

July 12, 2021

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. HUD-2021-0031-0001; FR-6249-1-01: Restoring Affirmatively Furthering Fair Housing Definitions and Certifications (RIN 2529-AB01)

Dear Madam or Sir:

The 75 undersigned local fair housing, civil rights and housing advocacy organizations submit these comments on HUD's interim final rule on "Restoring Affirmatively Furthering Fair Housing Definitions and Certifications." The Affirmatively Furthering Fair Housing (AFFH) provisions of the 1968 Fair Housing Act are critical tools for achieving the diverse and inclusive communities that Congress envisioned in 1968 and the racial equity to which President Biden recommitted the federal government in his January, 2021 executive order on racial equity.¹ Implemented effectively, the AFFH mandate will help overcome the racial segregation that characterizes so much of our country, and which the federal government played a significant role in creating and perpetuating. The AFFH mandate will spur strategic investment in under-resourced communities, help preserve and expand the supply of affordable housing, increase the housing options in well-resourced communities, expand access to opportunity and ensure that all communities have equitable access to important community resources and amenities. In doing so, it will benefit us all. Further, the AFFH provisions serve as the foundation for much of the work that our organizations do in our local communities and with the jurisdictions with which we engage. That work is hampered when HUD fails to maintain an AFFH regulatory framework that adheres to Congressional intent for this provision of the Fair Housing Act. Our comments below address both the provisions of the proposed interim final rule on AFFH that we believe comport with that intent and our recommendations for additional provisions that are needed.

Reinstating the Definition of AFFH

There is considerable guidance to draw upon to define accurately what it means to affirmatively further fair housing. This guidance is contained in the legislative history of the Fair Housing Act, the agency interpretation of the statute, and many decades of jurisprudence on the issue. The definition of AFFH in the 2015 rule captured these sources effectively. It stated that affirmatively furthering fair housing means,

¹ EO 13985, "Advancing Racial Equity and Support for Underserved Communities through the Federal Government." January 20, 2021.

“taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development.”²

Our organizations support the reinstatement of this definition, and the related definitions that are necessary to understand it and its implementation. It is important to have in place, in regulation, an AFFH definition that is consistent with the statutory mandate and helps HUD’s grantees clearly understand their AFFH obligations. In the absence of such a definition, or – as was the case with the 2020 Preserving Community and Neighborhood Choice (PCNC) regulation – if HUD institutes a definition that is not consistent with that mandate, grantees may fail to take appropriate actions to fulfill their AFFH obligations. This exposes them to liability and undermines efforts to expand access to opportunity and advance racial equity.

Because of the degree of nuance required for meaningful implementation of the AFFH obligation, we encourage HUD to issue additional guidance to its grantees on a number of related topics. Among these are the importance of providing *both* place-based investments in under-resourced neighborhoods *and* expanding access to well-resourced neighborhoods by increasing their supply of affordable housing, and the need to take steps to preserve existing affordable housing and prevent the displacement of neighborhood residents in areas in which increased investment spurs gentrification. Other important topics for guidance include the opportunity factors that should be considered in fair housing planning (access to jobs that pay a living wage, access to transportation and well-performing schools, a healthy environment, and the like), as well as the impact of climate change on disadvantaged communities.

Certification Requirements Should be Strengthened

When grantees tell HUD that they will affirmatively further fair housing, as they are required to do by multiple statutes,³ those certifications should be tied to a definition of AFFH that is consistent with the mandate set out by the Fair Housing Act. The definition included in HUD’s 2015 AFFH rule was consistent with that mandate, and our organizations support HUD’s proposed reinstatement of certification standards based on that definition.

However, the interim final rule omits a critical component of the certification standards from the 2015 rule. In addition to requiring grantees to certify that they would affirmatively further fair housing, the 2015 rule also barred them from taking “actions that are materially inconsistent with

² See § 5.152 of the 2015 rule.

