

October XX, 2018

Office of the General Counsel
Rules Docket Clerk
US Department of Housing & Urban Development
451 Seventh Street, SW
Room 10276
Washington, DC 20410-0001

Submitted electronically via www.regulations.gov

RE: Docket No. FR-6123-A-01

Dear Madam/Sir:

I am writing on behalf of [INSERT NAME OF YOUR ORGANIZATION] in response to the Advance Notice of Proposed Rulemaking: AFFH Streamlining and Enhancements, published in the Federal Register on August 16, 2018. [NAME OF ORGANIZATION] is [INSERT BRIEF DESCRIPTION OF YOUR ORGANIZATION TO INCLUDE THE TYPES OF FAIR HOUSING COMPLAINTS YOUR ORGANIZATION HANDLES. IF YOU SERVE A LARGE NUMBER OF PEOPLE, PLEASE INCLUDE THAT IN YOUR INTRODUCTORY REMARKS].

[NAME OF ORGANIZATION] strongly supports HUD's 2015 Affirmatively Furthering Fair Housing (AFFH) regulation and we urge HUD not to revoke or rewrite it. Rather, HUD should immediately resume implementation of the 2015 rule by taking the following steps: 1. Restore on-line access to the Assessment Tool for Local Governments; 2. Issue a notice informing local jurisdictions of their obligation to conduct an Assessment of Fair Housing (AFH) using that Assessment Tool and to follow the requirements spelled out in the rule; and 3. Resume training and technical assistance for those jurisdictions. It is imperative that HUD take these steps immediately, so that the 950 or so jurisdictions that will be submitting Consolidated Plans in 2019 and 2020, including [REFER TO LIST OF PROJECTED AFFH DUE DATES FOR THE APPROPRIATE NUMBER] in my organization's service area, have sufficient time to conduct their AFHs, submit them for HUD to review, and revise them as needed without interfering with the schedule for submission of Consolidated Plans and disbursement of CDBG and other HUD funds.

The 2015 rule represents an extremely important and long overdue effort by HUD to take meaningful steps to implement the affirmatively furthering fair housing provisions of the 1968 Fair Housing Act. It was the result of several years of consultation with many different stakeholders, including program participants, fair housing organizations like mine and others. It went through the required public comment process, during which HUD received over 1,000 comments. (See Regulations.gov at <https://www.regulations.gov/document?D=HUD-2013-0066-0001>.) That rule was extensively vetted internally at HUD, and field tested in 74 jurisdictions through the Sustainable Communities Initiative. HUD should respect the careful,

inclusive and deliberative rulemaking process that it undertook to devise the 2015 rule. Rather than undertaking another rulemaking process, which would be a duplication of effort and an unwise and unnecessary use of HUD's resources, it should instead move ahead with effective implementation of the 2015 rule.

HUD Should Preserve the 2015 Rule, Which Provides Both Clarity and Flexibility

One of the very important aspects of the 2015 rule is its definition of "affirmatively furthering fair housing." Previously, HUD's definition of AFFH was tied to the AI, which itself lacked definition, structure and standards. This left program participants with tremendous uncertainty about how to ensure that they were fulfilling their AFFH obligations and in compliance with the law. The definition in the 2015 rule eliminates that uncertainty, replacing it with the clarity that program participants sought. It states:

Affirmatively furthering fair housing means 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. (24 CFR §5.152)

This definition clearly states that AFFH requires program participants to go beyond just making plans; they must take meaningful steps to implement those plans. It lays out the necessary balance between the need to take action to dismantle the barriers of segregation by expanding access to housing in high opportunity areas and *also* by uplifting disinvested neighborhoods to ensure that their residents have equitable access to opportunity. The definition also clarifies the scope of the AFFH obligation, noting that is not limited to the expenditure of federal funds, a point that is underscored in the section of the regulations that addresses certification requirements. Additionally, the definition requires program participants to engage in activities that promote compliance with fair housing and civil rights laws, including working with stakeholders to combat illegal discrimination.

Further, the sections of regulation that deal with certification requirements note the comprehensive nature of the AFFH obligation. A program participant cannot fulfill that obligation if it takes appropriate actions in some of its programs or policies while taking other actions that are inconsistent with its obligations under the Fair Housing Act. In other words, it cannot give with one hand and take away with the other. Those sections state, "Each jurisdiction is required to submit a certification that it will affirmatively further fair housing,

which means that it will take meaningful actions to further the goals identified in the AFH conducted in accordance with the requirements of 24 CFR §5.150 through 5.180, and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.” (24 CFR §91.225; see also §91.324 and §91.425). This definition, in combination with other provisions of the rule and the Assessment Tool, provides program participants the clarity they need to understand their AFFH obligations and take meaningful steps to fulfill them. Such clarity was lacking in the AI process, which created confusion about what program participants should do to fulfill their AFFH obligations. As the result of that confusion, and their subsequent failure to take effective steps to affirmatively further fair housing, some jurisdictions found themselves subject to various sorts of enforcement actions under the Fair Housing Act and other laws. The clarity provided in the 2015 rule is reinforced by the requirement that AFHs be submitted to HUD for review and acceptance, and the provision for HUD to reject initial submissions that it deems unacceptable while also offering specific guidance about revisions jurisdictions can make to correct those shortcomings. These are critical components of the rule and must be preserved.

