

July 12, 2021

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

Re: Docket No. HUD-2021-0031-0001; Restoring Affirmatively Furthering Fair Housing Definitions and Certifications (86 Fed. Reg. 30,779-30,793 (Jun. 10, 2021)).

Dear Madam or Sir:

Introduction

The undersigned fair housing, affordable housing and civil rights organizations write to you in response to the proposed Interim Final Rule entitled “Restoring Affirmatively Furthering Fair Housing Definitions and Certifications.” We are heartened to see HUD moving toward restoring a meaningful Affirmatively Furthering Fair Housing (AFFH) rule to better implement the letter and spirit of the Fair Housing Act (“the Act”). This provision of the Fair Housing Act has largely gone unenforced, continuing the harms that have resulted from this nation’s legacy of government-sponsored residential segregation and discrimination. With the exception of the short time during which HUD’s 2015 AFFH Rule was in operation, there has been little meaningful implementation of the AFFH mandate of the Act. We appreciate that HUD has taken this important step to reinstate portions of the 2015 rule and offer the following comments to encourage HUD to improve upon the proposed Interim Final Rule and move swiftly to adopt and fully implement a complete, robust AFFH regulation.

Where you live matters because it determines access to suitable, affordable housing, high-performing schools, clean air, green space, employment, transportation, health care and other community assets that affect life outcomes. It is for this simple, basic truth that the AFFH mandate is essential to ensuring an equitable society in which people have real choices about where to live and all communities can provide their residents with access to the resources, amenities, and opportunities they need to thrive. However, the absence of a coherent or meaningful AFFH implementation and enforcement regime since the passage of the Act has allowed for deeper patterns of segregation, increased racially or ethnically concentrated poverty, disparate health outcomes for people of color, and the continued separation of people with disabilities – all with the continuing support of HUD funding through federal housing and community development programs.¹ These disparities have been both revealed and amplified by the current COVID-19 pandemic, underscoring the urgency with which HUD must act to reinstate a meaningful AFFH framework.

Our comments below provide our analysis of the proposed Interim Final Rule, our recommendations for ways to improve it, and our initial suggestions about issues HUD should consider as it moves on to full restoration of a regulatory framework to implement the AFFH provisions of the Fair Housing Act. Our main points include the following:

¹ See, e.g., Nikole Hannah Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, Pro Publica (2015), www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law#gao.

- HUD’s repeal of the 2020 Preserving Community and Neighborhood Choice Rule is appropriate because that rule lacked a legal foundation (both substantively and procedurally), and because in the absence of an effective AFFH rule, HUD and its recipients will predictably fail to fulfill their AFFH obligations.
- We support HUD’s restoration of the AFFH definitions, and underscore that the Fair Housing Act’s Congressional record, decades of federal court holdings, and an accumulating body of social science evidence undergird the principle that remedying residential racial segregation is central to the Act’s purpose, and that measures to expand geographic choice, bring resources to disinvested neighborhoods, and promote housing stability and quality are all needed.
- With regard to the “regulatory purpose” of the AFFH rule, HUD should place greater emphasis on the need for grantees to take meaningful actions to further fair housing as well as to engage in analysis, and more explicitly set forth the expectation that they will do so. HUD should also restore its 2015 language pointing to the strategies that may be needed to AFFH (including expanding geographic options, preservation, infrastructure investments, and others).
- We also support the measure of restoring the AFFH certification requirements, but point to a key omission HUD should correct– that all grantees must also certify that they will not take actions “materially inconsistent” with their AFFH obligation. We also emphasize that HUD should require that grantees certify that they have in place a current, publicly-available plan for specific meaningful action steps (based on analysis and public input) to further fair housing.
- Extensive experience and documentation has shown that HUD’s grantees are unlikely to fulfill their substantive AFFH obligations without a consistent and mandatory planning and oversight process. We urge HUD to restore such a process.
- HUD should expeditiously restore a planning and oversight mechanism that retains the strengths of the 2015 rule and uses the lessons of implementation to improve upon the process. It should include, for example, a complaint process, a standard of review that provides more momentum for results, streamlined data analysis, a better-tailored assessment of policies and practices, and robust public input. Public housing authorities play a critical role in advancing or impeding fair housing for the residents they serve and communities at large, and any new process must effectively promote PHA reforms. HUD should also examine how to better advance regional coordination and coordination among PHAs and other entities.

