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

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Summary

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. In fact, 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 FY2018, the appropriation for FHAP was $23.9 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 FY2018, the appropriation for FHIP was $39.6 million.

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—go through a process to certify that they are affirmatively furthering fair housing. In July 2015, HUD issued a new rule governing the process, called the Assessment of Fair Housing (AFH). The rule provided that funding recipients are to 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. HUD is to provide data for program participants to use in preparing their AFHs, as well as a tool that helps program participants through the AFH process. However, as of May 2018, HUD has indefinitely delayed implementation of the AFFH rule. In response, a group of advocacy organizations has filed a lawsuit challenging HUD's failure to implement and enforce the rule.

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 new 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. Another requirement overseen by FHEO is Section 3, which provides employment and training opportunities for low- and very low-income persons. Section 3 requirements apply to hiring associated with certain housing projects funded by HUD.

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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. 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 new regulations that govern how certain recipients of HUD funding (those receiving Community Planning and Development formula grants and Public Housing Authorities) must affirmatively further fair housing. However, as of the date of this report, HUD had delayed implementation of new regulations.

Additionally, HUD and FHEO have taken steps to protect against discrimination not explicitly directed against members of classes protected under the Fair Housing Act—issuing regulations to prevent discrimination in HUD programs based on sexual orientation and gender identity, 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.

After a brief summary of the Fair Housing Act, this report discusses each of these Fair Housing activities, as well as two other initiatives administered by FHEO, Limited English Proficiency and Section 3, the latter of which provides economic opportunities for low- and very low-income persons.

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

[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 "Requirement for HUD and Grant Recipients to Affirmatively Further Fair Housing (AFFH)."

with up to four units where one is owner-occupied.[4] Discrimination based on the following characteristics is prohibited under the act:

- 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).[5]
- National origin
- Sex—Courts have found discrimination based on sex to include sexual harassment, and HUD regulations establish standards for quid pro quo and hostile environment sexual harassment that violates the Fair Housing Act.[6] However, sex does not expressly include sexual orientation. Note, however, that discrimination based on nonconformity with gender stereotypes may be covered by the Fair Housing Act as discrimination based on sex. For more information, see CRS Report 95-710, *The Fair Housing Act (FHA): A Legal Overview*, by David H. Carpenter.
- Familial status—The statute defines familial status to mean parents or others having custody of one or more children under age 18.[7] Familial status discrimination does not apply to housing dedicated to older persons.[8]
- Handicap[9]—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.[10] Regulations provide lists of conditions that may constitute physical or mental impairments.[11] Major life activities means "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."[12]

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:[13]

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[4] 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.

[5] 42 U.S.C. §3607(a).

[6] 24 C.F.R. §100.600.

[7] 42 U.S.C. §3602(k).

[8] 42 U.S.C. §3607(b).

[9] Although the term "disability" has come to be preferred, the Fair Housing Act still uses the word "handicap."

[10] 42 U.S.C. §3602(h).

[11] 24 C.F.R. §100.201.

[12] Ibid.

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

- 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.[14]
- Retaliating (i.e., coercing, intimidating, threatening, or interfering) against anyone attempting to exercise rights under the Fair Housing Act.[15]

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.[16] (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).[17] HUD also refers complaints with possible criminal violations or patterns or practices of discrimination to DOJ.[18]

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

[14] 42 U.S.C. §3605.

[15] 42 U.S.C. §3617.

[16] 42 U.S.C. §3610(f).

[17] 42 U.S.C. §3610(g)(2)(C).

[18] 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 (hereinafter *FY2012-2013 Annual Report on Fair Housing*).

opportunity to file a response to the complaint.[19] HUD investigates complaints to determine if there is reasonable cause to believe a discriminatory practice has occurred or is about to occur.[20] While an investigation is ongoing, HUD may also engage in conciliation to try to reach an agreement between the parties.[21] 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.[22]

- **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.[23]
- **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.[24] Either party may request that the case be heard in court, but if neither party makes this election, then the case is heard before an administrative law judge.[25] If the case goes to federal court, then HUD transfers the case to DOJ.[26]

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.[27]

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.[28]

In FY2016, there were 1,366 complaints filed with HUD.[29] Of those, 2.5% led to HUD issuing a charge, 35.8% were settled through conciliation, and 37.7% resulted in a finding of no reasonable cause.[30] The remainder of complaints either had an administrative closure (where complainants did not continue to pursue their complaints), were withdrawn with a resolution, or were referred to DOJ. For more information on complaints, see "HUD and FHAP Agency Complaint and Enforcement Data."

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[19] 42 U.S.C. §3610(a).

[20] 42 U.S.C. §3610(g).

[21] 42 U.S.C. §3610(b).

[22] 42 U.S.C. §3610(g), 24 C.F.R. §103.400.

[23] See HUD's website at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/complaint-process, accessed March 1, 2016.

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

[25] 42 C.F.R. §3612.

[26] *FY2012-2013 Annual Report on Fair Housing*, p. 33.

[27] 42 U.S.C. §3612(g)(3).

[28] *FY2012-2013 Annual Report on Fair Housing*, p. 142.

[29] U.S. Department of Housing and Urban Development, *Office of Fair Housing and Equal Opportunity Annual Report to Congress, FY2016*, January 19, 2017, p. 18, https://portal.hud.gov/hudportal/documents/huddoc?id=FY2016FHEOAnnualReport.pdf (hereinafter *FY2016 Annual Report to Congress*).

[30] Ibid., p. 21.

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.[31] 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.[32] 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).[33] 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.[34]

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 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.[35] 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.[36] At the end of FY2016, there were 85 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.[37]

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[31] 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.

[32] 42 U.S.C. §3610(f)(3).

[33] 42 U.S.C. §3610(f)(1).

[34] 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.

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

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

[37] *FY2016 Annual Report to* Congress, p. 15 and *FY2009 Budget Justifications*, p. O-3, http://archives.hud.gov/budget/fy09/cjs/fheo1.pdf.

