



March 6, 2016

Office of General Counsel, Regulations Division
US Department of Housing and Urban Development
451 7th Street, SW
Room 10276
Washington, DC 20410-0001

RE: FR-5173-N-15 Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants

Submitted via www.regulations.gov

To Whom It May Concern:

I am writing on behalf of the National Fair Housing Alliance (NFHA) to express our strong opposition to the announcement HUD made in the above-referenced [Federal Register notice](#), dated January 5, 2018, effectively suspending implementation of the agency's 2015 Affirmatively Furthering Fair Housing (AFFH) regulation. The reasons for our opposition are described below. We urge HUD to revoke that notice immediately and resume implementation of the critical and long-overdue 2015 AFFH regulation.

Founded in 1988, NFHA is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. Headquartered in Washington, DC, NFHA's comprehensive education, advocacy and enforcement programs provide equal access to apartments, houses, mortgage loans and insurance policies for all residents of the nation.

The 2015 AFFH Rule was Much Needed and Long Overdue

The requirement for HUD and its grantees to affirmatively further fair housing was included in the original language of the Fair Housing Act when it was enacted by Congress in 1968, and retained when the law was amended in 1988. That language reflected Congress' intent that while HUD and its grantees should refrain from discrimination in their housing and community development programs, that alone would not be sufficient to overcome the negative effects of entrenched segregation on individuals, communities and our nation as a whole. To accomplish that goal, and to create truly open housing markets in which people could live in the communities of their choice without regard to race, color, religion, national origin, sex, disability

or family status would require HUD and its grantees to take affirmative steps to dismantle the deliberate policies, practices and programs that had created segregation to begin with.

2018 is the 50th anniversary of the passage of the Fair Housing Act. It is also the 50th anniversary of the release of the report of the President's National Advisory Commission on Civil Disorders, also known as the Kerner Commission, which then-President Lyndon B. Johnson established in the aftermath of the racial unrest that erupted in more than 100 cities across the nation the previous year. The Commission's mandate was to explore what happened in those cities, why it happened, and what could be done to prevent it from happening again. After extensive research and analysis, the Kerner Commission famously concluded that in 1968, our nation was, "moving toward two societies – one white and one black – separate and unequal." ("Report of the National Advisory Commission on Civil Disorders," 1967). It identified the lack of economic opportunity for African American citizens as a key cause of the unrest, and linked the disparities in access to jobs, education, and participation in civic affairs to residential segregation that had been imposed and maintained by white society. The Kerner Commission made a number of recommendations for redressing these inequities, including the adoption of legislation outlawing racial discrimination in housing.

The 50th anniversary of the Kerner Commission report has occasioned substantial research into how much has changed for African Americans and other people of color in the last half century. Unfortunately, the answer is "not enough." As detailed in a recent report, entitled, "[50 Years After the Kerner Commission](#)," and issued by the Economic Policy Institute last month, White Americans continue hold substantial advantage over African Americans on a host of indicators. African Americans are about half as likely as Whites to have a college degree (54.2 percent today as compared with 56 percent in 1968). The unemployment rate for African Americans was 6.7 percent in 1968, twice that of Whites (3.2 percent). That gap has remained virtually unchanged: in 2017 the unemployment rate for African Americans was 7.5 percent, while that for Whites was 3.8 percent. There continues to be a tremendous racial disparity in wealth, as well. In 1968, the typical African American family had very little wealth, but what wealth they had (\$2,647) was about one-sixth, or 15 percent, of that held by the typical White family. By 2017, that gap had grown, with African American families holding only one-tenth (\$17,409) of the wealth held by White families (\$171,000). Similarly, the racial gap in homeownership has persisted. In 1968, 65.9 percent of White families owned their own homes, a rate nearly 25 percent higher than that of African Americans (41.1 percent). Today, the rate of African American homeownership remains virtually unchanged (41.2 percent) while that of White families has increased by 5.2 percent to 71.1 percent – a gap of 30 percentage points. There are many other indicators of the racial disparities that continue to plague our nation.

While these racial disparities in many of the factors that account for access to opportunity have remained unchanged or even worsened over the past 50 years, we have gained considerable knowledge about the negative impacts of segregation and concentrated poverty, which are illustrated by the disheartening statistics cited above. In the field of public health, officials are grappling with the very same issues, which they view as social determinants of health. These have substantial implications for racial disparities in the incidence of numerous diseases, social and intellectual development, and even the lifespan of individuals. Public health officials are coming to see efforts to dismantle of segregation and neighborhoods of concentrated poverty and

to provide greater equity in access to opportunity as imperative for eliminating the most pressing health disparities facing our society.