Recommendations

1) HUD appropriately concluded that it could repeal the 2020 Preserving Community and Neighborhood Choice Rule through an Interim Final Rule

On August 7, 2020, HUD, under its prior leadership, published the Preserving Community and Neighborhood Choice rule (“2020 PCNC Rule”) as a Final Rule despite not having provided notice to the public and solicited comment before doing so.² The 2020 PCNC Rule had effectively no substantive overlap with the January 2020 proposed Affirmatively Furthering Fair Housing rule regarding which it

² Preserving Neighborhood and Community Choice, 85 Fed. Reg. 47,899 (Aug. 7. 2020).

did seek comment.³ To justify its decision to forgo notice and comment, HUD claimed that it was entitled to a statutory exemption from notice and comment, because the subject of the rulemaking related to grants.⁴ The 2020 PCNC Rule acknowledged that HUD had adopted a regulation foreswearing the exemption but went on to conclude that the Department could still decline to go through the notice and comment process because of a HUD regulation giving the Secretary the authority to waive any other regulation for “good cause.”⁵ HUD went on to elaborate on the reasons why it was the Department’s view that good cause existed, but its explanation was unconvincing.

The heart of HUD’s argument for the existence of good cause was that there had already been several opportunities for members of the public to provide HUD with their views regarding AFFH. However, because the content of the 2020 PCNC Rule was so different from the January 2020 proposed rule and from the 2015 AFFH Rule, none of the comments that HUD had received through prior rounds of notice and comment addressed the content and conceptual framework of the 2020 PCNC Rule. Thus, the mere fact that HUD had previously received extensive comments related to AFFH does not in any way establish that the public had an opportunity to opine on the specific subject matter of the 2020 PCNC Rule. If the public would have had that opportunity, commenters would have raised a number of irrefutable critiques of the 2020 PCNC Rule, highlighting its inconsistency with decades of case law interpreting the AFFH provision of the Act⁶ as well as with nonpartisan, expert recommendations on how to improve HUD’s oversight of its grantees’ efforts to comply with the AFFH duty.⁷

Further cutting against HUD’s attempt to invoke the grants exemption is the fact the changes in the 2020 PCNC Rule were substantive rather than procedural. Cases where reliance on the exemption withstood Administrative Procedure Act scrutiny have tended to involve agency actions that effectuated minor procedural changes.⁸ Lastly, courts have been least likely to uphold use of the grants exemption “where the agency action trenches on substantial private rights and interest.”⁹

The substance of the unlawfully promulgated 2020 PCNC Rule created an urgent need for corrective agency action. As discussed above, HUD’s 2015 AFFH Rule and the Interim Final Rule share a definition of AFFH that is deeply rooted in the text and history of the Act, as well as the case law, and that benefited previously from extensive public input. By contrast, the 2020 PCNC Rule discards all of that critical source material. Rather than asking grantees to take meaningful actions and achieve measurable results,¹⁰ HUD stated that “any action” would suffice.¹¹ In place of a focus on reducing segregation, one of the central purposes of the Act, HUD redefined fair housing to include a litany of factors – affordability,

³ Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2,041 (Jan. 14, 2020).

⁴ 85 Fed. Reg. at 47,904 (*citing* 5 U.S.C. § 553(a)(2)).

⁵ *Id.* (*citing* 24 C.F.R. § 5.110).

⁶ *See, e.g., NAACP, Boston Chapter v. Sec. of Hous. & Urb. Dev.*, 817 F.2d 149 (1st Cir. 1987); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973); *Shannon v. U.S. Dep’t of Hous. & Urb. Dev.*, 436 F.2d 809 (3d Cir. 1970); *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

⁷ GOVERNMENT ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS (Sep. 2010) (hereinafter GAO Report).

⁸ *See, e.g., Flagstaff Medical Center, Inc. v. Sullivan*, 962 F.2d at 886. (“The reach of the new regulation is narrow and does not substantively alter the strict compliance regime embodied in the 1979 regulations. HHS has simply changed an enforcement practice of disallowing credit solely for violations of the two-day rule.”); *National Wildlife Federation v. Snow*, 561 F.2d 227 (1976) (“The regulations at issue are in form procedural ones governing the timing and number of public hearings to be held before building a federal-aid highway.”).