Activities for which FHAP agencies receive funding include capacity building, processing complaints, administrative costs, training, and special enforcement efforts.[38] When a FHAP agency receives a fair housing complaint, it goes through much the same process as HUD.[39] The agency conducts an investigation, and, as the investigation is ongoing, works on conciliation with the parties. In FY2016, there were 7,019 complaints filed with FHAP agencies around the country.[40] Of these, 5.3% led to FHAP agencies finding reasonable cause to believe that discrimination occurred, 28.9% were settled through conciliation, and 50.7% resulted in a finding of no reasonable cause.[41] The remainder of complaints had an administrative closure or were withdrawn with a resolution. 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]

- **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

[38] 24 C.F.R. §115.302 and §115.304.

[39] HUD regulations spell out criteria that must be in state and local laws. 24 C.F.R. §115.204. See also, U.S. Department of Housing and Urban Development, *Annual Report on Fair Housing, FY2012-2013*, November 7, 2014, p. 17, http://portal.hud.gov/hudportal/documents/huddoc?id=2012-13annreport.pdf.

[40] *FY2016 Annual Report to Congress*, p. 18.

[41] Ibid., p. 21.

[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.

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

[44] 42 U.S.C. §3616a(h).

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

In FY2018, appropriations were approximately $24 million for FHAP and almost $39 million for FHIP. These are reductions from peak funding, which occurred between FY2010 and FY2012. In FY2010, FHAP funding reached $29 million and in FY2012 FHIP funding was nearly $43 million. Prior to FY2010, funding for FHIP was significantly lower than what it has been since that time. In FY2010, funding for FHIP jumped from almost $28 million, at that point the most that had ever been appropriated for the program, to $42 million. The President's budget for FY2010 proposed increased funding for a mortgage fraud prevention initiative, through FHIP. And while Congress appropriated additional funds for FHIP, it was not done as a separate set-aside for mortgage fraud prevention.[48] The same year, funding for FHAP increased by nearly $4 million. While funding for FHAP has fallen to its previous levels, funding for FHIP has remained well above the FY2009 level, ranging between $39 million and $42 million. **Figure 1**, below, shows these funding trends. For exact amounts appropriated since FY1996, see the **Appendix**.

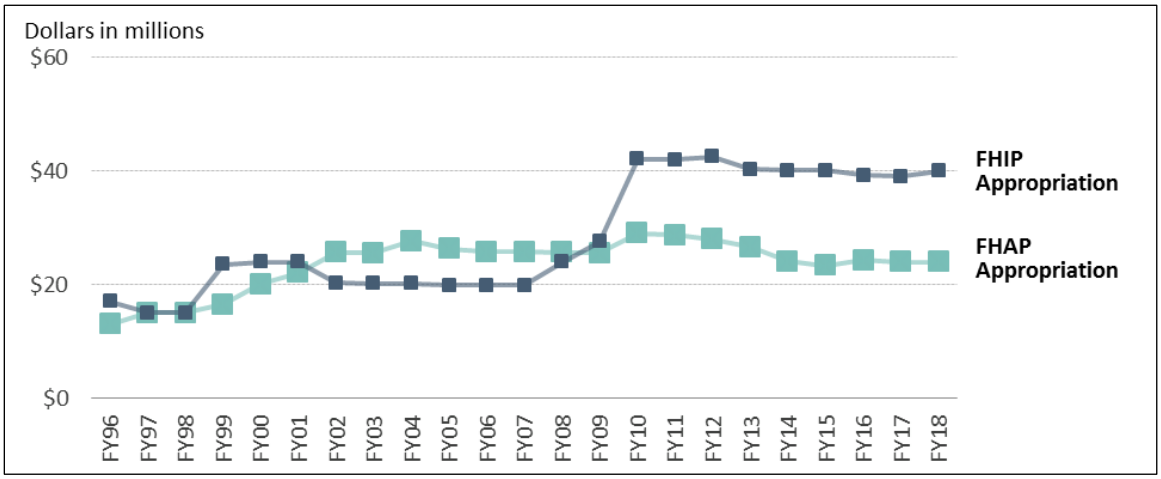
[45] 42 U.S.C. §3616a(d), 24 C.F.R. §125.301.

[46] See, for example, U.S. Department of Housing and Urban Development, *FY2015 Fair Housing Initiatives Notice of Funding Availability*, July 21, 2015, http://portal.hud.gov/hudportal/documents/huddoc?id=2015fhipnofa.pdf.

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

[48] See H.Rept. 111-366. "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."

Figure 1. FHAP and FHIP Funding Trends, FY1996-FY2018



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

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.[49] However, the NFHA data include organizations in addition to those that receive FHIP funding, and also includes 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, age, or sexual orientation). As a result, NFHA data are not included in this section. Yet it is important to note that 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.[50]

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 8,385 in FY2016, the most recent year in which data are available.[51] During this time period, the number of FHAP agencies decreased from 108 operating at the end of FY2008 to 85 at the end of FY2016.[52] In addition, complaints received by private fair housing organizations (those not receiving FHAP funding), as reported by the

[49] The National Fair Housing Alliance reports data on complaints in its annual Fair Housing Trends Report, available at http://nationalfairhousing.org/2018-fair-housing-trends-report/.

[50] For example, in its 2015 Annual Fair Housing Trends Report, the National Fair Housing Alliance reported 19,000 complaints investigated by nonprofit fair housing organizations in FY2014.

