



July 12, 2021

**Submitted via regulations.gov**

Sasha Samberg-Champion  
Deputy General Counsel for Enforcement and Fair Housing  
Department of Housing and Urban Development  
451 7th Street SW  
Room 10110  
Washington, DC 20410

**Re: Docket No. FR–6249–I–01, Restoring Affirmatively Furthering Fair Housing Definitions and Certifications (RIN 2529-AB01)**

Dear Mr. Samberg-Champion:

This letter is written on behalf of the National Housing Law Project (NHLP), as well as the undersigned organizations, in response to the interim final rule (IFR) “Restoring Affirmatively Furthering Fair Housing Definitions and Certifications” issued by the Department of Housing and Urban Development (HUD) on Jun 10, 2021.<sup>1</sup>

NHLP is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income tenants and homeowners; and increasing housing opportunities for those groups protected by civil rights statutes, including the Fair Housing Act. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide. NHLP worked to implement HUD’s 2015 Affirmatively Furthering Fair Housing regulation and submitted an amicus brief in *NFHA v. Carson* opposing the suspension of the 2015 AFFH rule. NHLP also worked with coalition partners to support legislation (Assembly Bill 686) in California that established an affirmatively furthering fair housing requirement under California state law.

NHLP applauds HUD for taking steps to restore definitions and requirements regarding the obligation to affirmatively further fair housing (AFFH). This rulemaking action is a necessary

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<sup>1</sup> U.S. Dep’t of Housing and Urban Dev., Interim Final Rule, “Restoring Affirmatively Furthering Fair Housing Definitions and Certifications,” 86 Fed. Reg. 30,779 (June 10, 2021).

step in implementing HUD’s long-standing statutory obligation to “administer the programs and activities relating to housing and urban development in a manner” that affirmatively furthers fair housing.<sup>2</sup> The reinstatement of a robust regulatory framework regarding the AFFH obligation is required not only by the Fair Housing Act itself, but also by the policy set forth in Executive Order 13,985 regarding promoting racial justice and the equitable distribution of resources to create more inclusive communities, as well as by the President’s “Memorandum on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies.”<sup>3</sup>

We offer the following comments to ensure that HUD publishes a final rule that maintains its commitment to ensuring that both mobility and place-based strategies can be consistent with the AFFH duty; that HUD ensures meaningful compliance with the AFFH obligation during the interim final rule period; and that the resulting final rule does not retreat from the approach of accountability and HUD oversight promoted by the 2015 Rule.

**A. NHLP Strongly Supports Promulgation of Rulemaking Regarding AFFH, Given the Urgency of Ensuring that COVID-19 Relief Funds are Equitably Distributed**

NHLP recognizes HUD’s urgency in promulgating an IFR and strongly agrees that taking steps to continue the implementation of AFFH regulations is in the public interest. Given the prior suspension of the 2015 AFFH Rule, combined with the confusion created by the Preserving Community and Neighborhood Choice Rule,<sup>4</sup> clarifying key definitions and certification requirements is a crucial step to promoting compliance with the AFFH obligation. In the comments that follow this section, we urge HUD to include important changes to the IFR as written.

We agree with HUD’s assessment in the IFR preamble that the Preserving Community and Neighborhood Choice Rule’s definition of AFFH “did not interpret the AFFH mandate in a manner consistent with statutory requirements, HUD’s prior interpretations, or judicial precedent.” As the IFR discusses, it is not enough for program participants (i.e., jurisdictions and public housing agencies) to certify that they are merely avoiding civil rights violations while “taking no steps to stop discrimination that violates the Fair Housing Act, let alone any proactive steps of the kind the AFFH statutory mandate requires.”<sup>5</sup> We also agree that HUD risks violating its own statutory obligation to affirmatively further fair housing by accepting certifications from

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<sup>2</sup> 42 U.S.C. § 3608(e)(5).

<sup>3</sup> Exec. Order No. 13985, 89 Fed. Reg. 7,009 (2021), and January 26, 2021, memorandum.

<sup>4</sup> U.S. Dep’t of Housing and Urban Dev., Final Rule, “Preserving Community and Neighborhood Choice,” 85 Fed. Reg. 47,899 (Sept. 8, 2020).