⁹ *Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980).

¹⁰ *NAACP, Boston Chapter*, 817 F.2d at 156 (“If HUD is doing so in any meaningful way, one would expect to see, over time, if not in any individual case, HUD activity that tends to increase, or at least, that does not significantly diminish, the supply of open housing.”).

¹¹ 24 C.F.R. § 5.150(b) (2020).

safety, and decent conditions¹² – that, while important in their own respects, are not directly related to fair housing or to any protected characteristic under the Act.

By promulgating this rule, which lacked both substantive and procedural legal foundation, prior HUD leadership placed its grantees across the country at risk of liability, and knowingly allowed for the ongoing failure of those grantees to meet their statutory obligation. (Some courts have held that the AFFH duty is directly enforceable against HUD grantees,¹³ and liability may also follow from the failure to identify and proactively respond to ongoing discrimination or segregation.¹⁴) With this Interim Final Rule, HUD is right to reduce the risk that disputes about whether its grantees have complied with the duty to AFFH will end up in court, and to take an important initial measure to effectuate its own AFFH compliance through its oversight responsibilities.

2) HUD’s restoration of definitions is a positive and necessary step

HUD’s restoration of the 2015 rule definitions is a welcome step that puts back in place an authoritative statutory interpretation consistent with caselaw and legislative intent. This will aid statutory compliance for program participants, housing authorities, and on behalf of impacted individuals and communities (including organizations that assist in promoting racial justice, such as fair housing groups).

HUD’s 2015 definition of what it means to “affirmatively further fair housing,” put back in effect by the June 2021 rule, is firmly grounded in decades of federal court decisions that have lent content to the purposes of the Fair Housing Act. It draws, too, from the Congressional record on the contributions of federal and local government policies to racial segregation and lack of housing choice, the related harms of concentrated poverty and unequal opportunity, and the need for powerful legislative action to remedy these problems. An evolving and ever-growing body of social science, as well, supports this definition.

As the 2015 and 2021 rules provide:

Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially 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.

As a composite, this definition formalizes the central aims of the Fair Housing Act, as well developed by the courts, and also gives direction to program participants and public housing authorities (PHAs) (and the communities they serve) as to the substantive requirements of the statute – especially the requirement

¹² 24 C.F.R. § 5.150(a) (2020).

¹³ See, e.g., *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 52–53 (D. Mass. 2002) (“Moreover, two of the three claims involve statutory provisions concerned with discrimination—redressing illegal discrimination on the one hand, affirmatively furthering fair housing on the other. They are precisely the kinds of rights with which § 1983, passed immediately after the Civil War, was uniquely concerned. They are phrased in mandatory not precatory terms. And antidiscrimination provisions are hardly beyond the competence of courts to administer. Courts have been the place where such rights have been enforced for decades.”).

¹⁴ 42 U.S.C. § 3604.

for actions that will have a real effect in furthering the Act’s purpose. It sets forth the expectation that program participants and PHAs will actively redress segregation and discrimination, including by taking measures to remedy the persisting harms those problems have caused, exacerbating poverty, housing insecurity, and lack of opportunity for people of color. Each part of the regulatory definition is essential to ensuring that HUD’s grantees take effective steps toward nondiscrimination and integration, including by disrupting the cycle of segregation, disinvestment, and housing insecurity that continues to damage many communities.

AFFH and segregation

In passing the Fair Housing Act, Congress acknowledged the extent and harms of racial segregation, as well as the federal government’s role in creating it. The remedying of segregation has thus always been at the core of the AFFH mandate. See, e.g., *Linmark Assocs., Inc. v. Willingboro Twp.* (characterizing Title VIII as “a strong national commitment to promote integrated housing”);¹⁵ 114 Cong. Rec. 2274 at 2985 (statement of Sen. Proxmire) (Act will establish “a policy of dispersal through open housing ...and the construction of low and moderate income housing in the suburbs”); *Trafficante v. Metro. Life Ins. Co.* (citing Sen. Mondale’s statement that the Act was intended to replace segregation with “truly integrated and balanced living patterns,” 114 Cong. Rec. 2274);¹⁶ *Alschuler v. Dep’t of Hous. & Urban Dev.* (“AFFH requires HUD to “consider the effect [of a HUD grant] on the racial and socio-economic composition of the surrounding area,” that is, its effect on integration);¹⁷ *Clients’ Council v. Pierce*, (“Congress imposed on HUD a substantive obligation to promote racial and economic integration in administering the section 8 program.”).¹⁸ The policies of *de jure* segregation, constraining households of color to particular areas by the explicit and formal mechanisms of law, were followed and reinforced by other government policies that actively supported and reinforced segregation. These included, for example, segregated public housing, discriminatory urban renewal policies, and racial redlining.¹⁹