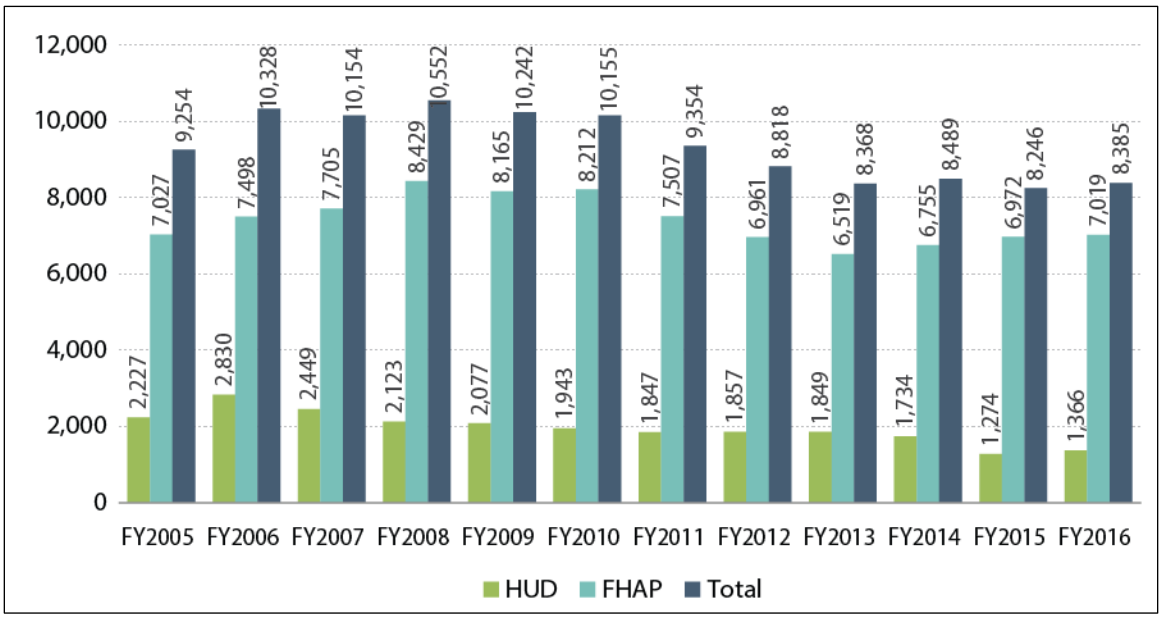
[51] See U.S. Department of Housing and Urban Development, *The State of Fair Housing*, FY2008 Annual Report on Fair Housing, http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_12309.pdf; and *FY2016 Annual Report to Congress*, p. 18.

[52] FY2008 Fair Housing Annual Report, p. 31; and *FY2016 Annual Report to Congress*, p. 15.

National Fair Housing Alliance, decreased slightly between 2008 and 2015, with about 500 fewer requests in 2015 than the 20,173 reported in 2008.[53] See **Figure 2** for HUD and FHAP agency complaints between FY2005 and FY2016.

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

FY2005-FY2016



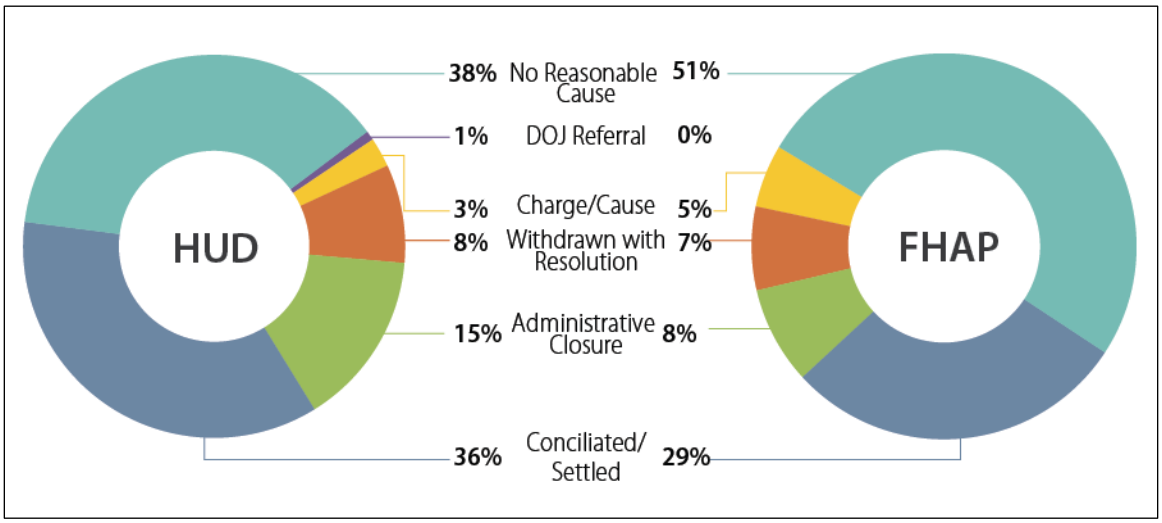
Source: HUD Annual Reports on Fair Housing, FY2008-FY2016, available at http://portal.hud.gov/hudportal/HUD?src=/annualreport.

Complaints filed with HUD and FHAP agencies rarely result in charges against housing providers. In fact, in many cases there is a finding of no reasonable cause to pursue the complaint—38% of complaints for HUD and 51% for FHAP agencies in FY2016. HUD conciliated and settled 36% of cases in FY2016, with FHAP agencies doing so for 29% of cases. Only 3% of complaints to HUD and 5% of those to FHAP agencies resulted in a charge being filed in FY2016. Approximately a quarter 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, 15% of cases were either administrative closures or withdrawn with resolution. See **Figure 3** for HUD and FHAP agency complaint dispositions in FY2016.

[53] See the National Fair Housing Alliance 2009 and 2016 Fair Housing Trends Reports, http://www.nationalfairhousing.org/FairHousingResourceCenter/ReportsandResearch/tabid/3917/Default.aspx.

Figure 3. HUD and FHAP Agency Complaint Disposition

FY2016



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

Recent years have brought a change in the types of complaints received by HUD and FHAP agencies. Approximately 10 years ago, in FY2005, the percentages of complaints based on race and disability were nearly equal: 38% and 41%, respectively. However, by FY2016 the percentage of complaints based on disability increased to 59%, and race declined to 26%. (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%.) Other protected categories—familial status, national origin, sex, religion, and color—have remained at about the same levels during the same time period. HUD also reports the number of complaints based on retaliation, which have increased from approximately 5% in FY2005 to 9% in FY2016. See **Figure 4** for complaints filed by protected class in FY2016.