While the rule provides clarity and direction, it does not take a “one size fits all” approach. It establishes a robust process through which community input must be solicited and considered, so that the AFH reflects local concerns. Based on that input, jurisdictions then identify their most pressing fair housing problems, set their own goals and priorities, and design their own strategies for achieving those goals. Nowhere does the rule state that program participants must address any particular fair housing issue, set any particular goal or number of goals, or take any particular action to overcome barriers to fair housing choice. The rule combines the structure that program participants need to analyze fair housing issues effectively, with the flexibility that is also needed to accommodate a diversity of local conditions.

HUD Has Mischaracterized the Early Results of the 2015 Rule, Which Were Promising

The early results under the 2015 rule were extremely promising, contrary to HUD’s erroneous and unfounded characterization of them as, “highly prescriptive regulations [that] give participants inadequate autonomy in developing fair housing goals as suggested by the principles of federalism.” (See HUD’s ANPR on the AFFH rule at 83 FR vol. 83, p. 40713.) In fact, there were a number of extremely positive aspects of the AFH process undertaken by the initial cohorts. For example, they undertook more robust community engagement efforts, offering more opportunities for public input and involving a larger number of stakeholders than under the AI process. (See Vicki Been and Katherine O’Regan, “The Potential Costs to Public Engagement of HUD’s Assessment of Fair Housing Delay,” NYU Furman Center, March 9, 2018.) Jurisdictions analyzed residential patterns and trends through a focused, fair housing lens, assessing the extent to which members of protected classes have equitable access to important community assets, resources and opportunities. They set priorities for addressing their particular local (and in some cases regional) fair housing problems, and adopted concrete goals, with metrics and milestones to measure their progress toward achieving those goals. (See, for

example, the research of Justin Steil and Nicholas Kelly, “The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance,” Working Paper for the Future of Housing Policy in the U.S. Conference, University of Pennsylvania, September 15, 2017.)

These initial AFHs were a substantial improvement over the Analyses of Impediments to Fair Housing (AIs) which preceded them, and to which HUD has now returned. As the Government Accountability Office found, and as HUD itself determined, the AI process was not an effective means for HUD to fulfill its own statutory obligation to affirmatively further fair housing or for HUD to ensure that its program participants were fulfilling their AFFH obligations. (See GAO-10-905, Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans,” October 14, 2010.) Too often, AIs were done without input from fair housing organizations, members of protected classes, or other stakeholders. They lacked a consistent format and often lacked a fair housing focus. Many failed to consider the barriers facing members of key protected classes under the Fair Housing Act, including people of particular races and ethnicities, families with children, and people with disabilities. Most did not contain concrete goals for addressing local barriers to fair housing, nor did they include specific steps to be taken, timelines for taking those steps, or metrics for assessing progress. Without a clear timeframe for conducting AIs, many were out of date. Without a direct link to the jurisdiction’s Consolidated Plan, they had little, if any, impact on decisions about how to use housing and community development resources. Because they were not required to be submitted to HUD for review, HUD had no way to ensure their timeliness, monitor their content, or assess their impact. In sum, the AI process was a failure.

For example, [INSERT ANY APPROPRIATE EXAMPLES OF PROBLEMS YOU HAVE EXPERIENCED WITH AIs IN THE PAST].

The 2015 AFFH Rule was Effective and should be Preserved

In responding to the questions that HUD posed about the AFFH rule in the ANPR, I want to highlight a number of aspects of the 2015 rule that are significant improvements over the AI process.

- 1. Community participation** - The 2015 rule requires much more robust community engagement. It directs program participants to give the public reasonable opportunities for involvement in the development of the AFH and in its incorporation into the Consolidated Plan or PHA plan, and to use communications designed to reach the broadest possible audience to inform the public of those opportunities. (See §5.158(a)). Further, it requires program participants to consult with a wide range of stakeholders. These include not only fair housing groups like mine, but also organizations that represent members of protected classes, public and private agencies that provide assisted housing, health services, and social services. (See, for example, §91.100). These provisions foster a much more inclusive fair housing process that reflects the problems that community residents feel are most pressing, and also incorporates the expertise of stakeholders who can offer solutions to the problems identified. For

example, [INSERT A BRIEF DESCRIPTION OF ANY POSITIVE EXPERIENCES YOU HAVE HAD WITH COMMUNITY PARTICIPATION IN THE AFH PROCESS.]