Today, American communities remain deeply segregated.²⁰ Segregation also continues to shape our subsidized housing policy, leaving many subsidized households in areas of deeply concentrated poverty and without the ability to exercise broader choice (despite HUD making progress in past decades by issuing programmatic standards on AFFH, there is still wide discretion in PHA policy-setting, and ongoing problems with program design).²¹ Because of generations of discrimination, continuing into the present day, segregation is closely linked to the issues of disinvestment, unequal opportunity in education, employment, health, and other respects, and economic vulnerability (and thus housing cost burden and exposure to poor housing conditions). This is to say, it is a complex problem that must be addressed from

¹⁵ 431 U.S. 85, 95 (1977).

¹⁶ 409 U.S. 205, 211 (1972).

¹⁷ 686 F.2d 472, 482 (7th Cir. 1982).

¹⁸ 711 F.2d 1406, 1425 (8th Cir. 1983).

¹⁹ See Richard Rothstein, *The Color of Law* (2017).

²⁰ See, e.g., U. Cal. Berkeley, *Roots of Structural Racism Project* (2021).

²¹ See, e.g., Ingrid Ellen and Keren Horn, *Housing and Educational Opportunity: Characteristics of Local Schools Near Families with Federal Housing Assistance* (PRRAC 2018); <https://www.prrac.org/pdf/HousingLocationSchools2018.pdf>; A. Mazzara and B. Knudsen, “Where Families with Children Use Housing Vouchers: A Comparative Look at the 50 Largest Metropolitan Areas” (Center on Budget & Policy Priorities and the Poverty & Race Research Action Council); Is the HOME Program Affirmatively Furthering Fair Housing? (PRRAC, Ebony Gayles & Silva Mathema, September 2014), <https://prrac.org/is-the-home-program-affirmatively-furthering-fair-housing/>; Creating Balance in the Location of LIHTC Developments: The Role of State Allocation Plans (PRRAC, Jill Khadduri, 2013), https://prrac.org/pdf/Balance_in_the_Locations_of_LIHTC_Developments.pdf.

multiple angles. This includes the provision of greater geographic housing choice (not only by removal of market barriers such as zoning but by intentional policies that promote mixed-income integration); strategies that promote housing stability, affordability, and quality; and strategies that invest in places that have lacked resources due to discrimination.

Access to opportunity, housing choice, and place-based investments

HUD's interpretation of AFFH recognizes that access to opportunity is an essential element of fair housing. The federal government played a key role in creating and perpetuating residential segregation that has helped lead to persistent racial and economic disparities in opportunity. Today, where one lives has an enormous impact on life outcomes as it affects access to a variety of resources and services.²² Fair housing issues therefore are inextricably linked to quality education, transportation, environmental health, and other dimensions of opportunity.

The role of housing as a platform for access to opportunity in other areas has been widely acknowledged by courts in landmark fair housing cases, from *Gautreaux v. Chicago Housing Auth.* (1974) to *Walker v. HUD* (1989) to *Thompson v. HUD* (1995) and to *Texas Department of Housing and Community Affairs v. ICP* (2015).²³ Additionally, increasingly compelling social science research over the past several decades has documented the harms faced by low income families, particularly children, who grow up in high poverty, segregated neighborhoods.²⁴ These include health impacts such as heightened risk of severe asthma, increased exposure to lead and airborne toxic chemicals, increased exposure to neighborhood violence, fears for personal safety, and other triggers of toxic stress. Children in high poverty neighborhoods are more likely to attend an under-resourced and under-performing school that also has a disproportionate concentration of low-income children, which further hampers learning.²⁵ Economic segregation is also related to income and wealth inequality, and constraints on upward social mobility. The cumulative effects of exposure to high poverty environments are intergenerational, passing on inherited disadvantage from parent to child.²⁶

This link between equitable opportunity and segregation is related to both housing choice (including access to areas currently rich in opportunity) and the need to make targeted investments where

²² See Stefanie DeLuca & Peter Rosenblatt, *Walking Away From the Wire: Housing Mobility and Neighborhood Opportunity in Baltimore*, 27 HOUSING POL'Y DEBATE 519-546 (2017).

