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Office of General Counsel
Regulations Division
U.S. Department of Housing and Urban Development
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Docket No. FR-6123-A-01
Affirmatively Furthering Fair Housing: Streamlining and Enhancements

Via regulations.gov

The National Low Income Housing Coalition (NLIHC) is an organization whose members include state and local affordable housing coalitions, residents of public and assisted housing, nonprofit housing providers, homeless service providers, fair housing organizations, researchers, faith-based organizations, public housing agencies, private developers and property owners, local and state government agencies, and concerned citizens. While our members include the spectrum of housing interests, we do not represent any segment of the housing industry. Rather, we focus on what is in the best interests of people who receive and those who are in need of federal housing assistance, especially extremely low income people and people who are homeless.

NLIHC urges HUD to not make any changes to the July 16, 2015 affirmatively furthering fair housing (AFFH) rule. Before HUD effectively suspended implementation on January 5, 2018, the rule had just begun to be implemented by a very small number of the approximately 1,200 local jurisdictions that would ultimately be required to comply over the coming years. HUD should immediately resume implementing the 2015 AFFH rule.

As the 50th anniversary year of the Fair Housing Act winds to a close, HUD should not stall implementation of the AFFH rule nor weaken the AFFH rule, which was developed with extensive input from a broad spectrum of stakeholders over the course of five years. HUD must move forward by expediting efforts to reduce segregation and foster greater housing opportunity for people in protected classes.

Before addressing the questions HUD posed in the advanced notice of proposed rulemaking (ANPR), NLIHC addresses issues HUD raised in the background section of the ANPR and highlights the ways the AFFH rule corrected the deficiencies of the Analysis of Impediments (AI) to fair housing choice process.

Critique of the ANPR Background Section

HUD Misconstrues Research

The background section of HUD's August 16, 2018 ANPR declares, "Evidence from peer-reviewed literature indicated that the positive outcomes of policies focused on deconcentrating poverty are likely limited to certain age and demographic groups." HUD cites "The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Project" by Raj Chetty, Nathaniel Hendren, and Lawrence Katz.

Contrary to HUD's claim, the authors concluded that children under the age of 13 who move from high-poverty neighborhoods to lower-poverty neighborhoods experience increased college attendance, and as adults have annual income 31% higher than that of a control group in their mid-twenties. The children, the preponderance of whom are African American and/or Latino, also live in better neighborhoods themselves as adults and are less likely to become single parents. The researchers also report that such moves may reduce the intergenerational persistence of poverty and ultimately generate positive returns for taxpayers.

HUD Exaggerates the Time Frame the AFFH Rule Was in Effect

In the background section of the ANPR, HUD claims that its "experience over the three years since the newly-specified approach was promulgated demonstrates that it is not fulfilling its purpose…"

There was not a full three years of experience with the AFFH rule. Local jurisdictions could not begin to implement the AFFH rule until 2016 when the Local Government Assessment Tool was published in final form on December 31, 2015 after undergoing the Paperwork Reduction Act (PRA) process. Subsequently, HUD effectively suspended implementation for the vast majority of local jurisdictions on January 5, 2018 when HUD postponed the obligation to submit an Assessment of Fair Housing (AFH) until a jurisdiction's new Consolidated Plan was due after October 21, 2020 (effectively suspending the rule until 2025 for approximately 900 jurisdictions).

During this period, HUD's experience with the AFFH rule was limited due to the manner in which the drafters of the rule thoughtfully structured implementation to roll out slowly and in modest increments. For instance, out of a universe of approximately 1,200 local jurisdictions, it is estimated that only 22 local jurisdictions would have been obligated to operate under the new AFFH rule in 2016 as their five-year Consolidated Plans were to be completed. About 98 local jurisdictions might have been required to follow the new AFFH rule in 2017. HUD staff indicated that fewer local jurisdictions would have to comply during that time period because a number of them decided to undertake joint or regional approaches, which enabled them to use a later due date tied to a lead jurisdiction in the joint or regional approach.

HUD Claims the Local Government Assessment Tool Is Ineffective

The background section of the ANPR claims that the Local Government Assessment Tool is ineffective, repeating claims HUD made in its January 5 and May 23 *Federal Register* notices. HUD is basing this claim on the experience of only the first 49 AFH submissions. Eighteen of the 49 were accepted by HUD on initial submission, and according to HUD 32 were ultimately approved. The AFFH rule anticipated a learning curve and provided for an iterative process by which HUD would identify problems with a draft AFH that a jurisdiction could fix.