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.[54] Examples of reasonable accommodations include changes to a unit such as widening doorways, installing a ramp or grab bars, or lowering cabinets.[55] 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 reasonable accommodation in order to give residents with disabilities an equal opportunity to use

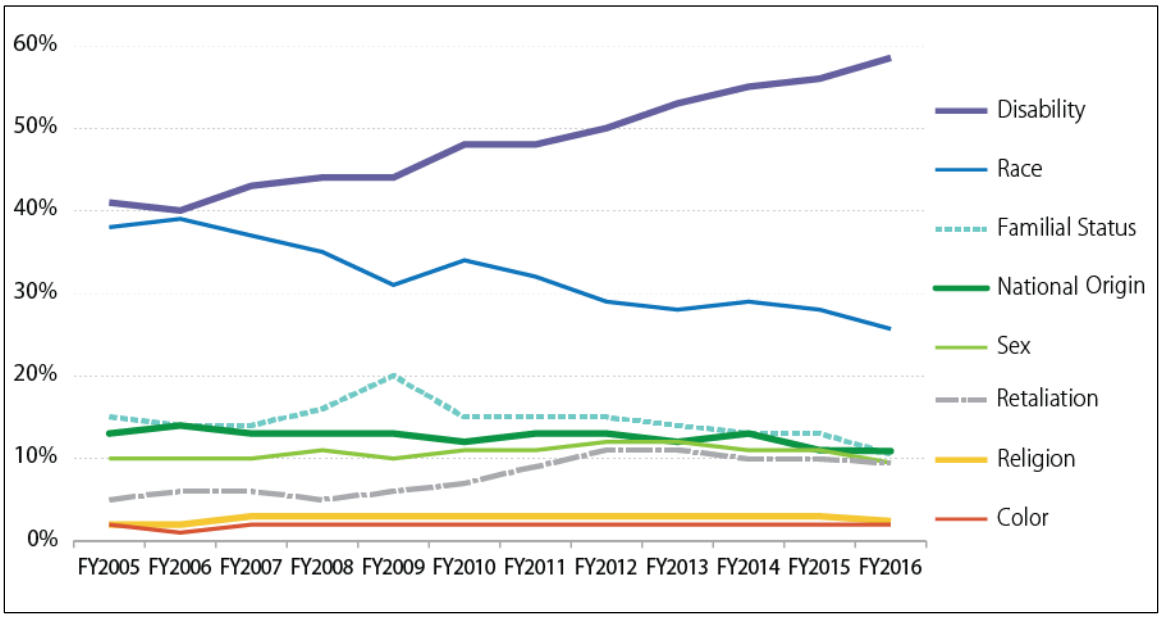
[54] 42 U.S.C. §3604(f)(3)(A).

[55] 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.

and enjoy their dwelling unit.[56] 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.[57] 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.[58] In FY2016, the failure to make a reasonable accommodation was the second-most frequently raised issue in complaints, representing 40% of HUD and FHAP complaints raised in cases filed (after discriminatory terms, conditions, privileges, services, and facilities in the rental or sale of property).[59]

Figure 4. HUD and FHAP Complaints Filed by Protected Status

FY2005-FY2016



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

In recent years, HUD has issued regulations and guidance to protect individuals from discrimination that may not be explicitly directed against protected classes under the Fair

[56] 42 U.S.C. §3604(f)(3)(B).

[57] *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.

[58] Ibid., p. 7.

[59] *FY2016 Annual Report to Congress*, p. 20. 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 has 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

The Fair Housing Act does not expressly protect individuals from discrimination based on sexual orientation or gender identity. (Note, however, that discrimination based on nonconformity with gender stereotypes may be covered by the Fair Housing Act as discrimination based on sex.)[60] However, HUD, 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," published a final rule in 2012 providing for equal access to HUD housing programs regardless of sexual orientation or gender identity.[61] 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.[62] 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.[63]

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. However, 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.

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 (HOME), Housing Opportunities for Persons with AIDS (HOPWA), Emergency Solutions Grants (ESG), and the Continuum of Care program.[64] In the

[60] For more information, see CRS Report 95-710, *The Fair Housing Act (FHA): A Legal Overview*, by David H. Carpenter.

[61] 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, http://portal.hud.gov/hudportal/documents/huddoc?id=12lgbtfinalrule.pdf.

[62] 24 C.F.R. §5.105(a)(2)(i).

[63] 77 *Federal Register* 5674.

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

notice, 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.[65] A final rule was released on September 21, 2016, and was effective one month later.[66]

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.[67] However, 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."[68] The final rule also updated the definition of gender identity as it applies to all HUD programs and defined "perceived" gender identity.[69]

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. The guidance addresses how use of criminal background checks, nuisance ordinances, and treatment of people with limited English proficiency can potentially result in discrimination against members of protected classes. The guidance discusses situations where discrimination could occur and the balancing test used to determine if policies or practices have a discriminatory effect.

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.[70] 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. For more information about discriminatory effects, also

[65] 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.

[66] 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.

[67] Ibid., p. 64765.

[68] Ibid., p. 64782.

[69] 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."

[70] 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_OGCGuidAppFHAStandCR.pdf.

called disparate impact, see CRS Report R44203, *Disparate Impact Claims Under the Fair Housing Act*, by David H. Carpenter.

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."[71] If a housing provider does take criminal history into account, HUD's 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.[72]

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.[73] 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.[74]

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.[75] 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.[76] 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.[77]

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[71] Ibid., p. 10.

[72] Ibid.

[73] 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.

[74] Ibid., pp. 3-5.

[75] Ibid., p. 8.

[76] 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.

[77] Ibid., p. 2.