²³ *Gautreaux v. Chicago Housing Auth.*, 503 F.2d 930 (7th Cir. 1974); *Walker v. HUD*, 734 F. Supp. 1231 (N.D. Tex. 1989); *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005); *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015).

²⁴ For reviews of these studies, see Durlauf, Steven N. 2004. "Neighborhood Effects." *Handbook of Regional and Urban Economics* 4:2173–2242; Ellen, Ingrid Gould and Margery Austin Turner. 1997. "Does Neighborhood Matter? Assessing Recent Evidence." *Housing Policy Debate* 8(4):833–66; Leventhal, Tama and Jeanne Brooks-Gunn. 2000. "The Neighborhoods They Live in: The Effects of Neighborhood Residence on Child and Adolescent Outcomes." *Psychological Bulletin* 126:309–37; New York: Russell Sage Foundation; Sampson, Robert J., Jeffrey D. Morenoff, and Thomas Gannon Rowley. 2002. "Assessing 'Neighborhood Effects': Social Processes and New Directions in Research." *Annual Review of Sociology* 28:443–78; Sharkey, Patrick and Jacob W. Faber. 2014. "Where, When, Why, and for Whom Do Residential Contexts Matter? Moving Away from the Dichotomous Understanding of Neighborhood Effects." *Annual Review of Sociology* 40:559–79; Hahn, Robert A., "Racial and Ethnic Residential Segregation as a Root Social Determinant of Public Health and Health Inequity: A Persistent Public Health Challenge in the United States," *Poverty & Race* (April-June 2017), available at <http://www.prrac.org/newsletters/aprmayjun2017.pdf>.

²⁵ *Coordinating Housing and Education Policy to Promote Integration*, edited by P. Tegeler. Washington, DC: Poverty & Race Research Action Council (2011).

²⁶ Sharkey, Patrick and Felix Elwert. 2011. "The Legacy of Disadvantage: Multigenerational Neighborhood Effects on Cognitive Ability" *American Journal of Sociology* 116(6):1934-1981; Sharkey, Patrick, *Stuck in Place* (2013).

discrimination has yielded a lack of resources. The restored definition's approach recognizes both of these important approaches and their necessity to furthering the Act's aims. That is, it encompasses both targeted place-based investments in high poverty, segregated neighborhoods as well as enhanced mobility that effectively helps more low-income families move to existing areas of high opportunity. Both of these fair housing strategies are vital to help expand meaningful housing choice and to improve and equalize housing and neighborhood conditions.

Notably, the planning framework in the 2015 rule helped HUD grantees better understand and address these connections. In a number of locations, that process helped produce concrete goals and strategies for community revitalization in high-poverty neighborhoods and for promoting greater housing mobility.²⁷ It will be essential that HUD's future rulemaking provide a strong and effective planning framework that will require grantees to understand and respond to disparities in opportunity, and develop multi-pronged strategies to ensure improved access to opportunity for all families.

AFFH and housing needs: cost and conditions

Discrimination and segregation are also closely related to disparities in housing needs, as recognized by the restored definition. That is, housing cost burden and conditions arise from the disinvestment and economic vulnerability disproportionately found in communities of color. As noted above, government practices such as redlining impeded wealth building for these communities, and other aspects of discrimination (such as location of employment opportunities) have contributed to this as well. The subprime lending boom and predatory lending practices in the 1990s and 2000s followed those historic patterns of segregation to target communities of color with more expensive and riskier home loan products, with the foreclosure crisis led to massive loss of wealth for African American and Latino families who lost their homes, as well as ongoing segregation and costs for municipalities.²⁸ Today, racial segregation continues to depress property values and contribute to the racial wealth gap.²⁹ Renters, disproportionately people of color, face housing instability and cost burden due to the combination of rising housing costs (and a lack of sufficient supply) and economic vulnerability. Rent-burdened households are disproportionately those of people of color, with a reported 55% of Black families paying over 30% of their monthly income in 2018 (in comparison to 43% of white households.³⁰ As the National Low Income Housing Coalition has documented, for every 100 very low income households, there are only 37 available homes; 20% of Black households are very low income.³¹ Strategies to promote housing security (including preservation, especially in areas where there is risk of displacement) and improve conditions are an important component of the AFFH mandate, and appropriately included in the restored definition.

