NATIONAL LOW INCOME
HOUSING COALITION

March 13, 2020

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

Re: Docket No. FR-6123-P-02: Affirmatively Furthering Fair Housing

Submitted 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 policy and funding improvements for extremely low-income people who receive and those who need federal housing assistance.

HUD should abandon its ill-conceived proposed "AFFH" rule, reinstate the 2015 Affirmatively Furthering Fair Housing rule, and resume its implementation. The proposal to gut the 2015 AFFH rule represents a complete retreat from efforts to undo historic, government-driven patterns of housing discrimination and segregation. This proposed rule would be worse than the minimal Analysis of Impediments (AI) AFFH process that existed from 1994 that the Government Accountability Office (GAO) found to be ineffective.

The proposed rule is not a fair housing rule. It considers housing that might be "affordable" to be the same as housing that is available to people in the Fair Housing Act's protected classes based on race, color, national origin, sex, familial status, disability, or religion. It substitutes a supply-side ideology that misleadingly assumes that an overall increase in the supply of market-rate housing will trickle down to become "affordable," without any consideration of a jurisdiction's policies and practices affecting people in the protected classes or any focus on overcoming historic patterns of housing segregation created by discriminatory federal housing policies in the first place. The proposed rule promotes neither fair housing choice nor affordable housing. It does not ensure that any increase in the housing supply is even affordable to low-income and extremely low-income households, much less people in the Fair Housing Act's protected classes who face many obstacles to fair housing choice.

In 1968, Senator Edward Brooke, who along with Senator Mondale drafted what would become the Fair Housing Act, spoke on the floor of the U.S. Senate when it was deliberating passage. Senator Brooke, also a former Chair of the NLIHC Board of Directors, debunked the common myth that segregation was simply a byproduct of individual preferences and housing costs when he said: "Careful analysis of 15 cities indicates that white upper- and middle-income households are far more segregated from Negro upper- and middle-income housing than some white lower-income households. Thus, racial discrimination appears to be the key factor underlying housing segregation patterns."

HUD and the courts have consistently interpreted the Fair Housing Act's affirmative mandate as requiring all state and local governments to use their federal housing and urban development funds to promote "truly balanced and integrated living patterns" (a phrase used by Senator Mondale in his speech on the Senate floor and quoted by the Supreme Court in its first opinion interpreting the Act). HUD's proposed rule reinterprets this provision as only requiring local jurisdictions to increase the supply of affordable homes, primarily by lifting some regulatory barriers to housing production.

Since passage of the Fair Housing Act of 1968, the federal government, states, and local communities have been required by law to work to undo the segregation of communities that federal housing policy created in the first place. The requirement to affirmatively further fair housing is enshrined in this law, but no meaningful guidance existed until the AFFH rule was published in 2015. After several years of considerable input from stakeholders across the spectrum, followed by two years of HUD thoughtfully assessing comments submitted in response to a 2013 proposed rule, the 2015 AFFH rule made the strongest effort in decades to reverse harmful patterns of segregation and discriminatory practices in communities across the nation.

The 2015 rule provided clarity and equipped communities with the tools and guidance they requested and needed to meet their obligations under the Fair Housing Act, while also giving jurisdictions the flexibility to identify their own fair housing challenges and develop their own priorities and methods for addressing them.

In 2018, Secretary Carson prematurely suspended implementation of the 2015 AFFH rule based on only 49 initial Assessment of Fair Housing (AFH) submissions by local jurisdictions, 32 of which were ultimately accepted by HUD. For a new and meaningful approach to AFFH, a learning curve was anticipated by the 2015 rule that provided for an iterative process for jurisdictions and HUD to interact. Now HUD is proposing to scrap years of extensive input and intensive work that went into the 2015 rule and make the agency's previous flawed and failed system even worse.

The first section of this letter addresses all of the problems with the proposed rule. The second section challenges HUD's justifications for gutting the 2015 AFFH rule laid out in the preamble to the proposed rule.

Section I. NLIHC's Articulation of the Myriad and Fundamental Flaws with the Proposed Rule

Definition of Affirmatively Furthering Fair Housing

Most regulations have a "definitions section," but the proposed rule would eliminate all of the 2015 rule's definitions. Instead, two key definitions are placed in §5.150. HUD proposes a drastic rewrite of §5.150, primarily by eliminating the 2015 rule's statement of purpose: to have an effective planning approach to aid program participants in taking meaningful actions to "overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination." The proposed rule has entirely banished the word "segregation."

The word "discrimination" would only be used twice in a revised §5.150 that would reword the definition of "fair housing choice" [§5.150(a)(2)] that has two clauses in the opening that are very troubling:

"Fair housing choice means, *within a HUD program participant's sphere of influence*, that individuals and families have the opportunity and options to live where they choose, *within their means*, without unlawful discrimination related to race, color, religion, sex, familial status, national origin, or disability."

Particularly troubling is "within their means," which could continue to relegate "affordable" housing to racially and ethnically concentrated areas of poverty. Also, people with disabilities live in poverty at more than twice the rate of people without disabilities, and about 80% were not in the labor force in 2018. Supplemental Security Income (SSI) is the source of income for 4.7 million adults with disabilities between the ages of 18 and 64. No state has an average-priced one-bedroom or studio apartment that would be affordable to someone receiving SSI.

Regarding *within a HUD program participant's sphere of influence*, the 2015 AFFH rule did not require jurisdictions to take actions beyond their influence or beyond their control. However, the 2015 rule realistically recognized that fair housing issues do not recognize borders and that other actors such as other public entities or private businesses have policies and practices that affect fair housing choice. Consequently, the 2015 AFFH rule urged jurisdictions to identify and recognize such problems and consider them as fair housing contributing factors worthy of attempting to rectify by working with other jurisdictions, entities, and actors to mitigate harmful policies or practices.

The three components of the proposed, revised definition of fair housing choice emphasize housing affordability and add that housing should be decent, safe, and sanitary. Although the proposed rule includes a reference to accessible housing for people with disabilities, it omits a key qualifier in the 2015 rule – that accessible housing should be in the most integrated setting appropriate for an individual and have disability-related services.

HUD explains why it is proposing a revised definition of AFFH in of the preamble to the proposed rule (85 FR 2045), wrongly inferring that the 2015 rule had fundamental flaws.

HUD Claim: "Avoiding a federal government directive for local action that does not align with the statutory directive."

NLIHC Response: The 2015 rule does not have any "federal government directive."

HUD Claim: Not requiring program participants to take actions that "goes beyond the authority of subject jurisdictions."

NLIHC Response: The 2015 rule did not require program participants to take actions beyond their borders or out of their control. The definition of affirmatively furthering fair housing in the 2015 rule clearly stated, "The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development," which echoes the Fair Housing Act.

HUD Claim: "Alleviating the unintended consequences of discouraging the use of federal assistance in communities that need help instead of restrictions."