One of the three *Federal Register* notices on May 23 withdrew the Assessment Tool, which the AFFH rule requires jurisdictions to use in drafting an AFH. Without an AFH the AFFH rule is again effectively suspended. This May 23 *Federal Register* notice identified seven categories of problems with the Assessment Tool and gave an example problem for each. Based on the examples offered, most problems could have been addressed very easily by using the AFFH rule's provision for an iterative process requiring HUD to offer suggestions for curing a deficiency. One of the problems HUD highlighted was an egregious violation of the public participation requirements by a jurisdiction; a violation that warranted rejection of the AFH until adequate public participation was provided.

HUD blames the example of inadequate community participation on the wording of the Assessment Tool, "…the questions in the Local Government Assessment Tool regarding community participation have resulted in confusion. The questions vaguely incorporate by reference the existing community participation requirements in HUD's Consolidated Plan regulations…"

However, jurisdictions should be expert at providing meaningful public participation because it has been a requirement since the Community Development Block Grant (CDBG) program was authorized in 1974 and elaborated on in subsequent CDBG and Consolidated Plan regulations. Nevertheless, over the decades advocates have encountered great disregard for genuine public participation. In such cases it is appropriate for HUD to not accept a recalcitrant jurisdiction's AFH. The notice itself cites a blatant violation of traditional public participation regulations, "For example, the regulation at 24 CFR 91.105(b)(4) requires a period of not less than 30 calendar days for comment by the community; however, one community posted a draft AFH for public comment on a Friday and submitted the final AFH to HUD the following Monday, after providing only three days for public comment." Such behavior by a jurisdiction is not a reflection of vague Assessment Tool questions.

A second problem HUD refers to is "insufficient use of local data and knowledge" as required by the AFFH rule. HUD claims the failure to use local data "resulted in an inability to address issues in a community that have not manifest themselves in the HUD-provided data." As an example, HUD points to a jurisdiction that did not identify multiple Superfund locations in their jurisdiction when discussing environmental health issues. HUD blames this omission on the fact that the HUD-provided maps did not include Superfund sites. Identifying Superfund sites would seem to be easy for a jurisdiction to do. It would be equally simple for HUD to request, as part of the AFFH rule's iterative process, and for a jurisdiction to include in an AFH resubmission, a discussion of the impact of Superfund sites on people living in racial/ethnic areas of concentrated poverty.

A third problem claimed by HUD relates to the identification of "contributing factors" to "fair housing issues." The example in the notice is of a jurisdiction that had three pages of detailed analysis of Home Mortgage Disclosure Act (HMDA) information outlining lending discrimination. The jurisdiction did not take the logical step of identifying lending discrimination as a "contributing factor." Again, the iterative HUD review process provided for in the AFFH rule could have readily corrected this shortcoming.

HUD Claims the AFFH Rule Is Ineffective in Addressing Inadequate Housing Supply

In the background section of the ANPR, HUD claims that the AFFH rule is ineffective in addressing the lack of adequate housing supply. HUD's media release asserts that the AFFH rule is "suffocating investment." In the summary section of the ANPR, the fourth change HUD seeks to the AFFH rule is to encourage actions that increase housing choice, including through greater housing supply.

The supply of housing is affected by various factors such as the cost of land and building materials, local zoning restrictions and the loss of construction labor due to the great recession. The supply of housing affordable to extremely low and very low income households is due to declining federal financial support for gap financing and operating costs. As stated previously, the AFFH rule has barely been in effect; very few local governments have had to comply. Therefore, it is premature to ascribe the lack of housing supply to any failure on the part of the AFFH rule.

With perhaps one exception, it is difficult to imagine how an AFFH rule could address the failure of the private market to build affordable multifamily housing. That one exception relates to local zoning and land-use ordinances. While the AFFH rule does not require jurisdictions to change their zoning codes or land-use ordinances, the Assessment Tool considers land use and zoning laws to be a potential "contributing factor" leading to a lack of racial integration which jurisdictions could consider.

While NLIHC always seeks to foster an increase in the supply of affordable housing, especially for extremely low income people where the need is greatest, increasing the supply of housing does not address the core of the Fair Housing Act's obligation to affirmatively furthering fair housing based on the protected classes. A robust AFFH rule is essential to ensuring that an increased supply of housing is in fact available to people in the protected classes.