<sup>5</sup> 86 Fed. Reg. at 30,783.

its program participants based on an improper definition of “affirmatively furthering fair housing.”<sup>6</sup>

NHLP supports the promulgation of an IFR considering the specific, time-sensitive circumstances of the COVID-19 relief effort. In addition to the billions of federal dollars received by HUD grantees each year, additional billions in rental and mortgage assistance are currently being distributed to many of those same HUD grantees. As HUD notes, existing “inequity in access to housing and opportunity” has been “exacerbated by presently converging health, economic, and climate crises.”<sup>7</sup> As HUD is aware, prior distribution efforts related to disaster recovery have not been equitable, particularly with respect to access for communities of color and limited English proficient populations.<sup>8</sup> It is therefore critical for HUD to ensure that its grantees do not repeat prior mistakes with respect to distribution of COVID-19 relief funds.

Given the specific circumstances regarding COVID-19 relief, combined with the fact that HUD previously solicited notice and comment on these definitions and the certification requirement as part of 2015 AFFH Rule, we believe HUD has good cause to adopt an interim final rule. As noted above, we urge HUD to adopt certain changes to the IFR as written.

### **B. HUD Must Reincorporate Language That Recognizes a “Balanced Approach” to Implementing the AFFH Mandate**

IFR § 5.150 omits language from the 2015 AFFH Rule that is important for understanding the full scope of the obligation to affirmatively further fair housing. The 2015 rule included important language clarifying that AFFH encompasses more than mobility out of racially and ethnically concentrated areas of poverty and can include place-based strategies such as preservation of affordable housing. This key language illustrates what is commonly known as the “balanced approach” between mobility strategies and place-based investments adopted by the 2015 Rule.

Specifically, the 2015 version of § 5.150 included the following language under the section describing AFFH’s purpose, excerpted in relevant part (and referenced later as the “excerpted language”):

...A program participant's strategies and actions must affirmatively further fair housing and may include various activities, such as developing affordable housing, and removing barriers to the development of such housing, in areas of high opportunity; strategically enhancing access to opportunity, including through: Targeted investment in

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<sup>6</sup> 42 U.S.C. § 3608(e)(5).

<sup>7</sup> 86 Fed. Reg. at 30,786.

<sup>8</sup> See e.g., HUD Voluntary Compliance Agreement and Conciliation Agreement Re: the State of New Jersey and the New Jersey Department of Community Affairs (2014), [https://www.lep.gov/sites/lep/files/resources/HUD\\_NJ\\_Agreement\\_5-30-14.pdf](https://www.lep.gov/sites/lep/files/resources/HUD_NJ_Agreement_5-30-14.pdf).

neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation.

This excerpted language is removed from IFR § 5.150, and while we understand that HUD crafted this definition without fully reinstating a fair housing planning requirement, we are deeply concerned that the removal of this language, particularly the language that references “preservation or rehabilitation of existing affordable housing”; “[t]argeted investment in neighborhood revitalization or stabilization”; the improvement of “community assets”; and the promotion of “greater housing choice within or outside of areas of concentrated poverty” could unintentionally convey that preservation and place-based strategies are not consistent with the AFFH duty, and that HUD is shifting policy in a way that forecloses investment in historically disinvested communities of color.

We strongly believe that preservation of affordable housing and community revitalization, when responsive to the preferences and needs of local residents, particularly protected class residents of affordable housing, are consistent with the obligation to affirmatively further fair housing – as are mobility strategies and supports for families who wish to relocate to higher resourced areas. Furthermore, preventing displacement for residents who wish to remain in their current communities, preventing evictions, and strong tenant protections for all renters are consistent with the obligation to affirmatively further fair housing. In promulgating the final AFFH rule in 2015, HUD specifically referenced changes to 24 C.F.R. § 5.150 (among other provisions) in the final rule to address comments written in response to the 2013 Proposed Rule that sought more explicit inclusion of place-based strategies.<sup>9</sup> We also note that 24 C.F.R. § 5.154(d)(5) of the 2015 Rule noted strategies that could affirmatively further fair housing, which included a reference to both enhancement of mobility strategies and the encouragement of building new affordable housing in higher resourced areas, as well as to place-based strategies that encourage community revitalization, including preservation of existing affordable housing, which includes HUD-assisted housing. Should a section like § 5.154(d)(5) be promulgated as part of the subsequent AFFH rulemaking, HUD should include both mobility strategies and place-based strategies as examples of strategies that may affirmatively further fair housing.