NLIHC Responses: The 2015 definition of AFFH called for, among three other actions, "transforming racially and ethnically concentrated areas of poverty into areas of opportunity." Although not in the actual definition of AFFH, the 2015 rule at §5.150 contained the description of the "both/and" nature of the AFFH rule: "strategically enhancing access to opportunity, including through targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing…"

HUD Claims: "Providing a more tailored approach that would take into account local issues and concerns by allowing local jurisdictions to create custom approaches based on their unique circumstances." And, "Finally, the revised AFFH definition would emphasize that a jurisdiction can AFFH in a variety of ways, according to the needs and means of the local community."

NLIHC Response: References to uniqueness are mentioned six times in the preamble, falsely implying that the 2015 rule used a one-size fits all approach. The 2015 rule is designed to enable program participants to reflect local issues, priorities, goals, and actions.

Elimination of the Assessment of Fair Housing (AFH)

The proposed rule would eliminate the Assessment of Fair Housing (AFH), instead rigorously tying AFFH compliance to a significantly altered meaning of AFFH "certification," one which requires a minimum of three goals and explanations of how meeting those goals would affirmatively further fair housing.

The AFH is intended to replace the failed Analysis of Impediments (AI) by providing a standardized road map that program participants could use, responding to the lack of guidance

and subsequent uncertainty that many program participants complained about regarding the AI process. The AFH text clearly demonstrates that localities have the flexibility to identify the fair housing issues and contributing factors to those issues that exist in their communities, and then to assign priorities among the identified fair housing issues and contributing factors, identifying and setting goals for overcoming the effects of the contributing factors, and ultimately prioritizing which goals to address over an up-coming five-year period.

AFFH Certification

HUD proposes to significantly alter the meaning of AFFH certification to the extent that a certification's nature and limited content would substitute for the AFH or even the AI. However, in the process HUD virtually eliminates a genuine assessment of affirmatively furthering fair housing – replacing such an assessment with a supply-side assessment. Affirmatively furthering fair housing will seldom trickle down from a supply side strategy.

The AFFH Certification Would Become a Faux Replacement for the AFH

The preamble (85 FR 2045) criticizes the 2015 AFFH certification because it "does not specify the exact way the jurisdiction intends to AFFH". Of course the AFH, not the certification, was the vehicle for specifying how a jurisdiction intended to meet its AFFH obligation.

The text of the proposed rule would require an AFFH certification to contain at least three goals or obstacles to fair housing choice that a jurisdiction plans to address. The preamble twice indicates that the three goals/obstacles are those that a jurisdiction would reasonably expect to address over the upcoming five-year period associated with the Consolidated Plan (ConPlan) [85 FR 2041, 2045].

The 2015 rule required jurisdictions to notify the public that an AFH would be drafted and required significant opportunities for broad community input into that draft AFH. Under the proposed rule a jurisdiction's AFFH certification will be developed without such public input and with very little public knowledge that such a certification exists; only entities consulted by a jurisdiction (per the ConPlan regulations at §91.100 and §91.110) would even be aware of the AFFH certification. Public participation is discussed in more detail later in this comment letter.

Sixteen Goals/Obstacles Are Exempt from Requirement to Describe How They Would Further AFFH

The proposed rule at §91.225(a)(1)(i) would require an AFFH certification to describe how addressing each goal/obstacle in a certification would AFFH. However, 16 goals/obstacles on HUD's proposed list would not need to be described because HUD misleadingly asserts that they are inherent barriers to fair housing choice. The preamble re-enforces the assertion that the list consists of conditions that HUD wrongly considers to be common barriers to fair housing choice (85 FR 2046).

Overemphasis on Supply-Side Conditions

The proposed rule lists 16 conditions, 13 of which have nothing to do with fair housing choice; rather, they address factors that might affect the cost of building new housing and perhaps inhibit growth of the overall supply of housing. They also reflect the current administration's intent to drastically reduce regulations, even if those regulations provide valuable protections for people and the environment. Increasing the supply of housing, however, does not address the many obstacles to fair housing choice for people in the protected classes under the Fair Housing Act; it might not even have a measurable impact on developing housing that is "affordable." An augmented housing supply will not necessarily trickle down to low-income (much less extremely low-income people), nor will it necessarily reduce or eliminate discriminatory attitudes, practices, or policies.

The proposed rule uses ambiguous adjectives in relation to most of the 16 conditions, leading to potentially arbitrary, subjective judgements by HUD as well as by jurisdictions. Of particular concern are the adjectives applied to the conditions that protect renters, workers, and the environment. Rent control might be an "artificial" economic restriction, but it has the potential to prevent displacement of low-income households; compare it to other "artificial" rental costs such as property tax assessments that have the potential to cause displacement. What are "arbitrary or unnecessary" labor requirements? What are "unduly burdensome" environmental regulations? What are "arbitrary or excessive" energy mandates? What metrics will be used to make such ambiguous terms concrete? Who decides? An "arbitrary" labor requirement might be what keeps a worker safe or enables a laborer to afford necessities for the family.

The proposed rule does have three conditions that could pertain to fair housing choice:

- (C) Concentration of substandard housing stock in a particular area
- (F) Source of income restrictions on rental housing
- (M) Unnecessary manufactured housing regulations and restrictions

While (C) does potentially address undue concentrations of substandard housing in a particular area, it does not directly address racial or ethnically concentrated housing, whether substandard or even standard. In addition, unlike the 2015 rule, it does not address jurisdictions that over the years have not equitably invested non-housing resources, such as Community Development Block Grants (CDBG), in disinvested neighborhoods primarily occupied by protected class people.

A fourth condition is not a fair housing obstacle but is a problem that must be addressed, "(H) High rates of housing-related lead poisoning in housing." Even this otherwise meritorious item is inadequate; it ought to address lead hazards, not lead poisoning. Congress, HUD, and local jurisdictions must do much more to identify and mitigate or eradicate lead hazards before children become poisoned by lead hazards.

Among the above, depending on how they are designed and implemented, some of the "inherent obstacles" that could protect protected class people as well as others reflect the current administration's deregulatory fervor that will harm the very people HUD is intended to serve. For example, "inherent barrier" (I), is rent control. While the research on rent control is mixed, depending on details of a given rent control provision, rent control has the potential to prevent displacement of protected class people in tight housing markets. On the other hand, there is nothing in the proposed rule that would indicate anti-displacement policies are policies that

would inherently serve to affirmatively further fair housing. Protections for workers (P) is another example. HUD rightly takes steps to promote self-sufficiency (albeit weakly), yet would give jurisdictions incentives to weaken labor protections for protected class people currently in the workforce or who successfully enter the workforce through self-sufficiency efforts.

Energy and water efficiency policies (K) and environmental and wetland regulations (L) help protected class people and other low-income people. Direct energy cost burdens on low-income families are already high and rising, but not because of energy efficiency or environmental standards. Their homes are often older and in greater disrepair, largely because they have not been serviced by energy efficiency or other retrofit programs that would reduce home energy cost. And these homes tend to have poorer indoor environmental quality with the presence of lead and other toxins while also being more likely to be located near environmentally hazardous facilities and areas of higher pollution.

In areas where landlords pay utilities rather than tenants, energy cost is the largest variable cost that local programs and policies can influence. They can help preserve affordable housing for low-income households by reducing the ongoing maintenance cost of providing housing.