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.[78]

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

Requirement for HUD and Grant Recipients to Affirmatively Further Fair Housing (AFFH)

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.[79]

What "affirmatively further fair housing" (AFFH) means is not defined in statute. Various courts, in decisions regarding HUD's obligations, have concluded that it means more than refraining from discrimination.[80] 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.[81]

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.[82]

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.[83] Applicants for

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[78] Ibid., p. 4.

[79] 42 U.S.C. §3608(d), (e)(5).

[80] 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)").

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

[82] *NAACP v. HUD*, 817 F.2d at 155.

[83] 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

HUD's competitive grants are required to certify that they will affirmatively further fair housing as part of the grant application process.[84]

AFFH Process for Specific HUD Grantees

For a number of years, to fulfill the requirement of affirmatively furthering fair housing, HUD required that certain grantees go through a specific process called an Analysis of Impediments (AI). The grantees required to go through the process were communities 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.[85]

Status of the AFFH Rule

The requirement for HUD program participants to affirmatively further fair housing by conducting an Assessment of Fair Housing (AFH), described in this section, was implemented and enforced for approximately two years, 2016-2017. During that time, 49 communities submitted AFHs to HUD. Then, 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 are not yet required to submit AFHs). Within five months of HUD's notice being issued, on May 8, 2018, a group of advocacy organizations filed a lawsuit challenging HUD's failure to implement and enforce the rule. Shortly thereafter, on May 23, 2018, HUD issued several more notices, the effect of which is to delay implementation of the rule indefinitely and revert to the former process of affirmatively furthering fair housing, the Analysis of Impediments. As of the date of this report, no ruling has been issued in the legal case. See the "HUD Decision to Delay Implementation of the AFFH Rule" section for a more detailed explanation about the status of implementation.

On July 16, 2015, HUD issued a final rule changing the process through which these formula grantees and PHAs are to affirmatively further fair housing, a process called the Assessment of Fair Housing (AFH).[86] The AFFH final rule was published two years after a proposed rule was released (on July 19, 2013) and received more than 1,000 comments.[87] The rule has been controversial. While some commenters expressed support for the rule as a way to increase housing opportunity and attain the goals of the Fair Housing Act, others contended that it intrudes on the authority of local jurisdictions and constitutes social engineering.[88] Other concerns about the rule included the potential cost of preparing AFHs, especially for small jurisdictions and PHAs; whether investment in racially and ethnically concentrated areas of poverty could still be prioritized; the fact that program participants may be unable to change the conditions affecting fair housing; and uncertainty about how HUD will enforce the rule. In Congress, there were amendments offered as part of both the FY2016 and FY2017 appropriations processes to prohibit funds appropriated by the HUD funding bill from being used to carry out the AFFH rule. (See "Proposed Legislation to

Strategy (P.L. 101-625).

[84] See, for example, U.S. Department of Housing and Urban Development, *General Section to HUD's Fiscal Year 2016 Notice[s] of Funding Availability for Discretionary Programs*, September 22, 2015, p. 8, http://portal.hud.gov/hudportal/documents/huddoc?id=2016nofa-gensec.pdf.

[85] The consolidated plan is a community's description of how it hopes to integrate decent housing, community needs, and economic needs of low- and moderate-income residents over a three- to five-year time span. 24 C.F.R. §91.1(a). Communities submit annual action plans that explain how funding will be used to address goals in the consolidated plans. 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.

[86] Department of Housing and Urban Development, "Affirmatively Furthering Fair Housing," 80 *Federal Register* 42272, July 16, 2015.

[87] Ibid., p. 42276.

[88] Ibid., p. 42278.

Prevent Implementation of the AFFH Rule.") Finally, in May 2018, HUD indefinitely delayed implementation of the rule and directed communities to resume the AI process, the previous method of affirmatively furthering fair housing. (See "HUD Decision to Delay Implementation of the AFFH Rule.")

The Old Process: Analysis of Impediments

Prior to release of the final AFFH rule, the regulations governing both CDBG recipients and the consolidated plan process, which applies to HOME, HOPWA, ESG, and CDBG recipients, provided that in order to satisfy the requirement to affirmatively further fair housing, recipient communities must conduct an analysis of impediments:

> the certification that the grantee will affirmatively further fair housing shall specifically require the grantee to assume the responsibility of fair housing planning by conducting an analysis to identify impediments to fair housing choice within its jurisdiction, taking appropriate actions to overcome the effects of any impediments identified through that analysis, and maintaining records reflecting the analysis and actions in this regard.[89]

Regulations governing PHA annual plans had similar language regarding the identification of impediments to fair housing and addressing them.[90] Through a report issued in 1996, the Fair Housing Planning Guide, HUD defined what it meant to affirmatively further fair housing and gave greater guidance surrounding the AI process for CDBG, HOME, HOPWA, and ESG recipients.[91] Pursuant to the HUD guidance, program participants were to identify impediments to fair housing within their communities and suggest steps to address those impediments.

The guide 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.[92] Communities were to identify impediments using local information and data. The guide 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 jurisdictions to use data in their analysis, but did not provide the data.[93] HUD encouraged jurisdictions 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.[94] There was also no requirement that materials be submitted to HUD.[95] Recipient communities were to submit a summary of the AI and

[89] 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).

[90] 24 C.F.R. §903.7(o) (2014).

[91] U.S. Department of Housing and Urban Development, *Fair Housing Planning Guide Volume 1*, March 1996, https://www.hud.gov/sites/documents/FHPG.PDF.

[92] Ibid., p. 2-8.

[93] Ibid., pp. 2-9 to 2-10.

[94] Ibid., p. 2-21.

[95] Ibid., p. 2-24.

any accomplishments with the consolidated plan performance report, and to complete or update an AI every three to five years (depending on when the consolidated plan was due).[96]

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.[97] Both agencies requested AIs from a sample of jurisdictions. 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.[98]

The New Rule: The Assessment of Fair Housing

The AFFH rule, for the first time, put in place detailed regulations that govern the process of affirmatively furthering fair housing. The rule applies to the same entities that had an obligation to affirmatively further fair housing previously: state and local governments and insular areas receiving CDBG, HOME, HOPWA, and ESG grants, and PHAs (collectively called "program participants"). However, the rule defines more specifically what affirmatively furthering fair housing means and provides for a new process called an Assessment of Fair Housing (AFH) instead of the AI. Further, HUD is to provide data for program participants to use in preparing their AFHs and is to publish tools that help program participants through the AFH process. In addition, because program participants must submit and have their AFHs approved by HUD, enforcement and results may be different.

