filed with both HUD and FHAP agencies has declined, from a high of 10,552 in FY2008 to 7,729 in FY2019, the most recent year in which data are available.⁵² During this time period, the number of FHAP agencies decreased from 108 operating at the end of FY2008 to 77 at the end of FY2019.⁵³ See **Figure 2** for HUD and FHAP agency complaints between FY2008 and FY2019.

Figure 2. Number of Complaints Filed with HUD and FHAP Agencies
FY2008-FY2019



Source: HUD Annual Reports on Fair Housing, FY2008-FY2019, available at <http://portal.hud.gov/hudportal/HUD?src=/annualreport>.

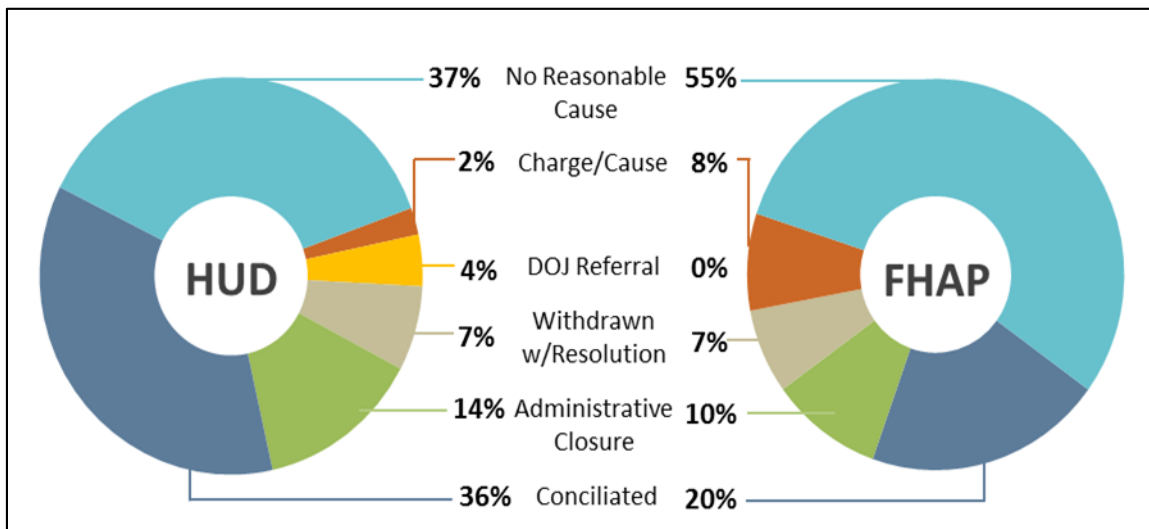
Complaints filed with HUD and FHAP agencies rarely result in charges against housing providers. In many cases there is a finding of no reasonable cause to pursue the complaint—37% of complaints for HUD and 55% for FHAP agencies in FY2019.⁵⁴ HUD conciliated and settled 36% of cases in FY2019, with FHAP agencies doing so for 20% of cases. Only 2% of complaints to HUD and 8% of those to FHAP agencies resulted in a charge being filed in FY2019. Approximately 21% of complaints for HUD were either administrative closures, meaning generally that complainants did not continue to pursue their complaints, or were withdrawn after some kind of resolution. For FHAP agencies, 17% of cases were either administrative closures or withdrawn with resolution. See **Figure 3** for HUD and FHAP agency complaint dispositions in FY2019.

⁵² See U.S. Department of Housing and Urban Development, *The State of Fair Housing, FY2008 Annual Report on Fair Housing*, http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_12309.pdf (hereinafter, *FY2008 Annual Report on Fair Housing*); and *FY2018-FY2019 Annual Fair Housing Report to Congress*, p. 23.

⁵³ *FY2008 Annual Report on Fair Housing*, p. 31; and *FY2018-FY2019 Annual Fair Housing Report to Congress*, p. 52.

⁵⁴ Resolution data are in *FY2018-FY2019 Annual Fair Housing Report to Congress*, p. 27.

Figure 3. HUD and FHAP Agency Complaint Disposition
FY2019



Source: HUD, *Annual Report on Fair Housing, FY2016*, January 19, 2017, available at <https://portal.hud.gov/hudportal/documents/huddoc?id=FY2016FHEOAnnualReport.pdf>.

Since FY2005, the highest percentage of fair housing complaints filed have been based on disability. Until that time, the percentage of complaints based on race and disability had been nearly equal: 38% and 41% of total complaints, respectively.⁵⁵ However, by FY2019 the percentage of complaints based on disability increased to 62%, and race declined to 26%.⁵⁶ (Note that in calculating complaint percentages HUD takes into account the fact that one case may allege multiple bases for discrimination. As a result, the sum of percentages for all types of discrimination exceeds 100%.) Familial status complaints have also declined somewhat during this period, while other protected categories—national origin, sex, religion, and color—have remained at about the same levels. HUD also reports the number of complaints based on retaliation, which have increased from approximately 5% in FY2005 to 13% in FY2019. See **Figure 4** for complaints filed by protected class through FY2019.

The high percentage of complaints based on disability may in part have to do with additional protections for people with disabilities. Unlike other protected statuses, the Fair Housing Act imposes affirmative duties on housing providers to make “reasonable accommodations” for individuals with disabilities. Under the law, it is discriminatory to refuse to allow residents with disabilities to make physical changes to the premises, at their own expense, in order to afford them full enjoyment of the premises.⁵⁷ Examples of reasonable accommodations include changes to a unit such as widening doorways, installing a ramp or grab bars, or lowering cabinets.⁵⁸ In addition, the law gives residents with disabilities the right to request “reasonable accommodations” in the rules, policies, practices, or services that may ordinarily apply to housing residents. It is considered discrimination under the Fair Housing Act to refuse to make a

⁵⁵ *FY2008 Annual Report on Fair Housing*, p. 3.

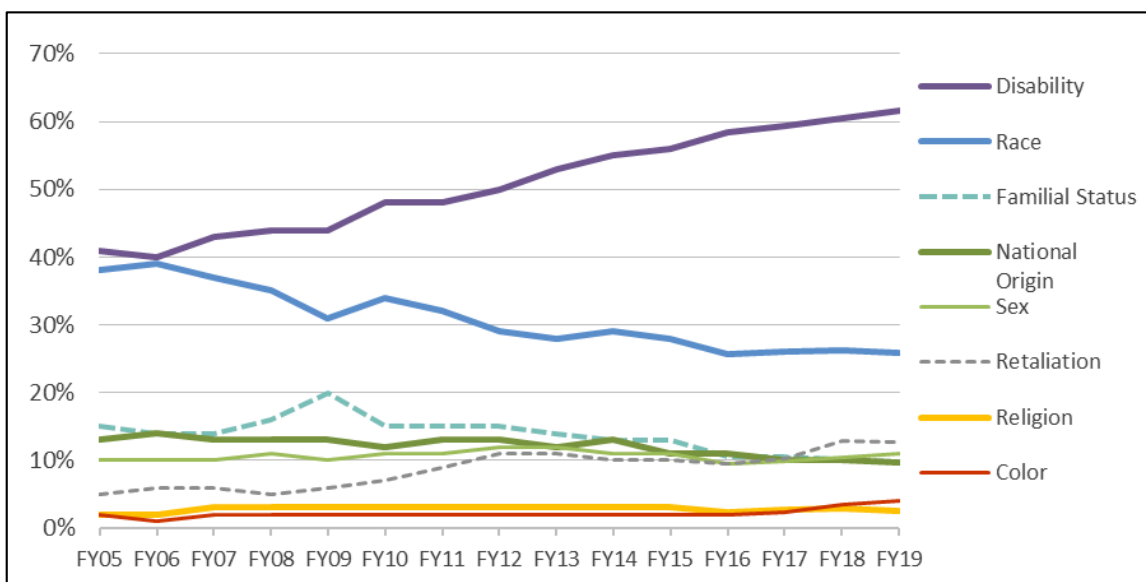
⁵⁶ *FY2018-FY2019 Annual Fair Housing Report to Congress*, p. 24.