"Inherent barrier" (O), "Tax policies which discourage investment or reinvestment," could have an adverse effect on state and local housing trust funds – leading to a reduction in the supply of housing affordable to low- and extremely low-income households.

Finally, listing locally passed policies regarding rent control, labor protections, energy and water efficiency policies, environmental and wetland regulations, and housing trust funds – all the result of local decision making – is contrary to much of the text in the preamble to the proposed rule that champions local decision making.

Zoning Policies

The above list of conditions does not explicitly include zoning policies, even though restrictive zoning laws are a major barrier to both the supply of affordable housing and to fair housing choice. The preamble (85 FR 2046) does, however, recognize that changes to zoning laws can be useful and appropriate in order to affirmatively further fair housing.

Nevertheless, HUD eschews listing zoning as an inherent barrier to fair housing choice, citing as a safe harbor §105(c)(1) of the Cranston-Gonzalez National Affordable Housing Act. That provision merely proscribes disapproving a housing strategy (later a ConPlan) if a jurisdiction has a policy such as a restrictive zoning ordinance. Cranston-Gonzalez does not proscribe recognizing restrictive zoning policies as obstacles to fair housing choice that a jurisdiction would like to consider adjusting in order to affirmatively further fair housing.

Cranston-Gonzalez at §105(c)(1) refers back to §105(b)(4), which asks jurisdictions to explain whether the cost of housing is affected by a number of listed public policies including zoning ordinances, and then §105(b)(4) asks jurisdictions to ***"describe the jurisdiction's strategy to remove or ameliorate negative effects, if any, of such policies"*** (emphasis added). Clearly, Cranston-Gonzalez is not a threat to a jurisdiction choosing to indicate that removing or ameliorating restrictive zoning ordinances because they raise the cost of constructing housing (or raise walls to the development of affordable multifamily structures). One could turn HUD's

§105(c)(1) argument around; if HUD does not want to list zoning ordinances among the list of exempt goals/barriers for fear of violating Cranston-Gonzalez, why does HUD not exhibit the same fear regarding some of the other policies enumerated in §105(b)(4), such as building codes, tax policies affecting land and other property, fees and charges, and policies that affect the return on residential development (i.e., rent control?).

Perhaps the absence of zoning ordinances from the list of "inherent obstacles" is a reflection of Secretary Carson's contradictory positions about local zoning policies. In a July 2015 *Washington Times* Op Ed, Secretary Carson wrote;

> "In practice, the [2015 AFFH] rule would fundamentally change the nature of some communities from primarily single-family to largely apartment-based areas by encouraging municipalities to strike down housing ordinances that have no overtly (or even intended) discriminatory purpose – including race-neutral zoning restrictions on lot sizes and limits on multi-unit dwellings, all in the name of promoting diversity."

However, in a *Wall Street Journal* interview dated August 13, 2018, discussing the Advance Notice of Proposed Rulemaking published on April 16, 2018, Secretary Carson said he wants to "focus on restrictive zoning codes…Stringent codes have limited home construction, thus driving up prices and making it more difficult for low-income families to afford homes." Indirectly referring to the CDBG program, Secretary Carson said he "would incentivize people who really would like to get a nice juicy government grant to take a look at their zoning codes."

Combating restrictive zoning that inhibits housing production is an important goal given the deep racial disparities created by some local zoning laws. Any AFFH rule must treat restrictive zoning laws as potential obstacles to AFFH.

Concluding this discussion about the proposed rule's overemphasis on the supply of housing, we reiterate that while increasing the supply of the appropriate types of housing in areas of opportunity is necessary, it is not sufficient. Merely increasing the supply does not necessarily even result in any portion of that new supply being affordable to low-income or extremely low-income people. Nor, does an increased supply necessarily trickle down in a manner that overcomes the many obstacles to realizing fair housing choice.

The proposed rule's focus on increasing the overall supply of housing fails to address the core of the Fair Housing Act's affirmatively furthering fair housing obligation based on the protected classes. The purpose of a robust AFFH rule is to ensure that more affordable housing is available to people in protected classes and to reverse decades-long patterns of segregation and discrimination.

Decoupling AFFH from a Jurisdiction's Strategic Plan in the ConPlan

The proposed rule would delete the paragraphs in the ConPlan regulations that require a jurisdiction's Five-Year Strategic Plan to describe how its priorities and specific objectives will affirmatively further fair housing by being consistent with its AFFH goals. The deleted paragraphs would be from §91.215(a)(5) for entitlement jurisdictions and §91.315(a)(5) for states. Perhaps HUD proposes deleting these simply because they refer to the AFH. However, at

a minimum HUD should keep these paragraphs and insert the AFFH certification in place of the AFH. This in fact is what the proposed rule would do with respect to the ConPlan's Annual Action Plan regulations at §91.220(k)(1) for entitlement jurisdictions and §91.320(j)(1) for states.

Minimum Level of Standard Data Rejected

The proposed rule at §91.225(a)(1)(iii) states:

> "The contents of the certification need not be based on any HUD-prescribed specific analysis or data but should reflect the practical experience and local insights of the jurisdiction, including objective quantitative and qualitative data as the jurisdiction deems appropriate."

The preamble (85 FR 2045) echoes this and intimates that the 2015 rule required the AFH to "reflect original research or commissioned expert opinions," which in fact the 2015 rule did not require or even ask for. In place of data the preamble states that the goals/obstacles "should reflect the practical experience and local insights of the program participant in conducting its ordinary housing-related operations…"

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 2015 AFFH rule's urging the use local information and knowledge, which is often not quantitative, can complement what HUD has called the 2015 AFFH rule's "data-centric approach."

For the 2015 rule HUD provided standard data sets to use as reasonable benchmarks so that there would be a minimum level of quality applied to all jurisdictions. HUD now proposes to discard a common set of minimum analytical tools to be used by all in favor of "practical experience and local insights." While using "practical experience and local insights" is important and makes a certain level of sense (the 2015 rule also urged the use of local data and knowledge), there is a danger that jurisdictions that find AFFH inimical will concoct "practical experiences and local insights" that evade addressing meaningful AFFH.

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 basic data considerations. Allowing a program participant to selectively choose which data to use can lead to jurisdictions creating overly optimistic AFFH certifications and/or establishing easy-to-achieve fair housing goals and accomplishments.

One of the hallmarks of the system underlying the 2015 AFFH rule is 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 2015 AFFH rule also urged program participants to use local information and knowledge, including that suggested during the public input process, to complement the standard data provided by HUD.

Misplaced Emphasis on Actions within a Jurisdiction's Control

The preamble (85 FR 2042, 2045, 2050) and the proposed rule [§§150(a)(1),150(a)(2), 225 (a)(1)(i) and (ii), 325(a)(1)(ii), and 903.7(o)(1)] frequently use the phrase "within their control" or "within the jurisdiction's sphere of influence," falsely implying that the 2015 rule imposed AFFH obligations on jurisdictions that that they could not control.