This subsection describes how the AFFH rule is to operate.

Assessment of Fair Housing Submission Deadlines

The requirements of the AFFH rule are to apply to program participants based on the three- or five-year cycle when their consolidated or PHA five-year plans are due. The year in which the first AFH is due pursuant to the rule varies, with local governments receiving CDBG grants greater than $500,000 required to submit an AFH as early as 2016, and other grantees and PHAs having later start dates.[99] For example, small PHAs and local governments with CDBG grants at or less than $500,000 are to submit AFHs based on their submission cycles beginning after January 1, 2019.[100] However, submissions may be further delayed based on the availability of

[96] Ibid., p. 2-6.

[97] 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.

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

[99] 24 C.F.R. §5.160.

[100] Prior to publication of the final AFFH rule, HUD reopened comments to solicit feedback on extending the submission dates for PHAs, local jurisdictions receiving smaller CDBG grants, states, and insular areas. See Department of Housing and Urban Development, "Affirmatively Furthering Fair Housing: re-Opening Public Comment Period on Subject of Later First AFH Submission Date for Certain Entities," 80 *Federal Register* 2062, January 15, 2015. After receiving comments, HUD extended the submission dates for local governments receiving

assessment tools and data for communities to use in compiling their AFHs. According to the AFFH rule, the deadline for submitting an AFH is to be at least nine months after publication of a final assessment tool.[101] As of the date of this report, HUD had only released final assessment tools for local governments and PHAs, but data were not yet available for PHAs.[102] As a result, only local governments were required to submit AFHs.

The Assessment of Fair Housing (AFH)

The AFFH rule defines "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 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.[103]

Prior to the AFFH rule, the term had not been defined in regulation. Program participants are to comply with the AFFH requirement by completing an AFH.

The AFH has several steps that program participants are to take:[104]

- 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. These may fall into four categories:
    - **Segregation or lack of integration** for any protected class. Segregation is measured using a dissimilarity index showing the extent to which the distribution of groups differs across Census tracts.[105]
    - **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.[106]

$500,000 or less in CDBG grants to after January 1, 2019. This is the same submission deadline as that for small PHAs. 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 That Receive a Community Development Block Grant of $500,000 or Less," 81 *Federal Register* 73129-73130, October 24, 2016.

[101] 24 C.F.R. §5.160.

[102] U.S. Department of Housing and Urban Development, "Affirmatively Furthering Fair Housing Assessment Tool for Public Housing Agencies: Announcement of Final Approved Document," 82 *Federal Register* 4373, January 13, 2017.

[103] 24 C.F.R. §5.154.

[104] Ibid.

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

[106] Ibid., p. 9.

- **Significant disparities in access to opportunity** for any protected class. There are five areas of opportunity that program participants are to evaluate: education, employment, transportation, low-poverty exposure, and environmentally healthy neighborhood opportunities.[107]
- **Disproportionate housing needs** for any protected class. This includes being housing cost burdened, experiencing overcrowding, or living in substandard housing.[108]

- Identifying factors that contribute to the fair housing issues and prioritizing them based on the extent to which they affect fair housing choice. The proposed and final assessment tools issued by HUD in the months following publication of the final rule listed descriptions of possible contributing factors for each of the four categories of fair housing issues.[109] The list is lengthy and includes many possible factors such as lack of access to financial services, community opposition to affordable housing, lack of accessibility features in a neighborhood for people with disabilities, etc.
- Setting goals for overcoming the effects of contributing factors. Program participants are to include strategies and actions they will take to achieve their goals in their Consolidated and PHA Plans.

The rule provides that program participants are to conduct the analysis for the programs they administer, the jurisdiction, and the region.[110] They are to ensure that members of the community have the opportunity to participate in the AFH by communicating in a way that reaches the broadest possible audience.[111]

Under the rule, HUD is to provide data to help program participants identify fair housing issues, and an assessment tool that prompts program participants to think about issues and contributing factors and how to use HUD data to inform the process.

HUD encouraged program participants to collaborate on an AFH.[112] For example, PHAs located within a CDBG entitlement area can work with each other or together with the city/county receiving CDBG funds. Two or more program participants that complete an AFH together are called "joint participants."[113] In addition, under the rule two or more joint participants may collaborate and submit a single AFH as long as at least two joint participants are consolidated plan participants (i.e., not consisting only of PHAs).[114]

According to the rule, HUD will not approve an AFH if it does not comply with fair housing or civil rights requirements, or if it is substantially incomplete.[115] If HUD does not approve an AFH, it is to notify the program participants involved, explain why the AFH was not accepted, and

[107] Assessment of Fair Housing Tool for entitlement communities, pp. 3-5, https://www.hudexchange.info/resources/documents/Assessment-of-Fair-Housing-Tool.pdf.

[108] 24 C.F.R. §5.152.

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

[110] 24 C.F.R. §5.154(d).

[111] 24 C.F.R. §5.158.

[112] 24 C.F.R. §5.156.

[113] 24 C.F.R. §5.152.

[114] Ibid.

[115] 24 C.F.R. §5.162.

provide guidance on how to comply.[116] Ultimately, the rule provides that if a program participant does not have an accepted AFH, then HUD will disapprove their consolidated or PHA plan.[117] In addition, program participants are required to certify that they will affirmatively further fair housing as part of their consolidated and PHA plans.[118] HUD may challenge the validity of the certification based on a program participant's failure to meet affirmatively furthering fair housing requirements.[119]

While HUD is to review each AFH to make sure it includes required components, the rule does not indicate how HUD will evaluate goals set by program participants and progress toward those goals. In the comments accompanying the final rule, HUD stated that "it is not HUD's intention to dictate to program participants the decisions that they make based on local conditions. As stated in the proposed rule, through this new AFH process, HUD is not mandating specific outcomes for the planning process."[120] The process encourages accountability at the local level by making the process and AFH available to the public.