As our understanding of the consequences for society of persistent segregation and concentrated poverty has increased, we have also learned a lot about the impact of increasing access to opportunity. Raj Chetty and his colleagues [have demonstrated](#) the benefits experienced by children who have the chance to move at a young age out of poor neighborhoods into lower poverty communities. Compared to their counterparts who remained in areas of concentrated poverty, these children had higher levels of educational attainment, earned higher incomes (and therefore paid higher taxes), were less likely to have children without being married, and lived in lower poverty neighborhoods as adults. Other research demonstrates the benefits of diversity in schools, in the workplace, and on the ability of regions to achieve robust and sustained economic growth.

The challenges created by segregation and the benefits made possible by its elimination were what Congress intended to address through the affirmatively furthering fair housing provisions in the Fair Housing Act. In the nearly 50 years between the passage of the Act and HUD's adoption of the new AFFH rule in 2015, the AFFH obligation has largely been honored in the breach by both HUD and its grantees. Although HUD itself has been sued several times over its failure to fulfill its AFFH obligation, it was not until the last administration that HUD took any real action to ensure that its grantees were doing so.

HUD's Announcement Delaying Submission of AFHs was Improper and Ill-Advised

Although HUD has styled the action announced in the January 5 notice as a delay in the submission dates of jurisdictions' Assessments of Fair Housing (AFH) until after October 31, 2020, it is for all intents and purposes a suspension of the AFFH rule. This is true for a number of reasons.

First, because the majority of the next round of Consolidated Plans will be submitted in 2020, a large number of AFHs was scheduled to be submitted in 2019. By delaying the submission of AFHs from these jurisdictions until after October 31, 2020, HUD is effectively delaying their submission for another 5-year cycle – until 2024. Thus, for the majority of jurisdictions in the country, it will be a minimum of 6 years before their fair housing plans must be conducted using the process laid out in the 2015 regulation. This is more than a temporary pause in the process; it is an effective suspension of the rule.

Second, the AFH is the lynchpin of the 2015 regulation. Eliminating its use has many significant implications. For example, HUD will no longer review the fair housing plan and give jurisdictions feedback to ensure their plans are complete and set out a good roadmap for fulfilling their AFFH obligation. Jurisdictions will not be required to incorporate the key goals and priorities of the fair housing plan into the Consolidated Plan, so that the allocation of their housing and community development resources will be informed by important fair housing considerations. The accountability measures intended to ensure actual progress toward overcoming the negative effects of segregation – annual reports on performance, updates in the jurisdiction's annual action plans, and HUD's review of progress at the end of the ConPlan cycle

– will no longer be in effect. Having eliminated these central elements of the 2015 regulation, HUD cannot credibly assert that the rule remains in effect.

Third, by instructing grantees to return to the pre-2015 requirements to conduct an Analysis of Impediments to Fair Housing Choice (AI), HUD has returned to a process whose faults and deficiencies are well-documented. In 2010, the Government Accountability Office (GAO) analyzed the AI process and highlighted its flaws as a means for ensuring that HUD grantees are meeting their AFFH obligations. These weaknesses left local officials uncertain as to whether they were taking proper steps to fulfill their fair housing obligations. In fact, GAO noted that public officials had requested greater clarity and guidance from HUD.

[GAO's review](#) found many AIs that were incomplete, out of date, or missing altogether. They did not consistently follow the format recommended in the Fair Housing Planning Guide. The lack of timetables for implementation of recommendations and signatures of key officials led GAO to question their usefulness as planning documents. GAO recommended that HUD adopt a regulation requiring its grantees to update their fair housing plans periodically, follow a specific format, and submit them to HUD for review. The 2015 regulation included all of these provisions and a number of additional beneficial features.

Further, HUD adopted the 2015 AFFH regulation after considerable public input. It was preceded by a listening tour around the country by HUD officials with a wide variety of stakeholders, including local elected officials, local government agency staff, fair housing groups, industry groups, and others. The rule itself went through the notice and comment process dictated by the Administrative Procedure Act (APA), during which HUD received [comments from more than 1,000 interested parties](#). The Assessment Tools that HUD has adopted to date went through the process laid out in the Paperwork Reduction Act (PRA), with an initial 60-day and a subsequent 30-day comment period. In fact, the Assessment Tool for local jurisdictions, which was initially approved by OMB for just one year, went through this process twice. All of these steps insured that interested parties had ample opportunity to weigh in on the establishment of the new AFFH process and its component parts.

Changes to rules adopted under the APA cannot be made without public notice and comment. The same is true for sub-regulatory documents adopted under the PRA. Yet, rather than going through a proper process of giving the public advance notice of and opportunity to provide input on this important decision, HUD acted abruptly and without any input from stakeholders. This flawed process has produced a flawed result, and once again leaves local officials without the certainty and guidance they need to fulfill their statutory obligations.