For example, the proposed rule at §91.225(a)(1)(ii) states:

> "Jurisdictions should focus on goals or obstacles within their control or partial control. If, in addition to identifying obstacles within the jurisdiction's control or partial control, a jurisdiction identifies obstacles to fair housing choice not within its control or partial control, but which the jurisdiction determines deserve public or HUD scrutiny, the certification may also discuss those issues and include suggested solutions to address the obstacles."

At least the proposed rule recognizes that there are obstacles to fair housing choice that are not in a jurisdiction's control or that exist beyond the jurisdiction's borders in neighboring jurisdictions. Examples might be local business decisions or the policies and programs of other jurisdictions in the region that affect fair housing choice. The 2015 rule required jurisdictions to identify such obstacles, but did not require jurisdictions to actually attempt to diminish or eliminate such obstacles. The 2015 rule, recognizing that fair housing issues cross borders in a metropolitan area, did encourage jurisdictions within a region to coordinate in efforts to overcome obstacles to fair housing choice.

A New Way for HUD to Evaluate AFFH Compliance

The proposed rule would introduce a new provision at §5.155 "Jurisdiction risk analysis." Continuing HUD's proposed emphasis on a supply-side approach to AFFH, the new "evaluation" would focus on measuring the adequacy of a jurisdiction's supply of affordable housing throughout the jurisdiction as well as the quality of the affordable housing.

Evaluating AFFH Performance by Looking at Factors Unrelated to Fair Housing

As with the proposed AFFH certification that, with two or three exceptions, did not address genuine fair housing choice issues, HUD proposes to evaluate jurisdictions by looking at nine factors, only two of which relate to fair housing choice. Seven factors will not address genuine obstacles to meeting the obligation to affirmatively further fair housing. Using the nine factors, HUD will give each jurisdiction a baseline score that HUD thinks indicates the adequacy of the supply of quality affordable housing.

Out of the nine factors, two actually address fair housing choice:

> (vii) The availability of housing accepting vouchers
> (ix) Availability of housing accessible to persons with disabilities
> (However, this factor fails to address the *Olmstead* standard that such housing and related supportive services should be in the most integrated setting appropriate to an individual's needs.)

Another two factors relate to affordability:

(i) Median home value and contract rent
(ii) Household cost burden
(HUD does not define or cite another regulation defining "cost burden" to mean the standard by which a household should not have to pay more than 30% of adjusted income for rent and utilities or homeowner payments plus utilities.)

Three factors relate to housing quality:

(iii) Percentage of dwellings lacking complete plumbing or kitchen facilities
(v) Rates of lead-based paint poisoning
(vi) Rates of subpar Public Housing conditions

- What is the extent, nationally, of dwellings lacking complete plumbing or kitchen facilities? Is this still a major issue across the nation, or a relatively infrequent program in certain geographic pockets?
- Regarding lead-based paint, HUD must be concerned about lead-based paint hazards – before children are poisoned.
- HUD has a very bad track record of enforcing Uniform Physical Condition Standards for both public housing and private, HUD-assisted multifamily housing.

Only two factors relate to supply:

(iv) Vacancy rates
(viii) The existence of excess housing choice voucher reserves
(This is a function of PHAs playing accounting games given the annual uncertainty of Congressional appropriations for voucher renewals).

Because seven of the nine proposed factors are not indicators of fair housing choice, this set of data will in no way provide a genuine analysis of a jurisdiction's success at achieving AFFH. To be sure, HUD is correct that "This ranking is not a determination that the jurisdiction has complied with the Fair Housing Act."

Relying on these nine factors does not even provide a meaningful indication of HUD's purported desire to use increasing the housing supply as a substitute for affirmatively furthering fair housing. Only two factors indicate anything regarding supply, and most PHAs do not horde vouchers. Regarding the three quality factors, all housing should be free of lead hazards (not just lead poisoning) and have complete plumbing and kitchen facilities. HUD should enforce Uniform Physical Condition Standards. Affordability indicators such as cost burden and rents and home prices (as well as vacancy rates) are affected by much greater market forces. For example in areas of high demand costs will only be addressed in a substantial manner if the housing supply is vastly increased and people are paid living wages, while areas that are losing sources of employment will "look good" because rents will decline and vacancy rates will increase.

Ranking Jurisdictions

Based on each jurisdiction's baseline score using the nine factors, HUD proposes ranking all jurisdictions. The preamble (85 FR 2047) explains:

> "By using public data, HUD intends to create a "dashboard" that would allow jurisdictions to anticipate where they would rank and therefore plan ahead accordingly…These rankings would allow HUD to objectively determine a jurisdiction's success in providing quality affordable housing without adjudicated adverse fair housing findings. This ranking system, while useful in helping HUD evaluating compliance with the jurisdiction's requirement to AFFH, would not reflect a determination that the jurisdiction has complied with the Fair Housing Act."

Arbitrarily ranking jurisdictions makes no sense, especially using the nine factors. Using this ranking to compare jurisdictions (85 FR 2047, 2049) is contrary to HUD's frequent refrain in the preamble (85 FR 2041, 2044, 2045) that each jurisdiction's situation is unique – and on that NLIHC agrees. Therefore, to establish a ranking system solely to compare jurisdictions contradicts HUD's own view of jurisdictions' relative fair housing choice needs, while at the same time proposing to undertake a meaningless exercise that cannot truly assess the success of any jurisdiction's compliance with its AFFH obligations.

HUD claims that the ranking will "provide a way for jurisdictions to measure their progress in affirmatively furthering fair housing over time…" (85 FR 2044, 2047). The 2015 AFFH rule required a jurisdiction's AFH to provide metrics and milestones regarding their progress toward achieving their AFFH goals – a far more jurisdiction-specific way of gauging progress than false comparisons with other jurisdictions that have their own unique fair housing issues and goals.

Providing Incentives for Jurisdictions Ranked as "Outstanding"

Jurisdictions that HUD ranks as "outstanding" based on the nine-factor evaluation would be eligible for preference points when competing for grants through Notices of Funding Availability (NOFAs), ostensibly an incentive for jurisdictions to better perform their AFFH obligations. But there are relatively few HUD programs that operate via NOFAs, and most of these are relatively small programs.

Jurisdictions that HUD ranks as "outstanding" are likely to be jurisdictions that readily strive to genuinely comply with their obligation to affirmatively further fair housing. Jurisdictions that attempt to avoid complying with AFFH are not at all likely to be motivated by the marginal benefits of points awarded in a NOFA competition. Residents of lower-ranking jurisdictions should not be "punished" if their jurisdictions lose out to outstanding jurisdictions that receive added points in a NOFA competition; they might be the residents who could benefit the most from the program tied to a NOFA.

There are relatively few HUD programs that operate via NOFAs, and most are relatively small programs. The preamble (85 FR 2049) mentions the Choice Neighborhoods Initiative (CNI), Jobs-Plus, lead-based paint reduction programs, Resident Opportunity and Self-Sufficiency (ROSS) grants, Family Self-Sufficiency (FSS) grants, and the Fair Housing Initiative Program

(FHIP). The Continuum of Care (CoC) programs (which currently have an appropriation of $2.3 billion) operate through NOFAs, but the preamble does not mention this program.