We therefore urge HUD to include in the IFR the excerpted language above in 24 C.F.R. § 5.150 and reaffirm HUD’s view that both place-based and mobility strategies, depending on local circumstances and preferences of residents, can be consistent with the obligation to affirmatively further fair housing. In both the IFR and subsequent rulemaking regarding AFFH, HUD should also reiterate its commitment to balancing place-based and mobility strategies, as well as emphasizing resident voices (particularly protected class residents of affordable housing),

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<sup>9</sup> 80 Fed. Reg. at 42,279.

preventing displacement and evictions, strong tenant protections, and avoiding a one-size-fits all approach to AFFH.

**C. HUD Must Quickly Promulgate a Final Rule That Creates a Robust Planning Process with Required Meaningful Public Participation and Must Ensure Program Participant Accountability and Compliance in the Interim**

HUD states that, for the limited period covered by this IFR, program participants may “voluntarily undertake” “fair housing planning and actions . . . in support of their certifications.”<sup>10</sup> These actions can include submitting an Assessment of Fair Housing (AFH), conducting an Analysis of Impediments (AI), or “[e]ngaging in other means of fair housing planning that meaningfully supports this certification.”<sup>11</sup> This arrangement, while intended to be temporary, does not provide stakeholders with a clear means of formally bringing to HUD’s attention a failure to affirmatively further fair housing by HUD program participants, specifically jurisdictions and public housing agencies (PHAs). However, stakeholders need the means to do so, particularly given the large amounts of COVID-19 relief funds being made available to local jurisdictions, many of which are also CDBG grantees, as well as the Emergency Housing Vouchers being allocated to a subset of PHAs across the country. HUD must establish a clear, formalized mechanism by which stakeholders can inform HUD of a HUD funding recipient’s failure to affirmatively further fair housing in the context of any of its programs and activities related to housing or community development – even with respect to housing programs that are not administered by HUD such as the Treasury Department’s Emergency Rental Assistance Program. We are very concerned that barriers to obtaining emergency rental assistance are once again resulting in members of protected classes being excluded from the COVID-19 recovery. For example, California-based advocates from Asian Americans Advancing Justice, Asian Law Caucus, and Bet Tzedek recently filed a state administrative complaint on behalf of the San Francisco Anti-Displacement Coalition regarding issues with the state’s rental assistance program, such as outlining significant problems regarding language access and access for persons with disabilities in applying for critical rental assistance.<sup>12</sup> Examples of problems outlined in the advocates’ complaint include the rental assistance program’s reliance on Google Translate and the inaccessibility of the telephonic service line for persons who are deaf or hard-of-hearing – among other ERAP access issues identified in the complaint.

We also urge HUD to reinstitute a fair housing planning requirement, even while the remaining portions of the AFFH rulemaking is pending. While the IFR allows for program participants to voluntarily engage in fair housing planning, we are concerned that the lack of a fair housing planning requirement will lead to the similar failures by HUD grantees to examine whether their policies and practices are consistent with the obligation to affirmatively further fair housing. As

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<sup>10</sup> 86 Fed. Reg. at 30,786.

<sup>11</sup> 86 Fed. Reg. at 30,791 (at IFR § 5.152(b)).

<sup>12</sup> [https://www.advancingjustice-alc.org/wp-content/uploads/2021/06/DFEH-Complaint-HCD\\_FINAL.pdf](https://www.advancingjustice-alc.org/wp-content/uploads/2021/06/DFEH-Complaint-HCD_FINAL.pdf).