⁵⁷ 42 U.S.C. §3604(f)(3)(A).

⁵⁸ See *Reasonable Modifications Under the Fair Housing Act*, Joint Statement of The Department of Housing and Urban Development and the Department of Justice, March 5, 2008, p. 4, https://www.hud.gov/sites/documents/reasonable_modifications_mar08.pdf.

reasonable accommodation in order to give residents with disabilities an equal opportunity to use and enjoy their dwelling unit.⁵⁹ Examples of reasonable accommodations include making parking spaces available to residents with disabilities or allowing assistance animals in a property that does not otherwise allow pets.⁶⁰ An accommodation is not considered reasonable if it imposes an undue financial or administrative burden, or if it fundamentally alters the nature of the housing provider’s operations.⁶¹ In FY2019, the failure to make a reasonable accommodation was the second-most frequently raised issue in complaints, representing 43% of HUD and FHAP complaints raised in cases filed (after discriminatory terms, conditions, privileges, services, and facilities in the rental or sale of property).⁶²

Figure 4. HUD and FHAP Complaints Filed by Protected Status
FY2005-FY2019



Source: HUD Annual Reports on Fair Housing, FY2008-FY2016, available at <http://portal.hud.gov/hudportal/HUD?src=/annualreport>.

Note: Percentages represent the number of discrimination complaints as a percentage of all cases filed. Cases may contain more than one complaint of discrimination (for example, race and sex). As a result, the sum of percentages each year exceeds 100%.

Other HUD Efforts to Prevent Discrimination in Housing

During the Obama Administration, HUD issued regulations and guidance to protect individuals from discrimination that may not be explicitly directed against protected classes under the Fair

⁵⁹ 42 U.S.C. §3604(f)(3)(B).

⁶⁰ *Reasonable Accommodations Under the Fair Housing Act*, Joint Statement of the Department of Housing and Urban Development and the Department of Justice, May 17, 2004, <http://www.nhl.gov/offices/fheo/library/huddojstatement.pdf>.

⁶¹ *Ibid.*, p. 7.

⁶² *FY2018-FY2019 Annual Fair Housing Report to Congress*, p. 26. HUD calculates percentages based on total number of complaints as a percentage of all cases filed. Because each case can contain more than one basis for a complaint, the sum of percentages exceeds 100%.

Housing Act. In one case, HUD used its authority to prevent discrimination in the programs it administers by issuing regulations prohibiting discrimination based on sexual orientation and gender identity. HUD also released guidance to inform housing providers and localities about policies that may seem facially neutral but could have discriminatory effects in violation of the Fair Housing Act. These include policies regarding criminal background checks, local nuisance ordinances that prohibit certain behaviors, and treatment of people with limited English proficiency.

The following subsections describe HUD’s regulations regarding equal access to housing as well as several guidance documents HUD released during 2016.

HUD’s Equal Access to Housing Regulations

In 2012, HUD published a final rule providing for equal access to HUD housing programs regardless of sexual orientation or gender identity.⁶³ The Fair Housing Act does not expressly protect individuals from discrimination based on sexual orientation or gender identity, and at the time of the rule’s publication, HUD did not interpret discrimination based on sex to include sexual orientation and gender identity. (In February 2021, HUD announced it would interpret discrimination based on sex more expansively. See “A Brief Overview of the Fair Housing Act”.) As a result, HUD issued the rule pursuant to its charge to ensure equal access to its programs, and to provide “decent housing and a suitable living environment for every American family.”⁶⁴

The regulations promulgated by the rule apply to all HUD housing programs, including loan programs. Housing in these programs must be made available without regard to actual or perceived sexual orientation, gender identity, or marital status.⁶⁵ In addition, the rule provided that property owners, program administrators, and lenders may not inquire about sexual orientation or gender identity of an applicant for or occupant of HUD-insured or HUD-assisted housing.⁶⁶

Application of Equal Access Rules to Emergency Shelters

The 2012 regulations contained an exception to the prohibition on inquiries into sex when an individual is an applicant or occupant of temporary emergency shelter where there may be shared bedrooms or bathrooms or to determine the number of bedrooms to which a family is entitled. The exception resulted in a number of commenters to the proposed rule expressing concern about transgender individuals’ ability to gain access to single-sex shelters in accordance with their gender identity. While HUD noted that it was not mandating a policy on placement of transgender persons, it said it would monitor how programs operate and issue additional guidance if necessary.

2016 Final Rule: In February 2015, based on this monitoring, HUD followed up by issuing a notice governing Community Planning and Development (CPD) programs—Community Development Block Grants, HOME Investment Partnerships, Housing Opportunities for Persons with AIDS, Emergency Solutions Grants, and the Continuum of Care program.⁶⁷ In the notice,

⁶³ U.S. Department of Housing and Urban Development, “Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity,” *77 Federal Register* 5662-5676, February 3, 2012, <https://www.govinfo.gov/content/pkg/FR-2012-02-03/pdf/2012-2343.pdf>.

⁶⁴ *77 Federal Register* 5672.

⁶⁵ 24 C.F.R. §5.105(a)(2)(i).

⁶⁶ *77 Federal Register* 5674.

⁶⁷ U.S. Department of Housing and Urban Development, *Notice CPD-15-02, Appropriate Placement for Transgender*

HUD clarified that it expected placement in single-sex shelters to occur in accordance with an individual's gender identity. HUD followed this notice, in November 2015, with a proposed rule that would apply to HUD CPD programs.⁶⁸ A final rule was released on September 21, 2016, and was effective one month later.⁶⁹

The final rule requires that placement in facilities with shared sleeping and/or bath accommodations occur in conformance with a person's gender identity. In addition, the final rule removed the general prohibition in the 2012 regulation on asking questions about sexual orientation and gender identity so that providers can ask questions to ensure they are complying with the rule.⁷⁰ The rule provides that individuals shall not be asked "intrusive" questions or "asked to provide anatomical information or documentary, physical, or medical evidence of the individual's gender identity."⁷¹ The final rule also updated the definition of gender identity as it applies to all HUD programs and defined "perceived" gender identity.⁷²

2020 Proposed Rule: On July 24, 2020, HUD released a proposed rule to make changes to the 2016 equal access rule. The proposed rule stated that HUD had reconsidered the 2016 rule's provisions, and that providers operating single-sex facilities should be able to consider biological sex, and make their own determinations about biological sex, in making placement decisions, without regard to gender identity.⁷³ According to HUD, "the 2016 Rule impermissibly restricted single-sex facilities in a way not supported by congressional enactment, minimized local control, burdened religious organizations, manifested privacy issues, and imposed regulatory burdens."⁷⁴ The 2020 proposed rule was not made final.

