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March 6, 2018

Office of General Counsel

Regulations Division

U.S. Department of Housing and Urban Development

451 7th Street, SW

Room 10276

Washington, D.C. 20410-0001

Re: Docket No. FR-5173-N-15 Affirmatively Furthering Fair Housing:
Extension of Deadline for Submission of Assessment of Fair Housing for
Consolidated Plan Participants (Docket ID: HUD-2018-0001)

Via regulations.gov

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

NLIHC strenuously opposes the effective suspension of the Affirmatively Furthering Fair Housing (AFFH) regulation for the vast majority of local governments until 2024. Compelling an estimated 900 of 1,200 local jurisdictions to revert to the demonstrably ineffective Analysis of Impediments (AI) scheme is a drastic, unjustified reversal of years of good-faith work by many stakeholders. During this 50th anniversary year of the Fair Housing Act, instead of moving backward, HUD should be moving forward by expediting efforts to reduce segregation and foster greater housing opportunity for people in protected classes.

Founded in 1974 by
Cushing N. Dolbear

HUD rationalized its abrupt suspension of the requirement to submit an Assessment of Fair Housing (AFH) on January 5, 2018 based on its limited experience with only 49 initial AFH submissions, only 17 of which were not “accepted” upon initial submission. In a meeting with advocates, HUD stated that 9 of the 17 were ultimately accepted. The *Federal Register* notice announcing the suspension did not discuss why those 17 AFHs were not initially accepted or how meaningful any deficiencies were. Misinterpretations and mistakes are to be expected when a new process is instituted, and the rule provides for re-submission based on HUD guidance.

HUD indicated in the *Federal Register* notice that program participants need additional technical assistance in drafting an AFH that have clearer AFFH goals, metrics, and milestones. NLIHC agrees that adequate technical assistance is essential to assist program participants in adapting to a new process as important as complying with the statutory obligation to affirmatively further fair housing. However, rather than effectively suspending implementation of the entire AFFH rule until 2024 for the vast majority of program participants, HUD should have accelerated and augmented its technical assistance. In addition, HUD should have exercised a degree of patience with the first and second cohorts of AFH submissions, learn from the exercise of using the new AFH tool, and prepared for the major cohort of submissions anticipated for 2019.

To the extent there was a need for more time to adjust to the new AFH Assessment Tool, HUD should have consulted stakeholders instead of halting implementation without warning. HUD’s precipitous action is inconsistent with the long and thorough manner in which the AFH Assessment Tool and the AFFH rule were promulgated and enacted. Both were developed with extensive input from stakeholders over the course of years, as required by the Administrative Procedure Act and Paper Work Reduction Act, respectively.

- Beginning in 2010, HUD started soliciting informal input from a broad array of stakeholders.
- In January 2012, as part of the Sustainable Communities Initiative, HUD began experimenting with the antecedent of the AFH Assessment Tool, the Fair Housing and Equity Assessment (FHEA), which helped inform HUD’s thinking as it worked toward what would eventually become the AFH Assessment Tool.
- On July 19, 2013, the proposed AFFH regulation was issued for public comment under the Administrative Procedure Act.
- On September 26, 2014, HUD published a proposed Assessment Tool for larger local governments that underwent an initial 60 days of public review and comment, as required by the Paperwork Reduction Act.
- On July 16, 2015, a revised Assessment Tool based on stakeholder feedback was published for further comment, per the PRA.
- On July 16, 2015, the final AFFH rule was published.
- A final Assessment Tool was not published until December 31, 2015.
- The extensive, *Affirmatively Furthering Fair Housing Rule Guidebook* was also published at this time.
- OMB approved the Assessment Tool published on December 31, 2015 for only one year so that the experience of that year could be used to inform and perhaps modify subsequent Assessment Tools. Consequently, on March 23, 2016, HUD began the process of renewing the Assessment Tool by seeking comment under the Paperwork Reduction Act for 60 days.
- The subsequent 30-day comment period commenced on August 23, 2016.
- The Assessment Tool was formally approved again on January 13, 2017.

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

The January 5, 2018 suspension compels all but the 27 program participants that had a HUD-accepted AFH prior to that date to continue to utilize the AI process. The AI was widely recognized as an ineffective process, including by the Government Accountability Office.

There are numerous limitations of the current AI system, including:

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

The AFFH rule addresses all of those problems because:

1. The AI is replaced by the Assessment of Fair Housing (AFH). The rule provides a standard framework for program participants to use to identify and examine "fair housing issues" and the underlying "contributing factors" that cause the fair housing issues.
2. HUD provides each program participant with data covering the local jurisdiction and the surrounding region. Program participants must consider this data when assessing fair housing.
3. HUD will receive, review, and decide whether an AFH can be accepted.
4. The fair housing goals and priorities that program participants set in the AFH will be incorporated into their Consolidated Plans and PHA Plans.
5. Public participation is required in the development of the AFH, enabling locally-driven assessments of fair housing issues and locally-driven goals to address those fair housing issues.
6. The AFH must be submitted every five years in synch with a new Consolidated Plan or PHA Plan.

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

The federal government, states, and local communities have been required by law since 1968 to work to undo the segregated communities that federal housing policy created in the first place. Suspending the tools that help communities meet that obligation, without any input from key stakeholders, is a step in the wrong direction.

By effectively suspending the AFFH rule without warning, HUD seems to be evading the law, the Administrative Procedure Act and the Paperwork Reduction Act. The suspension is redolent of HUD's recent suspension of the Small Area FMR rule, which was enjoined by a court as violating the Administrative Procedure Act. In *OCA v. Carson*, the district court found that HUD should have provided proper public notice and opportunity for comment before declining to enforce a promulgated regulation.

HUD's decision is a serious loss for fair housing and puts the promise of making every neighborhood a community of opportunity further out of reach. NLIHC calls on HUD to reverse its decision, withdraw the notice, and move ahead with implementation and enforcement of the Affirmatively Furthering Fair Housing rule.

Sincerely,

A handwritten signature in cursive script that reads "Diane Yentel".

Diane Yentel
President and CEO