³ These include the Housing and Community Development Act of 1974, the Cranston-Gonzalez National Affordable Housing Act of 1990, and the Quality Housing and Work Responsibility Act of 1998. See 42 U.S.C. 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), 1437C-1(d)(16).

the obligation to affirmatively further fair housing.”⁴ This meant that jurisdictions could not comply with their AFFH certification requirements by taking some actions that furthered fair housing while at the same time taking other actions that perpetuated discrimination and segregation. The relevant question here is not whether some actions a grantee takes affirmatively further fair housing, even though other actions do not. Nor is the relevant question whether the grantee’s actions to affirmatively further fair housing somehow outweigh any actions that undermine fair housing. Rather, all of the grantee’s actions must affirmatively further fair housing. Unless HUD imposes this kind of consistent and comprehensive standard, it will not be in a position to intervene should a grantee take some actions that are materially inconsistent with its obligation to affirmatively further fair housing. For this reason, we urge HUD to reinstate the full certification requirements from the 2015 rule.

HUD Should Require Grantees to Maintain Current Fair Housing Plans

The determination of which actions to affirmatively further fair housing will have a meaningful impact must be based on an understanding of the relevant conditions in a community: the extent of segregation or integration, the disparities in housing needs and access to opportunity, the racially or ethnically concentrated areas of poverty, and the degree of compliance with civil rights and fair housing laws. This understanding must be based on a rigorous assessment of the local landscape, informed by relevant data and local knowledge; such an assessment provides the basis for developing goals and strategies to advance fair housing and the benchmark against which to measure change. In other words, it requires grantees to conduct fair housing planning.

In its 2010 report on HUD’s fair housing oversight⁵, the Government Accountability Office noted that key weaknesses in HUD’s AFFH implementation included the lack of a consistent framework and standards for fair housing planning by its grantees, the absence of a regular schedule on which such planning was to be conducted, and the lack of any review by HUD of its grantees’ fair housing plans. As the result of these flaws, GAO found that grantees were uncertain about how to conduct fair housing planning, and their plans (Analyses of Impediments to Fair Housing Choice, or AIs) often lacked concrete steps to address fair housing barriers. Further, some AIs were out of date, incomplete or even missing altogether.

The 2015 rule addressed all of these flaws and others. It established a consistent format and analytical framework for fair housing plans, provided data, mapping and analytical tools to help grantees conduct their analyses, and included robust community engagement requirements to ensure that the plans were informed by local knowledge, experience and priorities. The rule also required grantees to identify key priorities and set measurable goals to address them, set a schedule for conducting fair housing planning and incorporated review and acceptance of the plans by HUD. At the same time, it preserved each community’s ability to identify those fair housing goals that would be the most meaningful in its unique context and to develop strategies to achieve those goals that were appropriate given its capacity and resources. This created a

⁴ See Sections 91,225(a)(1), 91,235(c)(4), 91.325(a)(1), 91.425(a)(1), 570,487(b)(2), 570.601(a)(2), 903.7(o)(1) and 903,15(d)(3)(i)(B) of the 2015 rule.

⁵ Government Accountability Office, “Housing and Community Development Grants: HUD Needs to Enhance its Requirements and Oversight of Jurisdictions’ Fair Housing Plans.” GAO-10-905, September 14, 2010.

strong and flexible structure for planning and established a solid basis against which to measure progress over time.

One of the major drawbacks of the 2020 PCNC rule was its complete lack of any fair housing planning requirement. In fact, since HUD suspended the 2015 rule in 2018, it has left grantees without clear guidance about how to fulfill their AFFH obligations. This has created conditions similar to those found by GAO in 2010. Grantees have been uncertain about how, when or even whether to conduct fair housing planning, and some have failed to do so at all, even if their fair housing plans were out of date in 2015. Recently, the National Fair Housing Alliance, conducted an informal survey of the fair housing plans of 62 jurisdictions of varying sizes and types, including some from each of the ten HUD regions. It found that 22 of those jurisdictions (35 percent) had fair housing plans that were dated 2015 or earlier. Some were dated 2010 or earlier, and one dated back 16 years to 2005. While HUD has stated its intention of promulgating a new AFFH regulation that will presumably include some type of fair housing planning requirement, it will likely be several years before such requirements take effect. By that time, many more grantees may have fair housing plans that are severely out of date.