HUD Guidance

In 2016, HUD released several guidance documents that inform housing providers and local communities about policies and practices that may violate the Fair Housing Act by having a discriminatory effect on members of a protected class. The guidance addresses how use of criminal background checks, nuisance ordinances, and treatment of people with limited English proficiency can potentially result in discrimination. The guidance discusses situations where

Persons in Single-Sex Emergency Shelters and Other Facilities, February 20, 2015, <https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placement-for-Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf>.

⁶⁸ U.S. Department of Housing and Urban Development, "Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs," 80 *Federal Register* 72642, November 20, 2015, <https://www.govinfo.gov/content/pkg/FR-2015-11-20/pdf/2015-29342.pdf>.

⁶⁹ U.S. Department of Housing and Urban Development, "Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs," 81 *Federal Register* 64763-64782, September 21, 2016, <https://www.govinfo.gov/content/pkg/FR-2016-09-21/pdf/2016-22589.pdf>.

⁷⁰ *Ibid.*, p. 64765.

⁷¹ *Ibid.*, p. 64782.

⁷² 81 *Federal Register* 64782. The new definition of gender identity is "the gender with which a person identifies, regardless of the sex assigned to that person at birth and regardless of the person's perceived gender identity." Perceived gender identity is "the gender with which a person is perceived to identify based on that person's appearance, behavior, expression, other gender related characteristics, or sex assigned to the individual at birth or identified in documents."

⁷³ U.S. Department of Housing and Urban Development, "Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs," 85 *Federal Register* 44811, July 24, 2020, <https://www.govinfo.gov/content/pkg/FR-2020-07-24/pdf/2020-14718.pdf>.

⁷⁴ 85 *Federal Register* 44812.

discrimination could occur and the balancing test used to determine if policies or practices have a discriminatory effect.

Disparate Impact

Each of the HUD guidance documents described in this section relies on a burden-shifting test for determining discriminatory effects discrimination, which is also referred to as disparate impact discrimination. The test is drawn from case law and HUD regulations published in 2013.⁷⁵ In 2015, the Supreme Court added clarity to the issue when it held that disparate impact claims are cognizable under the Fair Housing Act and outlined the burden-shifting test that should be applied for assessing disparate impact discrimination claims. The burden-shifting test applied by the Supreme Court was similar, but not identical, to the test outlined in HUD's prior regulations and guidance. In September 2020, HUD issued a new disparate impact rule modifying the one issued in 2013.⁷⁶ HUD stated that modifications were made to bring the rule into alignment with the Supreme Court decision as understood by HUD.⁷⁷ As of the date of this report, the 2020 disparate impact rule had not gone into effect because a federal district court, as part of a legal challenge to the rule, issued a preliminary injunction enjoining HUD from implementing or enforcing the rule.⁷⁸ President Biden has issued a memorandum directing HUD to examine the effects of the 2020 disparate impact rule on HUD's duty to comply with the Fair Housing Act.⁷⁹ For more information, see CRS Report R44203, *Disparate Impact Claims Under the Fair Housing Act*.

Use of Criminal Background Checks

In April 2016, HUD's Office of General Counsel released guidance applying the Fair Housing Act to use of criminal background checks in screening prospective tenants for housing.⁸⁰ Unlike HUD's regulations regarding discrimination based on sexual orientation and gender identity, the guidance is directed at all housing providers subject to the Fair Housing Act, not just HUD programs. While individuals with a record of arrests or convictions are not protected under the Fair Housing Act, HUD's guidance noted that African American and Hispanic individuals are disproportionately represented in the criminal justice system, and that screening for criminal records could have discriminatory effect or disparate impact based on race or national origin, which may be prohibited under the act.

HUD's guidance on this issue states that, in screening for criminal history (including arrest records), "arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification."⁸¹ If a housing provider does take criminal history into account, HUD's

⁷⁵ U.S. Department of Housing and Urban Development, "Implementation of the Fair Housing Act's Discriminatory Effects Standard," 78 *Federal Register* 11459, February 15, 2013, <https://www.govinfo.gov/content/pkg/FR-2013-02-15/pdf/2013-03375.pdf>. The regulations were codified at 24 C.F.R. §100.500.

⁷⁶ U.S. Department of Housing and Urban Development Act, "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard," 85 *Federal Register* 60288, September 24, 2020, <https://www.govinfo.gov/content/pkg/FR-2020-09-24/pdf/2020-19887.pdf>.

⁷⁷ U.S. Department of Housing and Urban Development, "HUD's Implementation of the Fair Housing Act's Disparate Impact Standard," 84 *Federal Register* 42857, August 19, 2019, <https://www.govinfo.gov/content/pkg/FR-2019-08-19/pdf/2019-17542.pdf>.

⁷⁸ The final rule is at 85 *Federal Register* 60288, September 24, 2020, <https://www.govinfo.gov/content/pkg/FR-2020-09-24/pdf/2020-19887.pdf>. The grant of the order of preliminary injunction was made in *Massachusetts Fair Housing Center and Housing Works, Inc. v. HUD*, available at <http://prrac.org/pdf/massachusetts-di-pl-decision.pdf>.

⁷⁹ U.S. President (Biden), "Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies," 86 *Federal Register* 7487-7488, January 26, 2021, <https://www.govinfo.gov/content/pkg/FR-2021-01-29/pdf/2021-02074.pdf>.

⁸⁰ U.S. Department of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, April 4, 2016, https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf.

⁸¹ *Ibid.*, p. 10.

guidance states that the policy should be tailored to serve a “substantial, legitimate, nondiscriminatory interest” and consider the particulars of an individual’s circumstances such as type of crime and amount of time that has passed since a conviction occurred.⁸²

Nuisance Ordinances and Victims of Crime, Including Domestic Violence

In September 2016, HUD released guidance about application of the Fair Housing Act to nuisance ordinances that may result in victims of crime, particularly domestic violence, losing their housing.⁸³ So-called nuisance ordinances, enacted at the local level, require property owners to abate—to lessen or remove—a nuisance associated with their property. The types of activities categorized as nuisances depend on jurisdiction, and may have to do with upkeep of the property itself, but they can also include disruptive behavior, criminal activity, or calls to law enforcement that exceed a certain minimum number. Similarly, lease provisions may consider calls to law enforcement a lease violation, potentially resulting in eviction. As described in the HUD guidance, calls from victims of domestic violence to law enforcement can result in evictions after landlords have been cited for violating nuisance ordinances for exceeding a minimum number of calls to law enforcement.⁸⁴

The HUD guidance points out that a nuisance ordinance could have a discriminatory effect, potentially violating the Fair Housing Act, if it is enforced disproportionately against victims of domestic violence resulting in discrimination based on sex.⁸⁵ In such a case, the burden would shift to the government enforcing the nuisance ordinance to show that the nuisance ordinance is necessary to achieve a substantial, legitimate, and nondiscriminatory interest, and that there is no less-discriminatory alternative.