HUD is well aware, a report from the Government Accountability Office (“GAO”) from 2010 found that AIs varied greatly in quality and depth of analysis, with many grantees producing documents that reflected an insufficient commitment to fair housing.<sup>13</sup> Documents submitted to GAO included, for example, a “four-page description of the community itself, and it did not identify impediments to fair housing,” and “a two-page e-mail that identified one impediment to fair housing choice, and in follow up conversations [sic] an official from this grantee, confirmed that the document constituted its AI.”<sup>14</sup> These documents were so deficient, that GAO was unsure if they even could be considered AIs.<sup>15</sup> Grantees also failed to consistently update AIs in a timely manner. The 2010 report estimated that 29% of AIs were written in 2004 or earlier, and 11% were written in the 1990s. We also note the percentage of first round AFHs that were deemed insufficient by HUD upon their initial submission to HUD review. We are therefore very concerned that the lack of a current planning requirement, combined with the length of time since implementation of the 2015 AFFH Rule was halted and the historic failures of many HUD program participants to complete meaningful fair housing analyses, mean that many HUD program participants will not timely consider the fair housing implications of COVID-19, and whether policies and practices in place will ensure the equitable distribution of substantial COVID-19 relief dollars.

We urge HUD to take several steps to address these challenges. First, HUD should move quickly in promulgating a final rule, informed by notice and comment, that will reinstitute a robust AFFH planning requirement. In the meantime, HUD must, at minimum, require that program participants update their prior fair housing planning document, whether an AI or AFH (or for PHAs with neither, to create a separate document), to outline the fair housing implications of the COVID-19 pandemic and include action steps that will ensure an equitable COVID-19 response that serves the needs of communities of color, persons with limited English proficiency, persons experiencing disabilities, and other protected class groups who have been historically denied equitable access to disaster recovery efforts. This is consistent with the approach taken in the 2015 AFFH Rule which required HUD program participants to revise an AFH if there was a “material change” in circumstances. COVID-19 and the subsequent response qualifies as such a material change, and with the distribution of COVID-19 relief dollars, is a particularly time-sensitive issue that requires HUD grantees to ensure they are furthering fair housing in their response to COVID-19.

Additionally, HUD must clearly outline the ways it will ensure AFFH compliance from jurisdictions and PHAs while the IFR is in effect, such as through compliance reviews or other means. HUD should release guidance to stakeholders, including community members and

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<sup>13</sup> See generally U.S. Gov’t Accountability Off., GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS (2010), <https://www.gao.gov/assets/320/311065.pdf>.

<sup>14</sup> GAO Report at 14-15.

<sup>15</sup> *Id.* at 15.

advocates, that details how stakeholders can raise any AFFH concerns with HUD directly, at least until there is a clear fair housing planning requirement.

**D. In the Final Rule, HUD Must Refrain Making Statements That Suggest the Likelihood of Certification Challenges Before the Fact**

By removing the requirement to conduct an AI or AFH, a HUD funding recipient's certification becomes the only mechanism of ensuring compliance with the obligation to AFFH during the pendency of the IFR. HUD has the authority to review supporting documents to confirm the validity of a certification. However, the IFR states that HUD will only do so if it "has reason to believe the certifications submitted are not supported by the recipients' actions" and that it "expects these instances to be rare."<sup>16</sup>

Historically, this assumption has not borne true. Given the number of jurisdictions that have failed to meet HUD's expectations under prior AFFH planning frameworks, there is no reason to believe deficient certifications will be rare. Between October 2016 and December 2017, out of 49 AFHs submitted to HUD, 31 (63 percent) of AFHs "were either never accepted or were only accepted after HUD required revisions."<sup>17</sup>

Combined with the deficiencies of the AI process described above, it is premature for HUD to say challenges to certifications will be rare. In promulgating the final rule, HUD must refrain from making any upfront determinations about the frequency or nature of possible challenges and instead evaluate certifications on a case-by-case basis.

**E. HUD Must Clarify the Meaning of "Burden" to Avoid Unintended Consequences, Especially Concerning Impacts on Community Engagement by Program Participants.**

The preamble to the IFR repeatedly stresses HUD's commitment to minimizing burden. The lack of an AI or AFH requirement for the short term is designed to "reduce the burden" on program participants. Meanwhile, HUD promises to "work[] toward an implementation scheme that will further reduce burden while bolstering fair housing outcomes," in part by "solicit[ing] comments through a separate NPRM on how to . . . achieve both burden reduction and material, positive change that affirmatively furthers fair housing."<sup>18</sup>

We ask HUD to define more clearly what burden it intends to minimize, as there are certain aspects of the implementation of affirmatively furthering fair housing that, while requiring effort by grantees, should not be viewed as burdensome, but rather a core part of meeting the AFFH obligation. For example, we do not believe that concerns about burden should be used to justify

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<sup>16</sup> 86 Fed. Reg. at 30,789.