The AFH Process in the 2015 Rule was Far Superior to the Pre-2105 AI Process

Based on the feedback that NFHA has received from its members around the country who have participated in the AFH process in their communities, and on our own observations, it is clear that the process established in the 2015 rule is far superior to the old, pre-2015, AI process that it replaced.

For example, the community engagement process established by the 2015 rule is substantially more robust than that associated with the pre-2015 AI process. The rule directs jurisdictions to consult with, among others, organizations that represent members of protected classes and groups involved in fair housing enforcement. Further, it recommends a number of other organizations and agencies with whom it would be beneficial to consult, including regional planning agencies and government agencies from adjacent jurisdictions. The result is a consultation process that does a better job of both including key stakeholders and casting a wider net to obtain relevant information than was typical of the AI process. In addition, the 2015 rule was more precise about providing formal opportunities for public input and responding to the input received. The result is a process that gives local community residents greater input, ensures that jurisdictions understand local priorities, and produces strategies that reflect those priorities.

Another aspect of the 2015 rule that is a significant improvement over the pre-2015 AI process is the structure and format of the Assessment Tool, the accompanying guidance, and the data and mapping tool that not only places valuable information into jurisdictions' hands, but also enables them to view its spatial implications. Together, these tools allow jurisdictions to assemble information and knowledge critical for fair housing planning, focus in on the issues that are most relevant, and identify priorities that address their most pressing challenges. This is a substantial change from the AI, which too often contained large amounts of data but lacked any clear focus, analysis or link to critical fair housing issues.

The requirement to identify the fair housing issues and contributing factors that should be given the highest priority, set goals for addressing those, and accompany those goals with appropriate metrics and milestones is another big improvement in the 2015 regulation. Under the AI process, many jurisdictions failed to identify priorities, establish goals, set out timelines for implementation, or establish any benchmarks by which to measure progress. The result was a planning process that had little impact on subsequent actions taken by the jurisdiction and little change in the lives of their residents.

The way that the 2015 regulation encourages and accommodates regional analysis and regional collaboration is also a significant advancement over the earlier process. The Assessment Tool calls on jurisdictions to consider how the patterns and problems that they face fit within the larger context of the region in which they are situated. The data and mapping tool provides the necessary data to accomplish this analysis, and the regulation makes provisions for jurisdictions in the same region to collaborate on an AFH, while still holding each accountable for identifying needed actions within their own borders. The result is that a number of jurisdictions have taken steps to develop regional AFH collaborations, including those in the Kansas City, Denver, Baltimore, and Washington, DC areas, among others. As HUD noted when issuing the regulation in 2015, these problems do not stop at jurisdictional borders, and it makes sense to take a regional approach to tackling them. While the AI process allowed for a regional approach, it did not support them in the same way and they were relatively rare.

In addition, even though they were not yet required to do so, an encouraging number of Public Housing Authorities (PHAs) opted to collaborate on AFHs with their entitlement jurisdictions. This was a notable step forward, since while PHAs have long been required to undertake fair

housing planning, that process has been ill-defined and a great many PHAs have failed to produce such plans. It would appear that the process established in the 2015 regulation provides PHAs with the support and structure necessary to allow them to take this important step in fulfilling their fair housing obligations, something that the pre-2015 rule did not do. Given the importance of the housing resources that PHAs oversee, as well as the extent to which the geographic concentration of those resources in many communities in segregated areas serves to limit residents' choices and perpetuate segregated living patterns, a structure that facilitates fair housing planning by PHAs is a major improvement. Conversely, the return to the pre-2015 AI process will likely mean that many PHAs will not undertake this planning, and that is a major reversal.

The explicit link between the AFH and the Consolidated Plan (ConPlan) and PHA Plan is another significant improvement embodied in the 2015 regulation. One of the biggest complaints about AIs – from local officials and community stakeholders alike – was that too often they were merely exercises on paper that sat on a shelf and collected dust but had no impact on the allocation of housing and community development resources and did not lead to improved conditions in local communities. The 2015 regulation changed this dynamic by requiring that the goals and priorities identified in the AFH be reflected in the ConPlan and PHA plan. In this way, the fair housing planning process could result in investments that would bring needed opportunities to disinvested neighborhoods and expand housing choices for local residents. With the return to the AI process, this vital link will be severed.