People with Limited English Proficiency

Another area of potential discrimination where HUD released guidance in 2016 is limited English proficiency, with guidance released just days after that regarding nuisance ordinances.⁸⁶ While the Fair Housing Act does not prohibit discrimination based on the language someone speaks, it is possible that this practice could have a discriminatory effect based on race or national origin.⁸⁷ Language-related restrictions could include requiring that tenants speak English or turning away tenants who do not speak English, particularly if low-cost translation services are available.⁸⁸

If someone were to challenge language-related restrictions, the same balancing test described in the other HUD guidance would apply. If a policy or behavior is shown to have a discriminatory effect, then the burden shifts to the housing provider to show that the practice is necessary to

⁸² Ibid.

⁸³ U.S. Department of Housing and Urban Development, Office of General Counsel *Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services*, September 13, 2016, <https://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf>.

⁸⁴ Ibid., pp. 3-5.

⁸⁵ Ibid., p. 8.

⁸⁶ U.S. Department of Housing and Urban Development, *Office of General Counsel Guidance on Fair Housing Act Protections for Persons with Limited English Proficiency*, September 15, 2016, <https://portal.hud.gov/hudportal/documents/huddoc?id=lepmemo091516.pdf>.

⁸⁷ Ibid., p. 2.

⁸⁸ Ibid., p. 4.

serve a substantial, legitimate, nondiscriminatory interest, and that no less-discriminatory alternative is available.

Affirmatively Furthering Fair Housing

In addition to prohibiting discrimination, the Fair Housing Act, since its inception, has required HUD and other federal agencies that administer programs related to housing and urban development to administer their programs in a way that affirmatively furthers fair housing.⁸⁹

What “affirmatively further fair housing” means is not defined in statute. Various courts, in decisions regarding HUD’s obligations, have concluded that it means more than refraining from discrimination.⁹⁰ For example, a federal court decision in 1973 interpreting the AFFH section of the Fair Housing Act regarding residents of public housing stated

Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.⁹¹

A 1987 federal appellate court decision looked at the legislative history of the Fair Housing Act, saying that the “law’s supporters saw the ending of discrimination as a means toward truly opening the nation’s housing stock to persons of every race and creed.” And with that goal in mind, the court stated

This broader goal suggests an intent that HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.⁹²

In addition to HUD, the AFFH requirement has also been applied, via statute, regulation, and competitive grants, to recipients of HUD funding. The requirement applies to communities, states, and insular areas that receive formula funds through the Community Development Block Grant (CDBG), HOME Investment Partnerships, Housing Opportunities for Persons with AIDS (HOPWA), and Emergency Solutions Grants (ESG) programs, as well as to Public Housing Authorities (PHAs) that administer both Public Housing and Section 8 programs.⁹³ Applicants for HUD’s competitive grants are required to certify that they will affirmatively further fair housing as part of the grant application process.⁹⁴

⁸⁹ 42 U.S.C. §3608(d), (e)(5).

⁹⁰ See, for example, *NAACP v. HUD*, 817 F.2d 149, 155 (1st Cir. 1987) (“Finally, every court that has considered the question has held or stated that Title VII imposes upon HUD an obligation to do more than simply refrain from discriminating (and from purposefully aiding discrimination by others)”).

⁹¹ *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2nd Cir. 1973).

⁹² *NAACP v. HUD*, 817 F.2d at 155.

⁹³ Statutory requirements are at 42 U.S.C. §5304(b)(2) (CDBG) and 42 U.S.C. §1437c-1(d)(16) (Public Housing Authorities). Regulations require recipients of HOME, HOPWA, and ESG funds to affirmatively further fair housing as part of the consolidated planning process. See 24 C.F.R. §91.225, §91.325, and §91.425. Prior to the consolidated plan, recipients were required to affirmatively further fair housing as part of the Comprehensive Housing Affordability Strategy (P.L. 101-625).

⁹⁴ See, for example, U.S. Department of Housing and Urban Development, *General Administrative Requirements and Terms for HUD Financial Assistance Awards*, <https://www.hud.gov/sites/dfiles/SPM/documents/GeneralAdministrationRequirementsand%20TermsforHUDAssistanceAwards2.pdf>.

Status of HUD AFFH Regulations

Over the years, HUD has enforced the AFFH requirement first through guidance, and then through regulations. HUD's AFFH regulations have changed under the previous two presidential administrations. Prior to 2015, HUD had not issued regulations regarding AFFH, and instead provided guidance for HUD grantees to follow, called an Analysis of Impediments (AI). In 2015, and again in 2020, HUD issued final rules governing the AFFH requirement. Below is a chronology of the AFFH rulemaking process, resulting in subsequent sets of regulations. (For more information about the details of each policy, including AI and AFFH, see **Appendix B.**)

- On July 16, 2015, HUD released an AFFH rule requiring states and communities receiving HUD formula grants, as well as PHAs, to affirmatively further fair housing by conducting an Assessment of Fair Housing (AFH).⁹⁵ The AFH process was implemented and enforced for approximately two years (2016-2017).
- On January 5, 2018, HUD issued a notice stating that it would delay implementation of the AFFH rule for local governments receiving more than \$500,000 in CDBG funds until after October 31, 2020 (other jurisdictions were not yet required to submit AFHs).⁹⁶ On May 23, 2018, HUD issued several more notices, the effect of which was to delay implementation of the 2015 rule indefinitely and revert to the former process of affirmatively furthering fair housing, the AI.⁹⁷
- On January 14, 2020, HUD released a proposed AFFH rule.⁹⁸ Before the rule could be finalized, HUD issued a different final rule, on August 7, 2020, entitled "Preserving Community and Neighborhood Choice."⁹⁹
- The 2020 final rule states that HUD need not go through the notice and comment process normally required of rulemaking under the Administrative Procedure Act (APA) due to an APA exception for matters "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." The rule took effect on September 7, 2020.
- On January 26, 2021, the Biden Administration issued a presidential memorandum to HUD, directing the agency to "take all steps necessary to examine the effects of the August 7, 2020, rule entitled 'Preserving Community and Neighborhood Choice' ... including the effect that repealing the July 16,

⁹⁵ Department of Housing and Urban Development, "Affirmatively Furthering Fair Housing," 80 *Federal Register* 42272, July 16, 2015, <https://www.govinfo.gov/content/pkg/FR-2015-07-16/pdf/2015-17032.pdf>.

⁹⁶ U.S. Department of Housing and Urban Development, "Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants" 83 *Federal Register* 683-685, January 5, 2018, <https://www.govinfo.gov/content/pkg/FR-2018-01-05/pdf/2018-00106.pdf>.

⁹⁷ See **Appendix B**, "HUD Decision to Delay Implementation of the 2015 AFFH Rule," for citations to the three notices.