- 2. Use of data** – The ANPR asks whether the fair housing planning process should be data-driven, or should allow program participants to plan based on their local experiences. We strongly oppose the notion that fair housing planning should be based solely on a qualitative approach rather than strategic, focused data analysis. A strictly qualitative approach would send a signal that program participants do not need to assess the extent to which their own policies and programs may be at odds with their obligation to affirmatively further fair housing, or to consider changes to existing policies and practices that would do a better job of ensuring that all community residents, regardless of the neighborhood in which they live, have equitable access to opportunity. It would endorse a “business as usual” approach to housing and community development, an approach that would perpetuate the problems so many communities face.

The 2015 rule strikes an appropriate balance with respect to the use of data. It provides for the use of qualitative information, as well as a mechanism for members of the community to bring such information to the attention of the program participant. It sets a baseline for the information to be considered in the fair housing planning process with the uniform national data, along with the data and mapping tool and the structured questions incorporated into the Assessment Tool. At the same time, it not only allows but actually encourages program participants to seek out and use relevant local data that can inform and enrich the fair housing planning process. This multi-faceted approach to data is flexible, offers valuable tools for program participants with limited capacity for data analysis, and ensures that the process is well-informed and comprehensive. For example [INSERT A BRIEF DESCRIPTION OF ANY POSITIVE EXPERIENCES YOU HAVE HAD WITH THE USE OF DATA IN THE AFH PROCESS.]

- 3. Goals** – The ANPR asks how much deference HUD should give jurisdictions in setting fair housing goals, accompanied by metrics and milestones for measuring progress. The 2015 rule gives jurisdictions tremendous deference. While it requires jurisdictions to set goals to overcome the contributing factors they identify, as well as metrics and milestones by which to measure progress toward achieving those goals, it does not dictate what those goals should be, how many goals must be identified, or what metrics and milestones must be used. Nonetheless, this modest framework is essential for ensuring that jurisdictions actually take concrete steps to address fair housing problems, and for holding them accountable for implementing those steps. Too often, jurisdictions’ AIs lacked any such concrete plans or accountability measures. For example, [INSERT A BRIEF DESCRIPTION OF ANY AIs IN YOUR AREA THAT HAVE LACKED ANY CONCRETE GOALS OR TIMETABLES AND/OR ANY AFHS THAT HAVE INCLUDED CONCRETE GOALS AND TIMETABLES.]

- 4. Safe harbor** – HUD asks whether it should create “safe harbors” for jurisdictions by specifying certain levels of effort on specific actions that would be deemed to be in

compliance with the obligation to affirmatively further fair housing. [ORGANIZATION] strongly opposes this idea. Given the wide variations in its program participants in terms of size, local conditions, priorities and resources, it is difficult to see how HUD could determine the range of activities or level of effort that would be appropriate for each. Further, even if it were possible to say that a particular jurisdiction had fulfilled its AFFH obligations at a particular moment in time, which is difficult to envision, local circumstances are dynamic and change over time. This means that jurisdictions must continually assess the extent to which fair housing problems may exist, the nature of those problems and the solutions needed to address them. Just as the need for other forms of planning and the implementation of those plans must be on-going, so the obligation to affirmatively further fair housing, which is rooted in statute, must be on-going, as well.

For more details on these and other questions posed in the ANPR, please refer to the comments filed by the National Fair Housing Alliance, which we endorse.

Conclusion

For these and other reasons, the AFH process laid out in the 2015 AFFH regulation is far better than the AI system as a means for HUD to ensure that its program participants are fulfilling their AFFH obligations and taking meaningful steps, designed by them and tailored to local conditions, to address the fair housing problems identified by local stakeholders. It would be a mistake either to rely on AIs for this purpose, or to go back to the drawing board and try to create an entirely new regulation. HUD acted on an extensive record when instituting the AFFH regulation, including prior case law on the scope of its mandate under the Fair Housing Act and an extensive administrative record. To disregard this record and retreat from the regulation now may be deemed arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act.

Housing discrimination and segregation remain an intractable problem in large part because the entities that helped create and perpetuate discrimination have not stepped up to be a meaningful part of the solution. The AFFH Rule provided the first real roadmap for participants to understand both what it means to affirmatively further fair housing and their role in achieving that goal. Weakening the rule would result in millions of families and individuals suffering from unnecessary discrimination. It would stifle opportunity and undermine our prosperity. Rather than pursuing this course, we urge HUD to preserve the existing AFFH regulation and use its resources to ensure effective implementation, oversight and enforcement of that regulation.

Sincerely,