Such inconsistency among HUD grantees in maintaining up to date fair housing plans throws into question not only whether those grantees are fulfilling their statutory AFFH obligations, but whether HUD itself is doing so, given its reliance – at least in part – on its grantees’ actions as a means of fulfilling its own AFFH obligations. Yet, rather than instituting fair housing planning requirements, drawing on the lessons learned from the implementation of the 2015 rule, this interim final rule includes no provisions to ensure that HUD’s grantees maintain current, robust fair housing plans.

Instead, the interim final rule leaves it to each grantee, on a voluntary basis, to decide whether to conduct fair housing planning and if so, what form that will take. Further, while the interim final rule reminds grantees that they must maintain documentation to support their AFFH certifications, it also makes it clear that HUD will not be undertaking any consistent oversight to ensure that grantees have either a current, acceptable fair housing plan or any documentation to support their certifications. Taken together, these provisions send the absolute wrong message to HUD’s grantees: that they can evade their AFFH obligations without expecting to face any consequences. This is an abdication of HUD’s statutory responsibilities and runs counter to the President’s stated commitment to advancing racial equity.

To address this problem, we recommend that HUD include a fair housing planning requirement in the final rule and issue guidance advising grantees how they are expected to maintain current fair housing plans. The guidance should point to best practices for such planning, building on the key tenets of the 2015 regulation.

In addition, such guidance should advise grantees to ensure that the programs and policies they put in place in response to the COVID-19 pandemic and its effects should adhere to AFFH principles. The pandemic has had a disparate impact on people and communities of color, who have contracted the virus, become ill and died at higher rates than their White counterparts. Further, people of color faced more severe economic impacts from the pandemic. They have lost

their jobs or suffered reduced hours at higher rates and are more likely to be behind on their rent or mortgage payments, putting them at risk of housing instability with all of its consequences. Congress has allocated billions of dollars in response to the pandemic, much of which is intended to address housing needs. It is critical to ensure that these funds fuel a recovery that is equitable, so that the communities that suffered the most can recover fully. To accomplish this, HUD’s guidance should help grantees ensure that these funds are being used in a manner that affirmatively furthers fair housing.

Conclusion

In sum, our organizations support HUD’s proposal to reinstate the definition of AFFH from the 2015 rule, along with the definitions of certain terms used in that definition. We also support the reinstatement of the certification standards contained in the 2015 rule, and urge HUD to do so in full, including the prohibition against grantees taking any material actions inconsistent with their obligation to affirmatively further fair housing. Further, we urge HUD to address the significant gap left by its failure to incorporate any requirements for grantees to maintain current fair housing plans by incorporating such requirements into the rule itself and issuing clear guidance in conjunction with this rule. Such guidance is needed to ensure that grantees are using their COVID-19 funding in a manner that affirmatively furthers fair housing.

Thank you for the opportunity to submit these comments. We look forward to engaging with you further as you develop a more comprehensive AFFH regulation in the near future.

Sincerely,

Organization	City	State
Fair Housing Center of Northern Alabama	Birmingham	AL
Southwest Fair Housing Council	Tucson	AZ
CSA San Diego County	El Cajon	CA
Greater Napa Valley Fair Housing Center	Napa	CA
Fair Housing Council of Riverside County, Inc.	Riverside	CA
Housing Rights Center (California)	Los Angeles	CA
Fair Housing Advocates of Northern California	San Rafael	CA
Fair Housing of Orange County	Santa Ana	CA
Connecticut Fair Housing Center	Hartford	CT
Open Communities Alliance	Hartford	CT
Equal Rights Center	Washington	DC
Gateway to Housing Inc	Delray Beach	FL
Delray Beach Housing Authority	Delray Beach	FL