⁹⁸ U.S. Department of Housing and Urban Development, "Affirmatively Furthering Fair Housing," 85 *Federal Register* 2041-2061, January 14, 2020, <https://www.govinfo.gov/content/pkg/FR-2020-01-14/pdf/2020-00234.pdf>.

⁹⁹ U.S. Department of Housing and Urban Development, "Preserving Community and Neighborhood Choice," 85 *Federal Register* 47899-47912, August 7, 2020, <https://www.govinfo.gov/content/pkg/FR-2020-08-07/pdf/2020-16320.pdf>.

2015, rule entitled ‘Affirmatively Furthering Fair Housing’ has had on HUD’s statutory duty to affirmatively further fair housing.”¹⁰⁰

Limited English Proficiency

In addition to administering fair housing programs and enforcing the law, FHEO oversees HUD’s compliance with limited English proficiency (LEP) requirements to ensure that persons with limited English proficiency have access to HUD programs. Title VI of the Civil Rights Act prohibits discrimination in federally assisted programs on the basis of race, color, or national origin.¹⁰¹ One aspect of this prohibition has been ensuring that LEP individuals have access to federal programs (lack of access may be considered discrimination based on national origin).¹⁰² In 2000, President Clinton signed an executive order to require federal agencies to publish guidance for recipients of federal funding about ensuring that LEP individuals have access to programs and services.¹⁰³ In 2007, HUD issued final guidance to recipients of HUD funding about factors to consider in meeting the needs of LEP clients.¹⁰⁴

HUD’s guidance applies to all recipients of funding, including state and local governments, PHAs, and for-profit and nonprofit housing providers, and also includes recipients that receive funds indirectly, such as subgrantees of state CDBG or HOME grants. The guidance directs recipients “to take reasonable steps to ensure meaningful access to their programs and activities by LEP persons.”¹⁰⁵ The guidance lays out four factors for recipients to consider in determining how to serve LEP clients: (1) the number or proportion of LEP clients likely to be served or encountered by the recipient, (2) how frequently eligible LEP persons are encountered by the recipient, (3) the nature and importance of the program or service in people’s lives, and (4) the recipient’s resources and the cost of LEP services.¹⁰⁶

Depending on a recipient’s analysis of these factors, it may opt to provide translation services on an as-needed basis by contracting with translation companies; or, if LEP clients are more frequent, it may decide to hire either a translator or bilingual staff. Recipients may also decide to have a wide number of documents translated or translate only the most critical documents. Enforcement of LEP requirements occurs through such avenues as compliance reviews or investigating complaints.¹⁰⁷

¹⁰⁰ The White House (President Biden), “Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies,” presidential memorandum, 86 *Federal Register* 7487-7488, January 26, 2021, <https://www.govinfo.gov/content/pkg/FR-2021-01-29/pdf/2021-02074.pdf>.

¹⁰¹ 42 U.S.C. §2000d.

¹⁰² See Department of Justice, “Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficiency Persons,” 67 *Federal Register* 41457, June 18, 2002, <https://www.govinfo.gov/content/pkg/FR-2002-06-18/pdf/02-15207.pdf>.

¹⁰³ The White House (President Clinton), “Improving Access to Services for Persons With Limited English Proficiency,” Executive Order 13166, 65 *Federal Register* 50121-50122, August 16, 2000, <https://www.govinfo.gov/content/pkg/FR-2000-08-16/pdf/00-20938.pdf>.

¹⁰⁴ U.S. Department of Housing and Urban Development, “Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,” 72 *Federal Register* 2732, January 22, 2007, <https://www.govinfo.gov/content/pkg/FR-2007-03-16/pdf/E7-4794.pdf>.

¹⁰⁵ 72 *Federal Register*, p. 2740.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, p. 2476. See also 28 C.F.R. §§42.106-42.107.

Congress set aside \$400,000 for HUD to translate materials as part of the FY2008 Consolidated Appropriations Act (P.L. 110-161) and has continued to set aside funding since that time, ranging from \$300,000 to \$500,000. Funding has been used to translate HUD documents, provide translation services at HUD events, provide phone translations for callers to HUD, and acquire technology, among other services.¹⁰⁸

Section 3, Economic Opportunities for Low- and Very Low-Income Persons

Until November 30, 2020, FHEO oversaw HUD's Section 3 program, through which Public and Indian Housing Authorities and grant recipients of HUD housing and community development construction or rehabilitation funds are to provide employment and training opportunities for low- and very low-income persons, particularly those residing in assisted housing. After release of new Section 3 regulations, on September 29, 2020, the offices overseeing HUD's programs that are subject to Section 3 will oversee the program's requirements and FHEO is no longer involved.¹⁰⁹

¹⁰⁸ U.S. Department of Housing and Urban Development, *FY2015 Budget Justifications*, p. D-8, http://portal.hud.gov/hudportal/documents/huddoc?id=fy15cj_fair_hsnsg_prog.pdf.

¹⁰⁹ U.S. Department of Housing and Urban Development, "Enhancing and Streamlining the Implementation of Section 3 Requirements for Creating Economic Opportunities for Low- and Very Low-Income Persons and Eligible Businesses," 85 *Federal Register* 61524, 61567, September 29, 2020, <https://www.federalregister.gov/documents/2020/09/29/2020-19185/enhancing-and-streamlining-the-implementation-of-section-3-requirements-for-creating-economic>.

Appendix A. FHAP and FHIP Funding Table

The table below shows FHAP and FHIP funding from FY1996 to the present.

Table A-1. Funding for FHAP and FHIP, FY1996-FY2021

(Dollars in millions)

Fiscal Year	Fair Housing Assistance Program (FHAP)		Fair Housing Initiatives Program (FHIP)	
	President's Budget Request	Appropriation	President's Budget Request	Appropriation
1996	15.0	13.0	30.0	17.0
1997	15.0	15.0	18.0	15.0
1998	15.0	15.0	24.0	15.0
1999	23.0	16.5	29.0	23.5
2000	20.0	20.0	27.0	24.0
2001	21.0	22.0	29.0	23.9
2002	23.0	25.6	22.9	20.3
2003	25.6	25.5	20.3	20.1
2004	29.8	27.6	20.3	20.1
2005	27.1	26.3	20.7	19.8
2006	22.7	25.7	16.1	19.8
2007	24.8	25.7	19.8	19.8
2008	24.8	25.6	20.2	24.0
2009	25.0	25.5	26.0	27.5
2010	29.5	29.0	42.5	42.1 ^a
2011	28.2	28.7	32.3	42.0
2012	29.5	28.0	42.5	42.5
2013	24.6	26.6	41.1	40.3
2014	24.6	24.1	44.1	40.1
2015	23.3	23.3	45.6	40.1
2016	23.3	24.3	45.6	39.2
2017	21.9	24.3	46.0	39.2
2018	24.3	23.9	39.2	39.6
2019	24.3	23.9	36.2	39.6
2020	24.3	25.0 ^b	36.2	46.0 ^b
2021	23.9	24.4	39.6	66.3 ^c

Sources: HUD Congressional Budget Justifications for FY1996-FY2021; the explanatory materials accompanying the FY2020 Further Consolidated Appropriations Act, P.L. 116-94, at <http://docs.house.gov/billssthisweek/20191216/BILLS-116HR1865SA-JES-DIVISION-H.pdf>; the Coronavirus Aid, Relief, and Economic Security (CARES) Act, P.L. 116-136; the explanatory materials accompanying the FY2021 Consolidated Appropriations

Act (P.L. 116-260) at <https://docs.house.gov/billssthisweek/20201221/BILLS-116RCP68-JES-DIVISION-L.pdf>; and the American Rescue Plan Act (P.L. 117-2).