Assessment Tool

In the months following the publication of the final AFFH 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 must be used by program participants in completing the AFH, and are meant to help them work through the process.[121] While there are different tools for each category of program participant, the content is similar.

The assessment tools provide instructions to program participants as they complete each portion of the AFH. For example, the assessment tools direct 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 prompt program participants for information about these issues. The assessment tools also contain comprehensive lists of possible contributing factors to fair housing issues, such as community opposition, lack of investment, zoning laws, location of affordable housing, etc.

Table 1. How the AFH and AI Processes Differ

Element of Plan	Assessment of Fair Housing (AFH)	Analysis of Impediments (AI)
Program participants are required to identify barriers to fair housing and propose steps to overcome them	X	X
The process is governed by regulations rather than HUD guidance	X	
HUD provides uniform data to program participants	X	
Program participants must ensure the opportunity for public participation	X	

[116] Ibid.

[117] Ibid.

[118] 24 C.F.R. §5.166.

[119] For PHAs, see 24 C.F.R. §903.15, for consolidated plan participants, see 24 C.F.R. §§91.225, 91.325, and 91.425.

[120] 80 *Federal Register* 42288.

[121] 24 C.F.R. §5.152, definition of Assessment Tool.

Element of Plan	Assessment of Fair Housing (AFH)	Analysis of Impediments (AI)
Collaboration among program participants is allowed and encouraged	X	
Reports are submitted to HUD	X	
Reports are made publicly available	X	
Regulations provide that reports must be updated	X	

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 1*, March 1996, https://www.hud.gov/sites/documents/FHPG.PDF.

Proposed Legislation to Prevent Implementation of the AFFH Rule

Since the proposed AFFH rule was published, legislation has been introduced in Congress that would keep HUD from implementing the rule. In addition, floor amendments also seeking to stop implementation of the rule have been offered to appropriations measures. The following are examples from the 114th and 115th Congresses.

- Versions of the Local Zoning Decisions Protection Act have been introduced in both the 114th and 115th Congresses. In the 114th Congress, S. 1909 would have prohibited federal funds from being used to administer, implement, or enforce the AFFH rule, and from being used to maintain a federal database containing information on community racial disparities or disparities in access to housing. Versions of the bill introduced in the 115th Congress (H.R. 482 and S. 103) include similar prohibitions, and would also require HUD to consult with officials from states, localities, and PHAs about furthering the purposes and policies of the Fair Housing Act and issue a report on its findings.
- The House amended its version of the FY2016 Departments of Transportation and Housing and Urban Development appropriations act (H.Amdt. 399 to H.R. 2577) to prohibit funds appropriated by the bill from being used to carry out the AFFH rule. The provision was not included in the final FY2016 HUD appropriations law.
- When the Senate considered the FY2017 HUD funding bill (also H.R. 2577), an amendment was proposed that would have prohibited funds appropriated in the bill from being used to carry out the AFFH rule (S.Amdt. 3897). The amendment was tabled. Instead, an amendment was adopted that would prevent HUD from using funds to direct grantees to make specific changes to their zoning laws as part of enforcing the AFFH rule (S.Amdt. 3970). The language was included in the FY2017 and FY2018 appropriations acts.[122]

[122] See P.L. 115-31, Section 243 of the General Provisions for the Department of Housing and Urban Development (HUD), and P.L. 115-141, Section 234 of the HUD General Provisions.

HUD Decision to Delay Implementation of the 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.[123] 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.[124] 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."[125] The delay in the submission deadline meant that many local governments would not be required to submit AFHs until 2024 based on their consolidated plan submission schedules.[126]

Five months after HUD released its notice extending the deadline for local governments, on May 8, 2018, a group of organizations—the National Fair Housing Alliance, the Texas Low Income Housing Information Service, and Texas Appleseed—filed a complaint in federal court alleging that by delaying implementation of the AFFH rule, HUD had violated the Administrative Procedures Act.[127] As of the date of this report, the case is pending in United States District Court for the District of Columbia.

A few weeks after the court case was filed, on May 23, 2018, HUD issued three more notices. The effect of the notices is to suspend indefinitely the implementation of the AFFH 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 AFFH rule for local governments until after October 31, 2020;[128] (2) withdrew the final assessment tool for local governments, which had been released on January 13, 2017;[129] and (3) directed program participants that have not already submitted an AFH under the new AFFH rule to comply with the previous requirements, the Analysis of Impediments (AI).[130]

In withdrawing the local government assessment tool, HUD delayed the AFH submission dates for those entities. This is because, as required by the AFFH rule, AFH submission dates are to be delayed to allow at least nine months between publication of the final assessment tool and the

[123] 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.

[124] 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.

[125] 83 *Federal Register* 684.

[126] See, for example, the National Low Income Housing Coalition, Letter to HUD's Office of General Counsel, March 6, 2018, available at http://bit.ly/2oZwhtx.

[127] A copy of the complaint, filed in the Federal District Court for the District of Columbia, is available at http://prrac.org/pdf/NFHA_v_Carson_complaint.pdf.

[128] 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.

[129] 83 *Federal Register* 23922

[130] 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.