Program funds that are reallocations of recaptured funds might be of marginal value to jurisdictions because they are likely to provide a very modest amount of extra funding. It is not clear which programs would have meaningful sums. For example, the HOME program's statute has requirements limiting the use of any HOME funds that are de-obligated. In addition, recaptured funds might be of little value to jurisdictions if the reallocated funds will be limited to a given program, a program that a jurisdiction does not need more money from or does not value highly.

After the first year, according to proposed §5.155(d)(2), HUD will use the ranking to determine how much each jurisdiction has improved. Jurisdictions that have shown the most improvement since their last strategic plan submission will be designated as outstanding and will be eligible for the benefits of that designation. However, the reservoir of potential benefits is limited and small. Rewarding jurisdictions that make significant improvements could also crowd out jurisdictions that consistently perform their AFFH obligations well.

Adjudicated Fair Housing Violations

The preamble elaborates on the intent of the "lack of adjudicated fair housing violations" provision (86 FR 2047). HUD indicates that the scoring system used to rank jurisdictions would include "adjudicated complaints of violations of the Fair Housing Act or related statutes." Adjudicated complaints should not even be in any formula for ranking a jurisdiction's compliance with AFFH. Such a violation is not a measure of affirmatively furthering fair housing; rather it is a demonstrable violation of the Fair Housing Act or related statutes.

The preamble adds, "One of the key ways HUD would confirm that program participants fulfill their AFFH responsibilities would be to reward only jurisdictions that are free of material civil rights violations." This and the text of the proposed rule itself [§5.155(d)(3)(i)] implies that the only real use of the "lack of adjudicated fair housing violations" will be in determining whether a jurisdiction can be ranked as outstanding. What would having an "adjudicated" violation mean for a jurisdiction that was not otherwise at the outstanding level, but nonetheless measured somewhere in between "outstanding" and "low-ranking?" Any jurisdiction with an adjudicated fair housing violation cannot even be considered as one that has met a base threshold test of meeting its affirmatively furthering fair housing obligation.

Furthermore, the proposed text limits this "adjudication" provision to court or administrative judge decisions brought in response to complaints by HUD or DOJ. As the National Fair Housing Alliance (NFHA) notes, most complaints are settled out of court. In addition, year in and year out NFHA reports that most fair housing complaints are brought by private, nonprofit organizations. In 2018, 75% of all complaints were brought by nonprofits, while the other 25% were brought by local and state agencies as well as by the federal government.

Finally, the proposed rule would punish a jurisdiction if a PHA operating within its borders had an adjudication. Jurisdictions have little, if any, control over PHAs; therefore, it does not seem appropriate to downgrade a jurisdiction for the fair housing findings attached to a PHA.

PUBLIC PARTICIPATION

The proposed rule would eliminate a separate public participation process pertaining to AFFH, instead hoping that AFFH will be adequately dealt with in the otherwise crowded ConPlan public participation process.

HUD considers a separate AFFH public participation process a burden (85 FR 2045). In addition HUD critiques the 2015 AFFH rule (85 FR 2042):

> "The 2015 rule also had public participation requirements that were similar to the consolidated plan citizen participation requirements, but it created a separate process for the AFH that duplicated the existing requirements for citizen participation and consultation with outside organizations that were already required for the consolidated plan. Jurisdictions were required to hold at least one public hearing specifically on their proposed AFFH strategies prior to publishing the AFH for comment."

HUD continues by stating, "According to some commenters [only one from the Michigan State Housing Development Authority is cited in a footnote], these AFFH-specific hearings created high additional costs for jurisdictions." HUD does not indicate how many "some" are, nor does it quantify how many commenters, like NLIHC, wrote in support of the separate public participation process for AFFH.

It is difficult to know how high the costs of one public hearing and associated notice requirements were and whether they were truly extreme. Obtaining public input regarding fair housing issues should be a very high priority for both HUD and jurisdictions; fostering more bottom-up processes ought to be a goal. Is there not great (even if non-quantifiable) value in fostering robust public engagement in fair housing issues, concerns, and potential solutions? How great is the civic cost of refusing to provide a means for the public to weigh in on fair housing issues?

Because AFFH compliance in the proposed rule would hinge on the proposed AFFH certification (replacing the AFH), there is even less public involvement in the AFFH process because development of the AFFH certification is not subject to public input – with the limited exception of a jurisdiction's consultation with certain entities, per the ConPlan regulations at §91.100 and §91.110.

When discussing the purported "benefits" that would be available to jurisdictions that perform well according to HUD's proposed ranking system, the preamble (85 FR 2044) dreams that the potential for a jurisdiction to reap those limited benefits will "increase the number of people who benefit from an expansion of fair and affordable housing. HUD expects that a larger share of the local community will be motivated to participate in local discussions on how to AFFH and what strategies are best suited for the locality. Such incentives may encourage citizens and local businesses to participate in important local housing debates when they otherwise might sit on the sidelines. HUD believes that having buy-in from a broad range of citizens and businesses in a community will result in a stronger AFFH effort and help reduce housing discrimination."

The minimal "benefits" HUD envisions derived from its proposed ranking scheme will not motivate robust public involvement. In addition, such benefits would only potentially be available to jurisdictions ranked as "outstanding;" robust public involvement is especially needed

in jurisdictions that do not aspire to the vaunted status of "outstanding." A separate, thorough, and genuine public participation process devoted solely to AFFH is necessary for all jurisdictions in order to plan for and guide decision making long before the ConPlan planning process begins.

HUD implies (85 FR 2044) that the 2015 AFFH rule had a top-down approach when it writes, "The proposed policy of encouraging local experimentation is a recognition of the difficulties of crafting a top-down approach." On the contrary, the public participation process devoted solely to AFFH in the 2015 rule afforded the public the opportunity to bring local knowledge and priorities to bear in writing during the 30-day comment period for the AFFH-specific public participation process as well as orally during the required public hearing. Nothing in the 2015 rule inhibited local experimentation; HUD does not provide any examples of stymied innovation among the 49 jurisdictions that submitted AFHs prior to the 2018 suspension.

The proposed rule itself is structured as a top-down approach. HUD falsely implies that the 2015 rule required goals that covered specific areas (85 FR 2045) and forced jurisdictions to tackle too many goals (85 FR 2044). The 2015 rule, of course, only "required" a jurisdiction to have at least one goal (a shortcoming in the view of advocates). And, jurisdictions under the 2015 rule could choose which goals to identify and subsequently prioritize.

According to HUD, the proposed rule would "By having jurisdictions focus on fewer elements it would be easier for the public to provide relevant information and feedback, better enabling jurisdictions to take those contributions from the public into consideration." Keeping in mind that HUD proposes to eliminate a separate AFFH public participation process, the three goals presented to the public (ostensibly in the already crowded ConPlan process) will have already been chose by the jurisdiction – a very top-down approach that the public could only comment on after the fact. Public input should be from the bottom up, and a separate AFFH public participation process is an effective way of exercising a bottom-up approach.