Notes: Amounts for the President's FY2010 and FY2011 budget requests do not include funding proposed for the Transformation Initiative.

- a. The President's budget request for FY2010 included additional FHIP funding to address mortgage fraud. While Congress appropriated additional funds for FHIP, the conference report stated "the conferees do not propose a separate set-aside for work on mortgage rescue scams as proposed by the Senate since these activities are already being funded as part of the program." See H.Rept. 111-366.
- b. The FY2020 Further Consolidated Appropriations Act appropriated \$23.5 million and \$45.0 million for FHAP and FHIP, respectively. The CARES Act provided an additional \$1.5 million for FHAP and \$1.0 million for FHIP.
- c. The FY2021 Consolidated Appropriations Act provided \$46.3 million for FHIP. An additional \$20 million was appropriated for the program in FY2021 as part of the American Rescue Plan Act.

Appendix B. Chronology of AFFH Proposed and Final Rules, 2015-2020

For a number of years, to fulfill the requirement to affirmatively further fair housing (AFFH), HUD required that certain grantees go through a process called an Analysis of Impediments (AI). The grantees required to go through the process were states and localities that receive formula funding through the CDBG, HOME, HOPWA, and ESG programs, as well as PHAs. The jurisdictions receiving formula grants were to go through the AI process as part of the consolidated planning process that they participate in to receive the grants, and PHAs as part of their PHA plan.¹¹⁰

The Consolidated Plan

Every three to five years, states and localities that receive HUD formula grants must submit a consolidated plan to HUD for approval. The plan is an assessment of affordable housing and community development needs. The process for developing the consolidated plan must involve consultation with housing and services providers and allow for citizen participation. Three of the four AFFH methods described in this appendix use, or proposed to use, the consolidated plan as the way in which communities certify that they have complied with the AFFH requirement.

On July 16, 2015, HUD issued a final AFFH rule changing the process through which formula grantees and PHAs were to affirmatively further fair housing, a process called the Assessment of Fair Housing (AFH). However, in May 2018 HUD indefinitely delayed implementation of the rule and directed grantees to resume the AI process. The agency released a new proposed AFFH rule in January 2020, but ultimately adopted a completely different final rule, published in August 2020, and which took effect on September 8, 2020. This appendix describes each of these four methods for affirmatively furthering fair housing: the AI, the 2015 AFFH rule, the 2020 proposed AFFH rule, and the 2020 final rule.

Analysis of Impediments (AI)

Prior to release of the 2015 final AFFH rule, the regulations governing the consolidated planning process required HUD formula grantees to use the AI process to identify impediments to fair housing choice and suggest steps for addressing them.¹¹¹ Regulations governing PHA annual plans contained similar language.¹¹²

Through a report issued in 1996, the Fair Housing Planning Guide, HUD defined impediments to fair housing choice as “Any actions, omissions, or decisions taken because of race, color, religion, sex, disability, familial status, or national origin which restrict housing choices or the availability of housing choices,” as well as those having the effect of restricting housing choice and availability.¹¹³ Grantees were to identify impediments using local information and data. The guide

¹¹⁰ Consolidated plan requirements are at 24 C.F.R. §91.1(a). PHAs submit annual and five-year plans. Part of the annual plan is a certification that PHAs will affirmatively further fair housing, <http://portal.hud.gov/hudportal/documents/huddoc?id=HUD-50077-CR-2-10.pdf>.

¹¹¹ See 2014 regulations for CDBG entitlement communities at 24 C.F.R. §570.601. Regulations for the consolidated plan process are the 2014 versions of 24 C.F.R. §91.225 (local governments), §91.325 (state governments), and §91.425 (consortia applicants).

¹¹² 24 C.F.R. §903.7(o) (2014).

¹¹³ U.S. Department of Housing and Urban Development, *Fair Housing Planning Guide Volume 1*, March 1996, p. 2-8, <https://www.hud.gov/sites/documents/FHPG.PDF> (hereinafter, *Fair Housing Planning Guide Volume 1*).

also suggested steps a recipient community could take to address impediments. Recipients were to keep written records of their analysis and actions taken as a result of the analysis.

HUD expected grantees to use data in their analysis, but did not provide the data.¹¹⁴ HUD encouraged grantees to communicate the findings to government officials, policymakers, community groups, and the general public, but there was no public process required for AIs, and results of an AI were not required to be made public.¹¹⁵ There was also no requirement that materials be submitted to HUD.¹¹⁶ Grantees were to submit a summary of the AI and any accomplishments with the consolidated plan, and to complete or update an AI every three to five years (depending on when the consolidated plan was due).¹¹⁷

Both HUD, in a report issued in 2009, and the Government Accountability Office, in a report issued in 2010, found weaknesses in the AI process.¹¹⁸ They found that AIs were outdated and that quality was uneven. GAO reported that among current AIs, many lacked timelines for accomplishing goals. A limitation identified by GAO as contributing to the problems was that regulations included very few requirements regarding AIs, with most procedures suggested in HUD guidance. GAO recommended that HUD issue a new regulation governing AFFH and include standards and a format for grantees to follow, require grantees to include time frames for implementing their recommended changes, and require grantees to submit their plans to HUD.¹¹⁹

2015 Final AFFH Rule: The Assessment of Fair Housing (AFH)

The 2015 final AFFH rule put in place detailed regulations that were to govern the AFFH process. The rule defined more specifically what AFFH means and provided for a new process called an Assessment of Fair Housing (AFH) instead of the AI. Further, HUD was to provide data for grantees (referred to in the rule as “program participants”) to use in preparing their AFHs and to publish tools to help program participants through the AFH process. Program participants also were to submit and have their AFHs approved by HUD.

AFH Requirements

The AFFH rule defined “affirmatively furthering fair housing” as

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 and ethnically concentrated areas of poverty into areas of opportunity, and fostering and

¹¹⁴ *Fair Housing Planning Guide Volume 1*, pp. 2-9 to 2-10.

¹¹⁵ *Fair Housing Planning Guide Volume 1*, p. 2-21.

¹¹⁶ *Fair Housing Planning Guide Volume 1*, p. 2-24.

¹¹⁷ *Fair Housing Planning Guide Volume 1*, p. 2-6.

¹¹⁸ U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *Analysis of Impediments Study: Draft*, January 27, 2009, <https://ia801002.us.archive.org/20/items/365748-hud-reporting-compliance-report/365748-hud-reporting-compliance-report.pdf>; and U.S. Government Accountability Office, *Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans*, GAO-10-905, September 2010, <http://www.gao.gov/new.items/d10905.pdf>.