The ANPR Refers to EO 13771 and EO 13777 as Additional Reasons for Streamlining the AFFH Rule

The background section of the ANPR offers another reason for amending the AFFH rule by referring to the May 15, 2017 *Federal Register* notice asking the public to identify regulations that are outdated, ineffective, or exceedingly burdensome. That notice, in response to Executive Orders 13771 and 13777, was not specific to AFFH. In response to the notice, NLIHC urged HUD to protect and maintain the AFFH rule. However, the notice provided a forum for AFFH opponents to complain about the AFFH rule before most local jurisdictions had to consider implementing the rule. In addition, HUD writes that small public housing agencies (PHAs) in particular wrote that compliance would be costly. However, PHAs in general have not yet been required to carry out the AFFH rule provisions. In addition, HUD had a streamlined "insert" to a PHA Assessment Tool for Qualified PHAs, those with 550 or fewer

public housing units, or 1,250 or fewer public housing units and vouchers that were going to partner with a larger PHA. Furthermore, in a January 13, 2017 *Federal Register* notice, HUD committed to developing a special, streamlined Assessment Tool for Qualified PHAs that would chose to submit their own AFH.

The AFFH Rule Was Developed with Extensive Stakeholder Input over Many Years

HUD's hasty intent to "streamline" the AFFH rule is inconsistent with the manner in which the AFFH rule was promulgated and enacted, and with the manner in which the Assessment Tool was developed – both with extensive input from stakeholders over the course of years.

In late 2009, HUD began to informally seek input from a comprehensive set of stakeholders. Only after a conscientious consideration of that input, did HUD published a proposed rule on July 19, 2013. HUD carefully considered the formal comments and did not issue a final rule until July 15, 2015. The Fair Housing Assessment Tool underwent two PRA 60-day and 30-day public review and comment cycles. Therefore, HUD should not now abruptly make changes to the AFFH rule, Assessment of Fair Housing, or Assessment Tool.

The AFFH Rule Corrected the Deficiencies of the Analysis of Impediments (AI) Process

Although the obligation to affirmatively further fair housing has been law since 1968, meaningful regulations providing jurisdictions with guidance on how to comply had not been promulgated. For many years, the only means by which program participants could demonstrate compliance with the Fair Housing Act's AFFH obligation was to follow the Analysis of Impediments (AI) to fair housing choice process. That merely meant a program participant had to certify that it had conducted an analysis of impediments to fair housing choice, would take appropriate actions to overcome those impediments, and keep records. The AI was widely recognized as an ineffective process, including by the Government Accountability Office.

The AI system has numerous limitations, including:

- There is no regulatory guidance. Consequently, there is no clarity about what constitutes an impediment to fair housing choice or an appropriate action to overcome an impediment.
- Public participation is not required when drafting an AI.
- An AI is not submitted to HUD for review.
- An AI is not linked to a jurisdiction's Consolidated Plan.
- An AI has no prescribed schedule for renewal; consequently, many are not updated in a timely fashion when appropriate – such as after a hurricane devastates a jurisdiction's housing stock.

The AFFH rule addresses all of those problems because:

1. The AI is replaced by the Assessment of Fair Housing (AFH). The rule provides a standard framework for program participants to use to identify and examine "fair housing issues" and the underlying "contributing factors" that cause the fair housing issues.

2. HUD provides each program participant with data covering the local jurisdiction and the surrounding region. Program participants must consider this data when assessing fair housing issues. The rule also requires program participants to use readily available local data, knowledge, and information, including that presented through the required public participation process.

3. Public participation is required in the development of the AFH, enabling locally-driven assessments of fair housing issues and locally-driven goals to address those fair housing issues.

4. HUD will receive, review, and decide whether an AFH can be accepted.

5. The fair housing goals and priorities that program participants set in the AFH are to inform their Consolidated Plans and PHA Plans.

6. The AFH must be submitted every five years in synch with a new Consolidated Plan or PHA Plan.

For the first time, the AFH Assessment Tool provides program participants with a roadmap to help them comply with their legal obligation to affirmatively further fair housing. It provides specific questions and analytical standards for the public and policy makers to consider as they work toward addressing fair housing challenges affecting housing choice and neighborhood opportunity.

NLIHC'S RESPONSES TO QUESTIONS HUD POSED IN THE ANPR

Question Set 1: HUD asks whether issues considered in the context of AFFH merit public participation procedures separate from the public participation procedures already required by the Consolidated Plan's Annual Action Plan process. In other words, could public input about AFFH be included as part of the Annual Action Plan process.

Response:

NLIHC welcomed the AFFH rule's requirement that there be genuine public participation in drafting an AFH. Under the flawed AI protocol, there was no public input, no opportunity to identify fair housing issues or contributing factors, or to suggest reasonable actions and policies to address those fair housing issues or contributing factors. The AFFH rule also required public engagement and consultation with fair housing organizations for the first time.