August 2018 HUD ANPR Hinted at Eliminating AFFH Public Participation

HUD's Advance Notice of Proposed Rulemaking (ANPR) published on August 16, 2018 provided a warning that HUD would propose eliminating a separate AFFH public participation process. In response, NLIHC wrote:

> "NLIHC welcomed the 2015 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 to suggest reasonable actions and policies to address those fair housing issues. The 2015 AFFH rule introduced public engagement and consultation with fair housing organizations for the first time.
>
> The Consolidated Plan's public participation process is designed to obtain input regarding housing and community development needs, assessing which needs among the many have the highest priority in the five-year Consolidated Plan cycle, and which programs and activities ought to be funded and at what level. That is quite a bit to consider.
>
> Identifying fair housing issues, assessing priorities among many fair housing issues, and recommending goals entail very different concepts and sometimes even different stakeholders, thereby warranting separate public participation procedures. The 2015 AFFH rule reasonably designed the AFFH public participation process to precede and inform the decision making associated with the Consolidated Plan and its Annual Action Plan system."

CONSULTATION

As with public participation, HUD claims that there is no need for special, separate consultation regarding AFFH; HUD asserts that the ConPlan regulation's consultation provisions are adequate. It is important to have a thoughtful, deliberative, multi-stage consultation process focused on fair housing issues in order to have clarity about AFFH goals long before a jurisdiction begins thinking about how those AFFH goals might fit in its ConPlan objectives and priorities.

CHANGES RELATING TO PHAS

The preamble to the proposed rule indicates:

> "Public housing agencies would demonstrate their efforts to AFFH through their participation in the consolidated plan process" (85 FR 2041).
>
> "PHAs, already required to participate in the consolidated plan process, would be required to certify, in every applicable annual plan, that they have consulted with the jurisdiction on how to satisfy their obligations to AFFH. This participation and certification would fulfill their AFFH responsibilities" (85 FR 2045, with similar language at 2044 and 2050).

There is nothing in the PHA Plan or ConPlan regulations that require "active" participation in the development of the ConPlan. Both sets of regulations merely require "consultation," especially with regard to "public housing needs and planned programs and activities" (ConPlan regs at §91.100(c) for entitlement jurisdictions; there is no similar provision for states). It is not apparent in general practice that anything beyond perfunctory consultation might take place between a PHA and its jurisdiction when developing a ConPlan.

As a result of the inaccurate claim by HUD that PHAs actively participate with their jurisdictions in the ConPlan process the preamble adds that:

> "A PHA would not be required to submit a certification detailing AFFH goals and obstacles." (85 FR 2050)
>
> "This participation [consultation] and certification would fulfill their AFFH responsibilities." (85 FR 2045)

It is important for PHAs to develop and submit specific AFFH-sensitive goals and proposed actions unique to PHA operations, policies, and programs that have a fair housing choice impact, such as: setting HCV payment standards, evaluating reasonable accommodation requests, adopting admissions preferences, serving limited English proficiency individuals, and serving survivors of domestic and sexual violence. Other fair housing-sensitive policies include: responding to HCV portability requests, implementing required or voluntary Small Area Fair Market Rents (SAFMRs), project basing vouchers, considering proposals to develop mixed-finance projects, and deciding which public housing projects to propose for demolition or disposition.

Proposed Changes to PHA Plan Regulations

HUD proposes key changes to 24 CFR Part 903, the Public Housing Plan regulations.

Changes to §903.7(o) Pertaining to Civil Rights Certifications

HUD proposes to significantly change paragraph (1) in two ways:

> "(1) The PHA must certify that it has consulted with the local jurisdiction on how to satisfy their obligations in common to affirmatively further fair housing,...and that it will affirmatively further fair housing in its programs and in areas under its direct control."

This deletes text in the 2015 rule that more specifically defines AFFH to mean the PHA:

> "…will take meaningful actions to further the goals in the AFH…and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing, and that it will address fair housing issues and contributing factors in its programs."

The proposed rule then removes the 2015 AFFH rule's affirmative direction to:

> "…address fair housing issues and contributing factors in its programs."

The key differences reflect the fact that a PHA's AFFH obligations would now really be limited to the vague notion of obligations that the PHA has in common with the jurisdiction. If the proposed rule is implemented as drafted, it would eliminate the 2015 rule's requirement to take "meaningful actions" rather than token actions, and to not take actions that are not consistent with the obligation to AFFH. The proposed rule continues to insinuate that PHAs under the 2015 rule had to take actions beyond their control, which of course is not true.

Finally, HUD proposes to significantly change paragraph (3) by eliminating the eight items a PHA would need to demonstrate that it is in compliance with its AFFH certification. One of the eight items that would be lost is "Specifies actions and strategies…"

Changes to §903.15 Pertaining to the Relationship of the PHA Plan to the ConPlan

The proposed rule's §903.15 (b), "Affirmatively Furthering Fair Housing," modifies the 2015 rule's (d)(2) opening text by eliminating important language such as "policies should be designed to reduce the concentration of tenants and other assisted persons by race, national origin, and disability." It would also eliminate, "Any affirmative steps or incentives a PHA plans to take must be stated in the admissions policy."

The proposed (b)(2) changes the 2015 AFFH rule's "use of nondiscriminatory tenant selection and assignment policies that lead to segregation" [at (d)(2)(ii)]. The reference to segregation acknowledged past and in some cases current policies that result in segregation. To avoid such an acknowledgement, the proposed rule substitutes "policies that lead to increased fair housing choice."

The proposed §903.15(c) makes two key deletions from (d)(3) of the 2015 AFFH rule – failing to take meaningful actions to further the goals in the AFH and taking action that is materially inconsistent with the obligation to AFFH.

The critical language from the 2015 AFFH rule must be restored.

PERFORMANCE REPORTS

HUD proposes to slightly modify §91.520 of the ConPlan regulations by adding a new subparagraph, §91.520(i)(2):

> "(2) With the steps the jurisdiction has taken to affirmatively further fair housing, HUD will deem that portion of the performance report "satisfactory" if the steps the jurisdiction has taken are rationally related to the goals or obstacles identified in the jurisdiction's certification to affirmatively further fair housing."

In the preamble (85 FR 2050) HUD states that it "would accept performance reports under 24 CFR 92.520, if the steps taken are each rationally related to the goals and obstacles identified in the jurisdiction's AFFH certification…This language is intended to follow the judicial definition of rational basis review closely."

Advocate attorneys explain that under the Constitution's Equal Protection provisions, "rational basis review" is the lowest level of judicial scrutiny required. Generally courts apply a "strict scrutiny" review in cases regarding issues affecting Fair Housing Act protected classes. There is also an "intermediate level of scrutiny." HUD should not be proposing to limit judicial scrutiny to the least rigorous level possible; to do so indicates that HUD does not highly value fair housing.

Section II. HUD'S Faulty Justifications for Gutting the 2015 AFFH Rule

This section of NLIHC's comment letter rebuts other HUD justifications in the preamble for gutting the 2015 AFFH rule.

<u>HUD Claims (85 FR 2048)</u>

HUD makes assertions that the proposed rule would increase the chances of people in protected classes to move to neighborhoods they choose.