¹¹⁹ GAO, *Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans*, pp. 32-33.

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.¹²⁰

Program participants were to comply with the AFFH requirement by completing an AFH. The AFH included several steps that program participants were to take:¹²¹

- Summarizing the extent to which fair housing actions have taken place in the jurisdiction (e.g., lawsuits, enforcements actions, settlements, judgments), an assessment of compliance with laws and regulations, and the jurisdiction's fair housing outreach and enforcement capacity.
- Identifying fair housing issues, including
 - **Segregation or lack of integration** for any protected class. Segregation was measured using a dissimilarity index showing the extent to which the distribution of groups differs across Census tracts.¹²²
 - **Racially or ethnically concentrated areas of poverty**. These are areas with a nonwhite population of 50% or more and a poverty rate that exceeds 40% or is three or more times the average tract poverty rate for the metropolitan/micropolitan area, whichever threshold is lower.¹²³
 - **Significant disparities in access to opportunity** for any protected class. There were five areas of opportunity that program participants were to evaluate: education, employment, transportation, low-poverty exposure, and environmentally healthy neighborhood opportunities.¹²⁴
 - **Disproportionate housing needs** for any protected class. This included being housing cost burdened, experiencing overcrowding, or living in substandard housing.¹²⁵
- Identifying factors that contribute to the fair housing issues and prioritizing them based on the extent to which they affect fair housing choice. HUD listed possible contributing factors for each of the four categories of fair housing issues in assessment tools published subsequently.¹²⁶ The list was lengthy and included many possible factors such as lack of access to financial services, community opposition to affordable housing, zoning laws, lack of accessibility features in a neighborhood for people with disabilities, etc.
- Setting goals for overcoming the effects of contributing factors. Program participants were to include strategies and actions they would take to achieve their goals in their consolidated and PHA Plans.

¹²⁰ 80 *Federal Register* 42353.

¹²¹ 80 *Federal Register* 42355.

¹²² HUD, Affirmatively Furthering Fair Housing (AFFH) Data Documentation, p. 11, <https://www.hudexchange.info/resources/documents/AFFH-Data-Documentation.pdf>.

¹²³ *Ibid.*, p. 9.

¹²⁴ Assessment of Fair Housing Tool for entitlement communities, pp. 3-5, <https://www.hudexchange.info/resources/documents/Assessment-of-Fair-Housing-Tool.pdf>.

¹²⁵ 80 *Federal Register* 42354.

¹²⁶ See, for example, http://www.huduser.org/portal/sites/default/files/pdf/AFFH_AssessmentTool_OptionA.pdf.

The rule provided that program participants were to conduct the analysis for the programs they administer, the jurisdiction, and the region.¹²⁷ HUD encouraged program participants to collaborate on an AFH.¹²⁸ For example, PHAs located within a CDBG entitlement area could work with each other or together with the city/county receiving CDBG funds. Program participants were to ensure that members of the community had the opportunity to participate in the AFH by communicating in a way to reach the broadest possible audience.¹²⁹

Assessment Tool

Under the 2015 final rule, HUD was to provide data to help program participants identify fair housing issues, and an assessment tool to prompt program participants to think about issues and contributing factors.

In the months following the publication of the 2015 final rule, HUD issued final assessment tools for entitlement communities and PHAs, while tools for states and insular areas were in the comment period. The assessment tools were to be used by program participants in completing the AFH, and were meant to help them work through the process.¹³⁰ While there were different tools for each category of program participant, the content was similar.

The assessment tools provided instructions to program participants as they completed each portion of the AFH. For example, the assessment tools directed program participants how to access and use HUD data for determining whether fair housing issues exist (such as segregation and racially or ethnically concentrated areas of poverty) and prompted program participants for information about these issues. The assessment tools also contained comprehensive lists of possible contributing factors to fair housing issues.

HUD Decision to Delay Implementation of the 2015 AFFH Rule

On January 5, 2018, approximately two and a half years after releasing the final AFFH rule, HUD issued a notice stating that it would extend the deadline for local governments receiving more than \$500,000 in CDBG funding to submit their AFHs until after October 31, 2020.¹³¹ Under the rule, these local governments had begun submitting AFHs starting in 2016. (At the time of HUD's notice, these jurisdictions were the only ones required to submit AFHs.)

Prior to HUD issuing the notice, 49 local governments had submitted AFHs, 17 of which were not initially approved.¹³² HUD reasoned that “[b]ased on the initial AFH reviews, HUD believes that program participants need additional time and technical assistance to adjust to the new AFFH process and complete AFH submissions that can be accepted by HUD.”¹³³

¹²⁷ 80 *Federal Register* 42355.

¹²⁸ 80 *Federal Register* 42356.

¹²⁹ 80 *Federal Register* 42357.

¹³⁰ 80 *Federal Register* 42352, definition of assessment tool.

¹³¹ U.S. Department of Housing and Urban Development, “Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants” 83 *Federal Register* 683-685, January 5, 2018, <https://www.govinfo.gov/content/pkg/FR-2018-01-05/pdf/2018-00106.pdf>.

¹³² U.S. Department of Housing and Urban Development, “Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments,” 83 *Federal Register* 23922, 23923, May 23, 2018, <https://www.govinfo.gov/content/pkg/FR-2018-05-23/pdf/2018-11146.pdf>.

¹³³ 83 *Federal Register* 684.

On May 23, 2018, HUD issued three more notices. The effect of the notices was to suspend indefinitely the implementation of the 2015 final rule and return to the AI process. The three notices did the following: (1) withdrew the January 5, 2018, notice that delayed implementation of the 2015 final rule for local governments until after October 31, 2020;¹³⁴ (2) withdrew the final assessment tool for local governments, which had been released on January 13, 2017;¹³⁵ and (3) directed program participants that had not already submitted an AFH under the 2015 final rule to comply with the previous requirements, the AI.¹³⁶

In withdrawing the local government assessment tool, HUD delayed the AFH submission dates for those entities indefinitely. This was because, as required by the 2015 final rule, AFH submission dates were to be delayed to allow at least nine months between publication of the final assessment tool and the AFH due date.¹³⁷ HUD stated that it withdrew the assessment tool because it had identified “significant deficiencies” that made it “unduly burdensome” for program participants to use.¹³⁸ The notice also contended that HUD did not have the personnel to provide technical assistance to all of the jurisdictions that would need to use the tool and complete an AFH. As a result, the notice provided that HUD would produce a “more effective and less burdensome” tool and that it would accept information and recommendations from the public on improving the tool.¹³⁹

2020 AFFH Rule

On January 14, 2020, less than five years after the 2015 final rule was published, HUD released a new proposed AFFH rule.¹⁴⁰ The 2020 proposed rule was open for comment until March 16, 2020. Instead of responding to comments and issuing a final rule based on the proposal, HUD issued a different final rule on August 7, 2020, called “Preserving Community and Neighborhood Choice.”¹⁴¹ In addition, HUD declared that the 2020 final rule was not subject to the Administrative Procedure Act notice-and-comment rulemaking process, a departure from HUD policy.¹⁴² As a result, the 2020 final rule became effective on September 8, 2020, 30 days after its publication, without the opportunity for the public to respond.