The Consolidated Plan's Annual Action Plan public participation process is designed to obtain input regarding: housing and community development needs, an assessment of which needs among many have the highest priority in the coming year of the five-year Consolidated Plan cycle, and which programs

and activities ought to be funded and at what level. That alone is quite a bit to consider during a single public input process.

Identifying fair housing issues and contributing factors, assessing priorities among many fair housing issues and contributing factors, and recommending fair housing goals entail very different concepts and sometimes even different stakeholders. Consequently, separate public participation procedures are warranted. The AFFH rule reasonably designed the AFFH public participation process in order to draft an AFH that preceded and informed the decision making associated with the Consolidated Plan and its Annual Action Plan system.

Question Set 2:

***Question 2a*:** Should program participants be allowed to choose which data to consider instead of using uniform data provided by HUD?

Response:

One of the hallmarks of the system underlying the AFFH rule was that HUD provided data from national sources and a free mapping tool to make it easier for jurisdictions to prepare an AFH. This was intended, in part, to lessen if not totally eliminate dependency on procuring expensive outside consultants, as was done under the AI protocol. The publicly available data and mapping tool also enabled the public to verify a jurisdiction's analysis and/or to offer additional analytical input. The AFFH rule also requires program participants to use local information and knowledge, including that suggested during the public input process, to complement the standard data provided by HUD.

There must be a minimum, uniform standard set of data that program participants should use. All recipients of federal housing and community development assistance should be required to attempt AFFH analysis based on the same data considerations. Allowing a program participant to selectively choose which data to use can lead to jurisdictions creating overly optimistic AFHs and/or establishing easy-to-achieve fair housing goals and accomplishments.

***Question 2b*:**

HUD also asks whether jurisdictions should be allowed to rely on their experiences instead of relying on what HUD calls a "data-centric approach."

Response:

Data is essential for rational analysis of fair housing issues. Data can reveal situations that might not otherwise be obvious. Data can help overcome unconscious bias. Data can help discern degrees of severity (or lack thereof) associated with fair housing issues. The AFFH rule's requirement to use local information and knowledge, which is often not quantitative, can complement a "data-centric approach."

Question Set 2 seems to be related to HUD's second proposed amendment to the AFFH rule, "to create a process that is focused primarily on accomplishing positive results, rather than on performing analysis of

community characteristics." How can a jurisdiction accomplish appropriate results without first conducting, within a broad but standardized framework, a reasoned analysis of underlying conditions and the factors and forces that cause those conditions? How else can jurisdictions set priorities for deciding which results to strive for, in what order, and in what timeframe?

Question Set 3:

***Question 3a*:** HUD asks whether program participants should be required to provide a detailed report of any AFFH analysis, or whether a summary of goals is sufficient.

Response:

Details are essential. Public officials who are responsible for complying with the Fair Housing Act need a thorough presentation of the analysis to responsibly set policies, establish procedures, and fund activities that affirmatively further fair housing. A summary of general goal statements cannot provide the nuance essential for decision-making. The public also needs detailed analysis to monitor AFFH compliance and progress and to keep public officials accountable.

***Question 3b*:** HUD asks how often program participants should report on their AFFH efforts.

Response:

The AFFH rule modified the Consolidated Plan and Annual Action Plan regulations to incorporate AFFH. However, it did not modify the performance report provisions at 24 CFR Part 91.105(d) or 91.520. That latter section already requires jurisdictions to report actions taken to affirmatively further fair housing in their Consolidated Annual Performance and Evaluation Reports (CAPERs), an aggregate program report in which AFFH reporting can be easily overlooked. Therefore, more specific AFFH-related annual reporting is necessary.

The AFFH rule requires a jurisdiction to identify metrics and milestones for measuring the extent to which they are achieving fair housing results. The reasonable intent of this requirement would be less than effective if annual reporting was not required. Public officials and the general public need to have annual performance reports in order detect difficulties in meeting metrics and milestones so that corrections or adjustments can be made on a timely basis.

***Question 3c*:** HUD asks whether the rule should continue to require that a new AFH be submitted every five years in synch with the five-year Consolidated Plan cycle.

Response:

The AI protocol did not specify how often a new AI should be conducted. Consequently, some AIs were very out of date. The *Fair Housing Planning Guide* from March 1996 suggested that jurisdictions update their AI with the Consolidated Plan cycle. Because the *Guide* was not formal HUD policy (it was not a Policy Notice or a Policy Memorandum), it had little weight among most jurisdictions. In addition, HUD

guidance in the form of a Memorandum dated September 2, 2004 (that most jurisdictions were not aware of), suggested that a new AI be conducted in concert with the Consolidated Plan cycle.