> "Affordable housing can advance the goal of providing members of protected classes with access to the neighborhoods of their choice."
>
> "Others who want to leave their neighborhood would benefit from reduced housing costs that make it easier for them to move."
>
> "Increasing overall affordability will, therefore, help members of protected classes maximize their ability to live where they choose."
>
> "Having a supply of affordable housing that is sufficient to meet the needs of a jurisdiction's population is crucial to enabling families to live throughout the jurisdiction and promoting fair housing for all protected classes,…"

NLIHC Remarks

In addition to NLIHC's earlier comments asserting that merely increasing the overall supply of housing does not result in affordable housing trickling down to low- and extremely low-income households, or to overcoming policies and practices that are barriers to fair housing choice, NLIHC notes that this administration sought to suspend the Small Areas Fair Market Rent (SAFMR) regulation. Implementing the SAFMR rule is an important ingredient to facilitating a low-income households' potential ability to move to neighborhoods of their choice.

HUD Claim

"Increasing the availability of affordable housing in a community would help low-income families." (85 FR 2048)

NLIHC Remark

This administration has consistently submitted budgets that would eliminate the public housing Capital Fund, the national Housing Trust Fund, and the HOME program – all of which provide, and with respect to the latter two will continue to provide affordable housing.

HUD Claims

HUD claims (85 FR 2042) that the AFH and AFFH Assessment Tool:

Is "overly burdensome to both HUD and the grantees and are ineffective in helping program participants meet their reporting obligations for multiple reasons."

"…the [assessment tools] are closely tied to the regulatory language, which HUD believes is too prescriptive in outcomes for jurisdictions. Therefore, HUD believes it is necessary to revise the codified regulation, not just the assessment tools."

"First, the AFH required significant resources from program participants, and its complexity and demands resulted in a high failure rate for jurisdictions to gain approval for their AFH in the first year of AFH submission."

"HUD became aware of significant deficiencies in the Local Government assessment tool that impeded completion and HUD acceptance of meaningful assessments by program participants."

NLIHC Remarks

This page contains the first of many intimations that the 2015 AFFH rule was "prescriptive, which it was not as this letter explains later. Also, here HUD returns to the extreme justification it gave for effectively suspending the AFFH rule on January 5, 2018 and for withdrawing the Assessment Tool on May 23, 2018. HUD is basing its claim on the experience of only the first 49 AFH submissions. Eighteen of the 49 were accepted by HUD on initial submission, and 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.

The 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 a jurisdiction to cure a deficiency.

One of the problems HUD highlighted was an egregious violation by a jurisdiction of the 2015 AFFH rule's public participation requirements; a violation that warranted rejection of the AFH until adequate public participation was provided. HUD blamed 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…"

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 that clearly warranted HUD's decision to not accept the AFH from the jurisdiction, "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; rather, it demonstrates a jurisdiction's fundamental disregard for genuine public participation.

A second problem HUD refers to is "insufficient use of local data and knowledge" as urged by the 2015 AFFH rule. HUD claimed 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 pointed to a jurisdiction that did not identify multiple Superfund locations in their jurisdiction when discussing environmental health issues. HUD blamed 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 2015 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 related to the identification of "contributing factors" to "fair housing issues." The example in the notice was 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 2015 AFFH rule could have readily corrected this shortcoming.

HUD Claims

Discussing the requirement that an AFFH certification have three goals, and a bit later discussing the new evaluation scheme, the preamble (85 FR 2044, 2045) frequently falsely infers that the 2015 AFFH was prescriptive and micromanaged localities:

> "Therefore, HUD is not proposing to require that jurisdictions carry out specific steps to AFFH. This approach would allow jurisdictions to act as they deem necessary to achieve their results while allowing HUD to avoid micromanaging localities…"
>
> "How should HUD balance requiring overly prescriptive standards with ensuring integrity for data sources that support such goals?"
>
> "The goals or obstacles identified in the certification would not need to be based on any HUD-prescribed mode of analysis…"
>
> "Therefore, HUD is not proposing to require that jurisdictions carry out specific steps to AFFH."
>
> "HUD will spotlight jurisdictions achieving such new solutions, but will not mandate or prescribe specific actions."
>
> "This approach will allow HUD to target its resources where they are most needed while enabling jurisdictions to measure their progress, understand their successes or failures, and continue to improve their efforts, without a mandate from HUD on exactly what steps to take."

NLIHC Remarks

> The 2015 AFFH rule simply provided general guidance, something that has always been lacking and that many jurisdictions requested over the years HUD gathered stakeholder input before issuing a proposed AFFH rule. Neither the final rule nor the assessment tool were prescriptive or demand specific steps or outcomes. Each jurisdiction was free to identify its own fair housing issues and contributing factors, fair housing goals, and which goals to prioritize and pursue in any given five-year period or annual period in between. Each jurisdiction was free to take steps they thought appropriate for working toward a fair housing goal, as well as establish its own milestones and time table for achieving its goals. Unlike the proposed rule, the 2015 AFFH rule did not have an artificial evaluation process inappropriately comparing jurisdictions regardless of each jurisdiction's unique fair housing circumstances and priorities.

HUD Claim

> "Program participants attempted to prepare successful AFHs by hiring outside consultants, redirecting resources that could have been used to support affordable housing directly." (85 FR 2042)

NLIHC Remarks

> HUD provided all the data a jurisdiction needed and the questions in the Assessment Tool were sufficiently straight forward for a jurisdiction to respond to without resorting to outside consultants. As HUD was developing the 2015 AFFH rule and Assessment Tool (which was subject to multiple Administrative Procedure Act public comment opportunities), HUD declared its stated intent was to eliminate the expensive use of consultants that many jurisdictions resorted to in order to complete their Analyses of Impediments under the old, failed regime.

HUD Claim

> "A commenter [from a small PHA] responding to the advance notice of proposed rulemaking on AFFH regulations issued in 2018 noted that this jurisdictional analysis was simply too complex to be effectively completed by staff without specific statistical and mapping knowledge, as housing providers generally have staff with skills that lie in providing affordable housing services, but not in providing complex statistical data analysis. The same is likely true for many smaller jurisdictions." (85 FR 2042)

NLIHC Remarks

> HUD provided free mapping tools and guidance as well as all the data a jurisdiction might need. Neither sophisticated statistical analytical abilities nor expertise in online mapping were needed. Smaller jurisdictions and smaller PHAs were afforded streamlined Assessment Tools.

HUD Claims

HUD refers (85 FR 2042) to a *Federal Register* notice published on May 15, 2017 inviting comments regarding regulations that might be outdated, ineffective, or excessively burdensome (regarding Executive Order 13777).

> "Many commenters specifically indicated that, as program participants, they found the rule's requirements to be (or likely to be) extremely resource-intensive and complicated, placing a strain on limited budgets."
>
> "A representative of PHAs [from Idaho] wrote that compliance with the "overly burdensome and impractical" rule would be expensive, with particular concern for PHAs with small housing portfolios, while other commenters stated that the rule did not provide enough consideration to the fact that jurisdictions are limited geographically in what they can do, even when a jurisdiction is in a regional partnership."

NLIHC Remarks

That comment came from the Idaho Chapter of the National Association of Housing and Redevelopment Officials (NAHRO). The proposed PHA Assessment Tool had a streamlined tool for small PHAs and state PHAs.