AFH due date.[131] HUD states that it withdrew the assessment tool because it had identified "significant deficiencies" that made it "unduly burdensome" for program participants to use.[132] The notice also contended that HUD does not have the personnel to provide technical assistance to all of the jurisdictions that would need to use the tool and complete an AFH.[133] As a result, the notice provides that HUD will produce a "more effective and less burdensome" tool and that it will accept information and recommendations from the public on improving the tool.[134]

Currently, no program participants are required to submit AFHs because submission dates are delayed until after final assessment tools are published and data are made available. HUD has directed program participants to submit AIs instead.[135] Plaintiffs in the court case amended their complaint to account for HUD's notices issued on May 23, 2018.[136]

Other Requirements Overseen by HUD's Office of Fair Housing and Equal Opportunity

In addition to administering fair housing programs and enforcing the law, HUD's Office of Fair Housing and Equal Opportunity (FHEO) oversees the Section 3 requirement and HUD's compliance with limited English proficiency requirements. Section 3 requires certain recipients of HUD funds to make attempts to hire and train low-income persons to work on projects for which the recipients receive federal funding. Limited English proficiency (LEP) requirements are federal government-wide and are meant to ensure that LEP individuals have access to federal programs.

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

Section 3 of the Housing and Urban Development Act of 1968 (P.L. 90-448, as amended) is meant to provide employment and training opportunities for low- and very low-income persons, particularly those residing in assisted housing. The law applies to Public and Indian Housing Authorities in their use of operating and capital funds, and to grant recipients of HUD housing and community development construction or rehabilitation funds that exceed $200,000, or the recipients' contractors with contracts exceeding $100,000.[137]

Public and Indian Housing Authorities: The law requires that Public and Indian Housing Authorities and those they contract with "make their best efforts" to provide employment opportunities for low- and very low-income individuals in the projects that they undertake with HUD funding. Housing authorities are to prioritize, in this order, individuals living in the housing for which funds are used, those living in other HUD-assisted housing, participants in the Department of Labor program YouthBuild, and those living in the metropolitan area where the funds are used. In addition, housing authorities and their contractors are to make their best efforts

[131] 24 C.F.R. §5.160(a)(1)(ii).

[132] 83 *Federal Register* 23923.

[133] Ibid.

[134] 83 *Federal Register* 23926.

[135] 83 *Federal Register* 23927.

[136] The amended complaint is available at http://prrac.org/pdf/Amended_complaint_AFFH.pdf.

[137] 12 U.S.C. §1701u and 24 C.F.R. §135.3(a)(3)

to contract with businesses that provide economic opportunities for low- and very-low income individuals, using the same priorities for individuals who are employed by the businesses.

Other HUD Funding Recipients: For entities that receive other HUD funding for housing construction or rehabilitation and community development projects, the HUD Secretary is to ensure that "to the greatest extent feasible" the fund recipients provide opportunities for training and employment related to the project to low- and very low-income residents in the metropolitan area. Priority is to be given to those residing in the service area of the project or neighborhood where it is located and to YouthBuild participants. The law also directs the Secretary to ensure, to the greatest extent feasible, that recipients of funds for these projects contract with businesses that provide economic opportunities for low- and very low-income residents.

Section 3 does not apply if housing authorities or other fund recipients do not need to employ additional people to undertake a project.[138] Fund recipients can demonstrate compliance with the "greatest extent feasible" requirement by meeting numerical goals set out in the regulations, but meeting these numerical goals is not required.[139] When interim program regulations were last published for Section 3, in 1994, the appendix to the regulations included examples of efforts Section 3-covered entities could undertake for training and employment opportunities.[140] On March 27, 2015, HUD released proposed Section 3 regulations to replace the interim regulations published in 1994.[141] Among the changes in the proposed rule would be clarification of what it means to provide employment and training opportunities "to the greatest extent feasible."[142] Under the proposed rule, covered entities would either meet numerical goals or provide written justifications explaining what actions were taken and impediments encountered in trying to meet the goal.

Limited English Proficiency

FHEO oversees HUD's efforts 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.[143] 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).[144] 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.[145] In 2007, HUD

[138] HUD FAQs, https://www.hud.gov/sites/documents/11SECFAQS.PDF.

[139] 24 C.F.R. §135.30.

[140] U.S. Department of Housing and Urban Development, "Economic Opportunities for Low- and Very Low-Income Persons," 59 *Federal Register* 33888, June 30, 1994.

[141] U.S. Department of Housing and Urban Development, "Creating Economic Opportunities for Low- and Very Low-Income Persons and Eligible Businesses Through Strengthened 'Section 3' Requirements," 80 *Federal Register* 16520, March 27, 2015.

[142] HUD, in its proposed rule, states that it considers the PHA requirement to "make best efforts" to be the same as the "greatest extent feasible" requirement applied to other grantees. 59 *Federal Register*, p. 16520.

[143] 42 U.S.C. §2000d.

[144] 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.

[145] Executive Order 13166, "Improving Access to Services for Persons With Limited English Proficiency," 65 *Federal Register* 50121-50122, August 16, 2000.

issued final guidance to recipients of HUD funding about factors to consider in meeting the needs of LEP clients.[146]

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."[147] 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.[148]

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.[149]

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.[150] Further, the campaign "HUD Speaks," launched in 2015, is meant to communicate the availability of HUD services to LEP persons through posters, desk guides, and language cards where LEP clients can indicate their native language.[151]

[146] 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.

[147] Ibid., p. 2740.

[148] Ibid.

[149] Ibid., p. 2476. See also 28 C.F.R. §§42.106-42.107.

[150] U.S. Department of Housing and Urban Development, *FY2015 Budget Justifications*, p. D-8, http://portal.hud.gov/hudportal/documents/huddoc?id=fy15cj_fair_hsng_prog.pdf.

[151] U.S. Department of Housing and Urban Development, *FY2017 Budget Justifications*, p. 33-6, http://portal.hud.gov/hudportal/documents/huddoc?id=33-FairHSNGPrograms.pdf.

Appendix. 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-FY2019

Dollars in Millions

	Fair Housing Assistance Program (FHAP)		Fair Housing Initiatives Program (FHIP)	
Fiscal Year	**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		36.2	

Sources: HUD Congressional Budget Justifications for FY1996-FY2019, and the explanatory materials accompanying the FY2018 Consolidated Appropriations Act, P.L. 115-141, in the *Congressional Record,* vol. 164, no. 50, Book III (March 22, 2018), p. H2881.

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.

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