Fair Housing Center of the Greater Palm Beaches	Lantana	FL
Housing Opportunities Project for Excellence	Miami	FL
Savannah-Chatham County Fair Housing Council, Inc.	Savannah	GA
3Synergies Consulting	Boise	ID
Boise/Ada County A41 Homeless Coalition	Boise	ID
Empower Idaho, a program of Jannus, Inc.	Boise	ID
Idaho Coalition Against Sexual & Domestic Violence	Boise	ID
Intermountain Fair Housing Council, Inc.	Boise	ID
Living Independence Network Corporation	Boise	ID
NAACP	Boise	ID
Gary E. Hanes & Associates, LLC	Boise	ID
Treasure Valley Idaho NAACP	Boise	ID
PODER of Idaho	Nampa	ID
Access Concepts & Training, Inc	Boise	ID
Chicago Urban League	Chicago	IL
Housing Action Illinois	Chicago	IL
Housing Choice Partners	Chicago	IL
Metropolitan Planning Council	Chicago	IL
Northwest Side Community Development Corporation	Chicago	IL
Northwest Side Housing Center	Chicago	IL
UIC John Marshall Law School Fair Housing Legal Clinic	Chicago	IL
Respond Now	Chicago Heights	IL
Connections for the Homeless	Evanston	IL
Hope Fair Housing Center	Wheaton	IL
Access Living of Metropolitan Chicago	Chicago	IL
Chicago Area Fair Housing Alliance	Chicago	IL
Chicago Lawyers' Committee for Civil Rights	Chicago	IL
Northside Community Resources	Chicago	IL
Shriver Center on Poverty Law	Chicago	IL

South Suburban Housing Center	Homewood	IL
Lawyers' Committee for Better Housing	Chicago	IL
Fair Housing Center of Central Indiana, Inc.	Indianapolis	IN
Louisiana Fair Housing Action Center	New Orleans	LA
Fair Housing Center of Metropolitan Detroit	Detroit	MI
Fair Housing Center of Southwest Michigan	Kalamazoo	MI
Fair Housing Center of West Michigan	Grand Raids	MI
Mid-Minnesota Legal Aid	Minneapolis	MN
Montana Fair Housing	Butte	MT
New Jersey Citizen Action Education Fund	Highland Park	NJ
United South Broadway Corporation-Fair Lending Center	Albuquerque	NM
Long Island Housing Services, Inc.	Bohemia	NY
Housing Opportunities Made Equal, Inc.	Buffalo	NY
Fair Housing Justice Center, Inc.	Long Island City	NY
ERASE Racism	Syosset	NY
CNY Fair Housing	Syracuse	NY
HOME of Greater Cincinnati	Cincinnati	OH
Miami Valley Fair Housing Center, Inc.	Dayton	OH
Housing Research & Advocacy Center dba Fair Housing Center for Rights & Research	Cleveland	OH
Fair Housing Advocates Association	Akron	OH
Fair Housing Council of Oregon	Portland	OR
Housing Equality Center of Pennsylvania	Fort Washington	PA
Fair Housing Partnership of Greater Pittsburgh	Pittsburgh	PA
Hazelwood Initiative, Inc.	Pittsburgh	PA
Pittsburgh Commission on Human Relations	Pittsburgh	PA
Fair Housing Rights Center in Southeastern Pennsylvania and Lakeside Global Institute	Philadelphia	PA
West End P.O.W.E.R.	Pittsburgh	PA
North Texas Fair Housing Center	Dallas	TX

Greater Houston Fair Housing Center	Houston	TX
Housing Opportunities Made Equal of Virginia	Richmond	VA
Northwest Fair Housing Alliance	Spokane	WA
Fair Housing Center of Washington	Tacoma	WA
Metropolitan Milwaukee Fair Housing Council	Milwaukee	WI