The notice HUD mentions was not specific to AFFH. In response to that 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 wrote that small PHAs in particular wrote that compliance would be costly. However, PHAs in general had not yet been required to carry out the 2015 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 and/or vouchers (combined), or to a PHA with 1,250 or fewer public housing units and vouchers that intended 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.

In addition, the 2015 AFFH rule did not require program participants to undertake activities that they had no power to affect beyond their boundaries; the 2015 rule merely recognized that fair housing obstacles do not stop at boundaries. The 2015 rule encouraged program participants to consider regional obstacles and attempt to work with others to diminish regional obstacles.

Finally, the preamble to the proposed rule only cites five comments against the 2015 AFFH rule. On the other hand, HUD only devotes three general sentences that indicate "Many expressed support for the 2015 final rule and urged HUD to continue to implement its requirements." HUD does not indicate how many of the 700 public comments were in support of the 2015 rule. Unlike other instances of an ANPR, HUD does not address the specific comments regarding the ANPR and the individual arguments in favor of the 2015 rule or individual arguments against the notions HUD put forward in the ANPR. Instead, HUD simply forges ahead ignoring those comments and largely proceeds along the lines of the direction the ANPR alluded to.

HUD Claim

"The number of questions, the open-ended nature of many questions, and the lack of prioritization between questions made the planning process both inflexible and difficult to complete." (85 FR 2042)

NLIHC Remarks

Every question did not need a detailed response or in some cases even any response. Open-ended questions allowed for flexibility and avoided being prescriptive. Because the questions were not given specific relative priority, the unique circumstances of each jurisdiction could be reflected; a question that might be relevant or of high priority in one locality will not necessarily be relevant or a priority at all in another locality.

HUD Claim

> "Third, the 2015 rule's scope was particularly burdensome because HUD did not tailor the rule depending on the program participant, other than through creating broad categories. Every jurisdiction, regardless of their size, civil rights record, or current housing conditions, had to go through the same AFH process, without the flexibility to identify their locality's most relevant issues or to adapt their process to the unique conditions of the jurisdiction. Commenters [City of Winston-Salem] expressed concerns that they lacked the capacity to analyze the several contributing factors prescribed by HUD and requested that HUD allow grantees flexibility in identifying issues and developing a course of action." (85 FR 2043)

NLIHC Remarks

> Part of the intent of the 2015 AFFH rule was to provide a basic, standard framework for all jurisdictions. One of the problems HUD cited at the time was that jurisdictions did not like the lack of guidance and resulting uncertainty that came with the failed AI process. The 2015 AFFH rule afforded jurisdictions the flexibility to identify their own fair housing issues and contributing factors, develop their own fair housing goals and priorities, as well as methods for taking action to address those fair housing issues and contributing factors. It is not true that the 2015 rule forced jurisdictions to adhere to set issues or solutions. The 2015 AFFH rule did not prescribe any "contributing factors;" it merely offered 39 examples to stimulate consideration and to help jurisdictions understand what the new term "contributing factors" might mean. Jurisdictions could also indicate contributing factors not on the sample list.

HUD Claims (85 FR 2043)

> "Fourth, HUD determined that the 2015 rule focused too much on planning and process, and not enough on either the jurisdiction or HUD evaluating fair housing results."
>
> "This uniform, process-based approach discouraged innovation, allowed the process to substitute for actual results, and made it difficult to evaluate and compare jurisdictions over time."
>
> "The inherent nature of fitting jurisdictions into pre-determined categories and methods rather than evaluating jurisdictions based on results and achievements could discourage innovation and inhibit HUD's ability to evaluate a jurisdiction's improvement."

NLIHC Remarks

> 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?
>
> The 2015 AFFH rule did not fit jurisdictions into pre-determined categories.
>
> The 2015 AFFH rule required jurisdictions to provide metrics and milestones for assessing improvement.

HUD does not explain how the 2015 AFFH rule discouraged innovation. NLIHC does not see how the 2015 rule would discourage innovative actions to address fair housing issues or contributing factors. Comparing jurisdictions is meaningless. It also is contrary to the notion that each jurisdiction's situation is unique (and therefore not comparable).

HUD Claim

"Jurisdictions were required to consider and provide extensive documentation for every question regardless of whether the question or the expected answer advanced the jurisdiction's duty to AFFH or was relevant to the needs of the jurisdiction." (85 FR 2043)

NLIHC Remark

This is patently false.

HUD Claim

"HUD lacks the extensive localized knowledge of State and local officials." (85 FR 2043)

NLIHC Remark

The 2015 AFFH rule required the AFH to include "local data, local knowledge, and information gained through community participation."

HUD Claims (85 FR 2043)

"Finally, the completion of the AFH required grantees to use specific data sets and HUD-provided tools, including extensive mapping data, locally available data, and data from various interest groups."

"For local jurisdictions, the tool was difficult to learn and operate and did not include all factors that jurisdictions deemed relevant, such as low-income housing tax credit supported projects."

NLIHC Remarks

One of the hallmarks of the system underlying the 2015 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 2015 AFFH rule also urged 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.

As stated previously, HUD prematurely suspended implementation based on the inaugural experiences of only 49 jurisdictions. Given more time and a bit more technical assistance (not all TA available was used) jurisdictions could become comfortable with the mapping tools and HUD-provided data.

Regarding the claim that the tool did not include all of the factors that jurisdictions deemed relevant, the mapping toll was necessarily limited to publicly available national data. In HUD's formal explanation of why it suspended the rule on January 5, 2018, HUD pointed to a jurisdiction not indicating it had superfund sites, blaming the Assessment Tool for not including superfund sites. As NLIHC commented, jurisdictions are fully aware of superfund sites and upon HUD's review comment the jurisdiction could have easily amended its AFH.

Finally, it is not true that the tool did not provide information about low-income housing tax credit supported projects. The tool provided the location of and unit counts for LIHTC. However, the tool did not provide occupancy demographics because, even though HUD has that data due to HERA, almost 12 years later the data quality is still abominably low/inconsistent.

HUD Claim

"For PHAs and states, no tools were ever provided because of the challenge in developing appropriate data sets for both relatively large and small geographies, i.e., states and particular housing developments." (85 FR 2043)

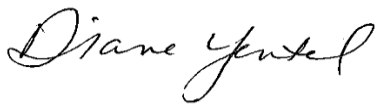
NLIHC Remarks

Assessment tools were in fact provided, separately, for states and PHAs. Thanks to the APA public review and comment process, HUD agreed that those Assessment Tools needed to be significantly modified. HUD was in the process of engaging states and PHAs to learn how best to amend the tools when that work was stopped because of the change in administrations.

CONCLUSION

HUD should abandon this ill-conceived proposal, reinstate the 2015 AFFH rule, and resume its implementation. As the housing crisis and its disproportionate harm to low-income people of color worsens, the racial wealth gap grows, and African American homeownership declines below levels when discrimination was legal, the promise and obligations of the Fair Housing Act are more important than ever. Rather than attempting to weaken it, Secretary Carson must work to vigorously enforce the obligation to further fair housing in our country.

Sincerely,



Diane Yentel
President and CEO