The AFFH rule, for the first time, requires jurisdictions to undertake a new AFH process every five years, in synch with the five-year Consolidated Plan and PHA Plan cycle. This five-year cycle makes sense.

Question Set 4: One of the questions in this set asks whether the rule should be amended to allow program participants to determine the number and types of fair housing obstacles to address.

Response:

The AFFH rule does not specify, as is hinted at in Question Set 4, the number or types of fair housing obstacles a jurisdiction must address. The AFFH rule leaves it up to each jurisdiction to assess its own community and set its own goals.

As a guiding principle, the AFFH rule does require use of a framework comprised of four "fair housing issues" across the protected classes:

1. Integration and segregation patterns and trends;
2. Racially or ethnically concentrated areas of poverty;
3. Significant disparities in access to opportunity; and,
4. Disproportionate housing needs.

The AFFH regulation then requires the AFH to identify factors that might contribute to creating these fair housing issues. The AFFH rule does not specify "contributing factors" a jurisdiction must consider, but does provide a lengthy list of potential factors to help jurisdictions contemplate factors. In short, the AFFH rule offers jurisdictions great latitude in determining the number and types of fair housing obstacles to address.

Question 5: In a related vein, HUD asks how much deference jurisdictions should have in establishing objectives to address obstacles to identified fair housing goals and associated metrics and milestones.

Response:

Again, the AFFH rule does not prescribe how jurisdictions should set objectives, goals, metrics, or milestones.

Question Set 4 and Question 5 seem to relate to the first and third proposed changes to the AFFH rule that HUD lists in the summary section of the ANPR, "minimizing regulatory burden" and "provide for greater local control." The background section of the ANPR asserts that the AFFH rule is "highly prescriptive" and gives program participants "inadequate autonomy in developing fair housing goals."

NLIHC does not view the AFFH rule as overly burdensome, prescriptive, or inimical to local autonomy and control. The AFFH rule replies to jurisdictions' frustration with the AI system and its lack of clarity and guidance.

Question Set 6: HUD asks what types of elements should distinguish acceptable efforts to address fair housing issues from those that should be considered unacceptable.

Response:

The AFFH rule, for the first time, requires HUD field staff to review a jurisdiction's AFH and assess whether it should be accepted. If there are shortcomings or problems in an initial AFH submission, HUD is to specify the shortcomings or problems and jurisdictions have 45 days to address them in order to have an AFH accepted. The criteria for HUD to decide to not accept an AFH are very general, consequently there is a lot of leeway.

That leeway can allow a jurisdiction to have an AFH approved that fair housing advocates might consider very inadequate. On the other hand, that absence of "prescription" offers jurisdictions the opportunity to submit and HUD to accept an AFH that is appropriately tailored to a given community. The only consideration should be whether the public agrees that an AFH identifies meaningful goals and activities that relate to genuine fair housing issues. The days of jurisdictions claiming that they were addressing fair housing impediments by putting up fair housing posters during fair housing month should be over.

Question 7: HUD asks whether the rule should be amended to specify certain levels of effort or specific actions that will be deemed to be in compliance, or whether there should there be "safe harbors."

Response:

Again, the AFFH rule does not prescribe specific levels of activity, and this is appropriate given varying conditions in communities and the extent to which local governments have influence on the actions of businesses and individuals both within their jurisdiction and their region. Ultimately it is up to the public to judge whether a program participant's efforts are sufficient and convince the jurisdiction and/or HUD that more needs to be done.

Question 8: HUD asks for other types of revisions that could add clarity, reduce uncertainty, or decrease regulatory burden.

Response:

While the AFFH rule did not include all of the provisions that NLIHC and other advocates requested, the final AFFH rule represents the previous administration's conscientious, lengthy, cautious, and balanced approach to drafting the final rule. Therefore, NLIHC strongly urges HUD to make no changes to the AFFH rule until there has been substantial experience by all 1,200 jurisdictions with the July 16, 2015 rule.

Summary

The National Low Income Housing Coalition reiterates our great support for the Affirmatively Furthering Fair Housing (AFFH) rule issued on July 16, 2015 after many years of comprehensive stakeholder input and careful consideration by HUD of all points of view that resulted in a balanced rule. HUD suspended implementation of the rule after only a brief period of implementation based primarily on putative "problems" with Assessments of Fair Housing from 49 program participants. Most of the problems cited by HUD were or could have been easily rectified by the iterative review process in the AFFH rule. NLIHC strongly opposes any changes to the AFFH rule until all 1,200 program participants have had substantial experience with the rule. HUD should immediately resume implementing the 2015 AFFH rule.

Sincerely



Diane Yentel
President and CEO