<sup>17</sup> 85 Fed. Reg. at 2,042, 43.

<sup>18</sup> 86 Fed. Reg. at 30,789.

reductions in community participation requirements relative to what was required by the 2015 AFFH Rule. Community participation is a cornerstone of any planning process regarding affirmatively furthering fair housing and must not be scaled back in the forthcoming rulemaking.

**F. HUD Must Include Prohibition on Actions that are Inconsistent with AFFH Duty in Certification Language, and Include VAWA Compliance Within Programmatic Civil Rights Certifications**

HUD must include language within the certification regulations of each program (e.g., 24 C.F.R. §§ 91.225, 91.235, 91.325, 91.425, 570.487, and 903.7(o)), that the obligation to affirmatively further fair housing includes taking no actions that are materially inconsistent with the obligation to affirmatively further fair housing. HUD should also include this language within the cross-cutting regulation at 24 C.F.R. § 5.152(a). Prohibiting actions that are inconsistent with the AFFH obligation are just as important as ensuring that the jurisdiction or PHA is also affirmatively enacting policies that are in fact taking concrete steps to dismantle the vestiges of segregation.

We also urge HUD to include the Violence Against Women Act among the civil rights laws requiring compliance with respect to the civil rights certification. HUD has previously recognized the relationship between the Fair Housing Act and discrimination against survivors of gender-based violence.<sup>19</sup> In fact, HUD issued guidance in 2016 that noted the elimination by entitlement jurisdictions of crime-free or nuisance ordinances that prevent survivors from accessing emergency assistance can be a means of affirmatively furthering fair housing. Furthermore, among PHAs, compliance with specific VAWA implementation requirements, such as the adoption of emergency transfer plans, is still a major issue eight years after VAWA 2013 was signed into law, and several years after HUD issued regulations implementing VAWA 2013. HUD should therefore include VAWA compliance as a required statute to be complied with under programmatic civil rights certifications.

**G. The Final AFFH Rule Must Focus on an Analysis for PHAs that Examines PHA Policies, Practices, and the Exercise of PHA Discretion, and Include VAWA Compliance in its Certification Language**

We strongly support the continued inclusion of PHAs within the scope of the AFFH rulemaking. As HUD begins the process of issuing reinstating an AFFH planning framework, we urge HUD

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<sup>19</sup> Sara K. Pratt, Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act (FHAct) and the Violence Against Women Act (VAWA) (Feb. 2011); 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 (Sept. 2016).



to ensure that the forthcoming framework centers the analysis regarding PHAs on an in-depth examination of PHA existing and proposed policies, including the Admissions and Continued Occupancy Policy and the Administrative Plan, and evaluating whether those documents contain policies that affirmatively further fair housing. Other planning documents include (but are not limited to) MTW Annual Plans and Reports, Language Access Plans, Violence Against Women Act (VAWA) Emergency Transfer Plans, and Rental Assistance Demonstration (RAD) and other public housing conversion relocation plans.

By focusing the AFH analysis on PHA policies and practices, with an emphasis on areas where the PHA has exercised discretion, the forthcoming fair housing planning framework will focus the fair housing planning, as well as the resulting goals and strategies, on PHA compliance with existing legal requirements that impact protected classes and on how the PHA uses its discretion on a range of issues (e.g., admissions, terminations, payment standards, adoption of SAFMRs, etc.) to either advance or hinder AFFH objectives. This focus must be done in conjunction with robust resident engagement by the PHA as part of the AFFH planning process, such that HUD must work to increase engagement relative to current levels of engagement related to the PHA planning process.

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In conclusion, we greatly appreciate HUD's work to reinstate meaningful AFFH requirements and urge HUD to promulgate a final rule with an AFFH planning framework as quickly as possible. In the interim, we also urge HUD to ensure that stakeholders have a clear means by which to alert HUD to failures to affirmatively further fair housing, and that HUD program participants are required to update fair housing planning documents specific to COVID-19. Please contact Renee Williams, [rwilliams@nhlp.org](mailto:rwilliams@nhlp.org), with questions about these comments.

Sincerely,

A handwritten signature in cursive script that reads "Renee Williams". The signature is written in dark ink and is positioned above the typed name and title.

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