One other critical improvement in the 2015 regulation was the inclusion of mechanisms by which HUD and the public could hold jurisdictions accountable to carry through on the goals identified in their AFHs. The rule's definition of AFFH makes it clear that a jurisdiction cannot certify that it is affirmatively furthering fair housing by creating a plan. Rather, it must take meaningful steps to implement that plan in order to comply with its statutory obligation. The accountability mechanisms in the rule include submission of the AFH to HUD for review and acceptance, incorporating the AFH's priorities into the ConPlan or PHA Plan, providing annual reports on progress and updates on strategies, and creating timelines and benchmarks against which both HUD, the public and the jurisdiction itself can measure progress. None of these are features of the AI process. With the suspension of the 2015 rule, all of this is lost and the prospects that jurisdictions will make discernable progress toward meeting fair housing goals or that HUD will take effective steps to hold them accountable for fulfilling their statutory fair housing obligations are diminished.

For all of these reasons, we believe that HUD's suspension of the 2015 AFFH regulation is a serious mistake that should be reversed.

The 2015 AFFH Rule Contemplated the Need for Revisions to Initial AFH Submissions

The January 5 notice suspending the 2015 AFFH regulation notes that 35 percent of the first 49 AFHs were not accepted upon initial submission and uses this as a rationale for suspension of the rule. However, this is an erroneous conclusion.

Any time a new regulation is put into effect, it is reasonable to assume that there will be a learning curve for the regulator (in this case, HUD) the regulated entities (jurisdictions) and the public, and that it will take some time and experience for all parties to become familiar with the mechanics of the new regulation. This is true for virtually all regulations, regardless of their subject matter and the issuing agency. The fact that 65 per cent of the first round of AFHs were accepted upon initial submission seems like a rather high acceptance rate, and suggests that the process was reasonably straightforward and the technical support that HUD provided was helpful to the majority of grantees.

In any case, HUD itself anticipated that not all AFHs would hit the mark the first time out, and drafted the regulation specifically to accommodate this likely eventuality. In [§5.162](#), the regulation states that if HUD notifies a grantee (“program participant”) that it does not accept an AFH, in the notification, “HUD will inform the program participant in writing of the reasons why HUD has not accepted the AFH and the actions that the program participant may take to resolve the nonacceptance.”

The regulation also sets out a timeline for grantees to revise their initial AFHs in accordance with HUD’s written feedback (no less than 45 days), as well as time for a second review by HUD (30 days), after which, if HUD takes no further action, the AFH will be deemed accepted.

These regulatory provisions clearly indicate HUD’s expectation that grantees might need to make revisions to their initial submissions, that it has a responsibility to provide specific feedback about shortcomings it might identify in any grantee’s AFH and how those could be corrected, and that it viewed such back and forth as a normal part of the regulatory process. In fact, this view is consistent with the public comments made by numerous HUD officials at the time the regulation was adopted, in which they stated that it was HUD’s goal to work with grantees to ensure that they would be able to navigate the AFH process successfully, have their AFHs accepted and move on to implementation of their plans. The fact that some communication back and forth with grantees going through a new regulatory process for the first time has proven necessary merely underscores HUD’s foresight in establishing a process that would accommodate such interaction. It is not a reason to suspend the regulation.

HUD has Sufficient Technical Assistance Resources; It Should Use Them

In the January 5 notice, HUD also indicates concern that it has failed to provide grantees with the technical assistance they need to navigate the AFH process successfully. This may well be true, but it is not for lack of resources or authority. Congress has appropriated funds for HUD specifically for the purpose of providing its grantees with technical assistance on compliance with the 2015 regulation. It is our understanding that multiple requests for such assistance languished at HUD and did not receive a timely response. If this is accurate, resolution of this problem is entirely within HUD’s control, and does not require suspension of the rule. Similarly, HUD tasked its contractors with developing additional guidance to help grantees gain a better understanding of some of the contributing factors to fair housing issues that are identified in the regulation. The contractors completed their work, but the guidance has never been released. Again, this is a situation that should be corrected, but authority to correct it lies well within HUD’s authority and there is no need to suspend the regulation in the meantime.

HUD Should Immediately Revoke the Jan. 5 Notice and Reinstate the 2015 Rule

In sum, in announcing what amounts to the effective suspension of the 2015 AFFH regulation through an improper process that gave neither prior notice nor opportunity for public input, HUD has returned to an inferior system that has been demonstrated to be ineffective in ensuring that its grantees are taking appropriate steps to fulfill their statutory obligation to affirmatively further fair housing. HUD has given no credible rationale for this action, which will have negative consequences for its grantees, the communities they serve, and the nation as whole. NFHA urges HUD to reverse this ill-considered action, revoke the January 5, 2018 notice, and resume immediate implementation of the 2015 rule.

Thank you for your consideration of these comments. If you have any questions or wish to discuss them further, please contact Debby Goldberg on my staff at 202-898-1661 or dgoldberg@nationalfairhousing.org.

Sincerely,



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National Fair Housing Alliance