¹³⁴ U.S. Department of Housing and Urban Development, “Affirmatively Furthering Fair Housing: Withdrawing of Notice Extending the Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants,” 83 *Federal Register* 23928, May 23, 2018, <https://www.govinfo.gov/content/pkg/FR-2018-05-23/pdf/2018-11143.pdf>.

¹³⁵ U.S. Department of Housing and Urban Development, “Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments,” 83 *Federal Register* 23922, May 23, 2018, <https://www.govinfo.gov/content/pkg/FR-2018-05-23/pdf/2018-11146.pdf>.

¹³⁶ U.S. Department of Housing and Urban Development, “Affirmatively Furthering Fair Housing (AFFH): Responsibility to Conduct Analysis of Impediments,” 83 *Federal Register* 23927, May 23, 2018, <https://www.govinfo.gov/content/pkg/FR-2018-05-23/pdf/2018-11145.pdf>.

¹³⁷ 80 *Federal Register* 42357.

¹³⁸ 83 *Federal Register* 23923.

¹³⁹ 83 *Federal Register* 23926.

¹⁴⁰ U.S. Department of Housing and Urban Development, “Affirmatively Furthering Fair Housing,” 85 *Federal Register* 2041-2061, January 14, 2020, <https://www.govinfo.gov/content/pkg/FR-2020-01-14/pdf/2020-00234.pdf>.

¹⁴¹ U.S. Department of Housing and Urban Development, “Preserving Community and Neighborhood Choice,” 85 *Federal Register* 47899-47912, August 7, 2020, <https://www.govinfo.gov/content/pkg/FR-2020-08-07/pdf/2020-16320.pdf>.

¹⁴² The final rule stated that the APA exemption applying to matters “relating to agency management or personnel or to public property, loans, grants, benefits, or contracts” meant that rulemaking was not necessary because AFFH obligations apply to HUD grantees. 85 *Federal Register* 47904.

This subsection describes both the proposed and final 2020 rules.

Proposed Rule

The 2020 proposed rule would have defined AFFH as “advancing fair housing choice within the program participant’s control or influence.”¹⁴³ The proposal further defined “fair housing choice.”

Fair housing choice means, within a HUD program participant’s sphere of influence, that individuals and families have the opportunity and options to live where they choose, within their means, without unlawful discrimination related to race, color, religion, sex, familial status, national origin, or disability. Fair housing choice encompasses: (i) Protected choice, which means access to housing without discrimination; (ii) Actual choice, which means not only that affordable housing options exist, but that information and resources are available to enable informed choice; and (iii) Quality choice, which means access to affordable housing options that are decent, safe, and sanitary, and, for persons with disabilities, access to accessible housing as required under civil rights laws.

HUD formula grantees would have been required to certify that they had satisfied AFFH requirements as part of their consolidated plans. PHAs would have certified, through their PHA plan, that they had consulted with the jurisdiction receiving formula grants during the consolidated planning process.

Formula grantee certification would have consisted of listing three fair housing goals to accomplish or obstacles to overcome, along with an explanation of how addressing these goals/obstacles would AFFH.¹⁴⁴ If the goals or obstacles were considered an “inherent barrier” to fair housing choice (as identified in a list provided by HUD), then a jurisdiction would be considered to satisfy the rule’s requirement simply by listing them.

The list of inherent barriers to fair housing choice proposed by HUD covered a variety of potential activities.¹⁴⁵ With the exception of housing accessible to persons with disabilities, none of the inherent barriers referred to activities or outcomes that specifically affect classes protected by the Fair Housing Act.

- Some barriers on the list related to the availability, accessibility, and quality of housing (e.g., “lack of a sufficient supply of decent, safe, sanitary, and accessible” affordable housing).
- Others included regulations related to housing development such as design, building, environmental, and labor standards (e.g., “unduly burdensome wetland or environmental regulations”).
- Two inherent barriers on the list specifically related to rent (source of income restrictions on rental housing and rental control).
- In addition, while not on the list, the proposed rule provided that “jurisdictions should feel free to examine their State or local zoning laws and may determine that modifying these provisions is how they can best AFFH.”¹⁴⁶

Under the 2020 proposed rule, HUD would not have evaluated grantees’ efforts to AFFH based on their list of fair housing goals/obstacles. Instead, HUD would have ranked grantees based on

¹⁴³ 85 *Federal Register* 2053.

¹⁴⁴ 85 *Federal Register* 2056.

¹⁴⁵ The list of inherent barriers are at 85 *Federal Register* 2057-2058.

¹⁴⁶ 85 *Federal Register* 2046.

their “supply of affordable and available quality housing for rent and for sale” as measured by publicly available data sources.¹⁴⁷ HUD proposed that highly ranked grantees would qualify for additional points in HUD’s competitive grant programs while low-ranked grantees could have their AFFH certification called into question.¹⁴⁸

Final Rule

The 2020 final rule, issued on August 7, 2020, differed markedly from the 2020 proposed rule. The 2020 final rule defines the terms “fair housing” and “affirmatively further” separately.

- The phrase “fair housing” means housing that, among other attributes, is affordable, safe, decent, free of unlawful discrimination, and accessible as required under civil rights laws.
- The phrase “affirmatively further” means to take any action rationally related to promoting any attribute or attributes of fair housing as defined in the preceding subsection.

To satisfy the AFFH requirement, HUD formula grant recipients are to certify that they have taken any action rationally related to “promoting one or more attributes of fair housing” as defined in the rule. AFFH certification is to be included in grantees’ consolidated plans, but the 2020 final rule does not indicate whether grantees are required to submit specific documentation, or if certification itself is sufficient. Unlike the 2015 final rule, there are no separate processes for public participation. Grantees submitting consolidated plans are to consult with PHAs about a number of issues, including AFFH, but PHAs are not otherwise required to participate.

Table B-1. Comparison of AFFH Processes

Element of Plan	Analysis of Impediments (AI)	2015 Rule Assessment of Fair Housing (AFH)	2020 Proposed Rule	2020 Final Rule
The process is governed by regulations rather than HUD guidance.		X	X	X
AFFH takes place via a process separate from consolidated planning, requiring separate public participation.		X		
HUD provides uniform data to program participants.		X		
Data required to be considered includes segregation based on protected category.	X	X		
Program participants are required to identify barriers to fair housing.	X	X	X	
Program participants are required to propose steps to overcome barriers to fair housing.	X	X		

¹⁴⁷ 85 Federal Register 2053.

¹⁴⁸ 85 Federal Register 2054.

AFFH reports are submitted to HUD.	X	
AFFH reports are made publicly available.	X	
HUD evaluates proposals to address barriers to fair housing.	X	a

Sources: CRS analysis of U.S. Department of Housing and Urban Development, “Affirmatively Furthering Fair Housing,” 80 *Federal Register* 42272-42371, July 16, 2015; and U.S. Department of Housing and Urban Development, *Fair Housing Planning Guide Volume I*, March 1996, <https://www.hud.gov/sites/documents/FHPG.PDF>.

a. The 2020 proposed rule would have evaluated grantees based on publicly available affordable housing data.

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