²⁷ See Justin Steil and Nickolas Kelly, "Snatching Defeat from the Jaws of Victory: HUD Suspends AFFH Rule that was Delivering Meaningful Civil Rights Progress," PRRAC 2017, available at <https://prrac.org/snatching-defeat-from-the-jaws-of-victory-hud-suspends-affh-rule-that-was-delivering-meaningful-civil-rights-progress/>

²⁸ See, e.g., Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc., and Brief of Amicus Curiae Lawyers' Committee for Civil Rights under Law and National Fair Housing Alliance, et al., *Wells Fargo and Bank of America v. City of Miami*, 137 S.Ct. 1296 (2017).

²⁹ George Lipsitz and Melvin Oliver, "Integration, Segregation, and the Racial Wealth Gap," in *The Integration Debate: Competing Futures for America's Cities* (C. Hartman and G. Squires, Eds) (Routledge, 2010).

³⁰ See Center on Budget and Policy Priorities, *More Housing Vouchers: Most Important Step to Help More People Afford Stable Homes* (April 2021), www.cbpp.org/research/housing/more-housing-vouchers-most-important-step-to-help-more-people-afford-stable-0; [America's Rental Housing 2020 \(Harvard Joint Center\)](#) at 31.

³¹ *The Gap: The Affordable Housing Gap Analysis 2021*, National Low Income Housing Coalition, p. 6, https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2021.pdf.

3) Regulatory purpose: emphasize actions and clarify consistency with the full “AFFH” definition

While we commend HUD for restoring the 2015 definition and its recognition of the need for multiple strategies to advance the purposes of the Fair Housing Act, we believe additional clarity is needed in the statement of the “regulatory purpose” to align with the definition and the important content of the 2015 rule. We hope that HUD will modify the language of “regulatory purpose” accordingly in the 2021 interim final rule.

The 2021 interim final rule’s “regulatory purpose” is as follows:

§ 5.150 Affirmatively Furthering Fair Housing: Purpose. Pursuant to the affirmatively furthering fair housing mandate in section 808(e)(5) of the Fair Housing Act, and in subsequent legislative enactments, the purpose of the Affirmatively Furthering Fair Housing (AFFH) regulations is to provide program participants with a substantive definition of the AFFH requirement, as well as to provide access to an effective planning approach to aid those program participants that wish to avail themselves of it in taking meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination.

The “purpose” should make clearer that the rulemaking places significant emphasis on “meaningful actions” from HUD’s recipients. The “purpose” should set forth the expectation that the restoration of the substantive definition and the certification requirements will go hand and hand with HUD’s re-invigorated fair housing compliance activities and the potential for engagement by fair housing groups, and it should squarely state that “meaningful actions” to advance fair housing are required.

In addition, as we detailed above, each component part of the AFFH definition reflects a critical aspect of the relation between housing discrimination, the continuing drivers of segregation, and particular harms including disinvestment, lack of access to opportunity, and disproportionate housing needs. We recommend that the “purpose” include fuller language that includes both strategies to promote housing choice and integration and also strategies to promote place-based investments and housing security. The purpose should, for example, incorporate the “definition’s” fuller language, regarding “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.”

We also recommend that HUD restore the following language from the 2015 rule’s “purpose,” at the former § 5.150:

“A program participant’s strategies and actions must affirmatively further fair housing and may include various activities, such as developing affordable housing, and removing barriers to the development of such housing, in areas of high opportunity; strategically enhancing access to opportunity, including through: Targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation.”

This language is needed to emphasize both the need for action steps and that such actions should encompass a range of important strategies.

4) Restoration of certification requirements: correct “materially inconsistent” omission and include clear parameters, including an action plan

Program participants’ and housing authorities’ fair housing certifications are an important compliance mechanism, and we appreciate HUD’s restoration of certification requirements that correspond appropriately with the Fair Housing Act’s statutory AFFH requirement.

However, HUD should correct its omission of the requirement that program participants (other than housing authorities) certify that they “will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.” This was previously codified for states at §91.325, local governments at §91.225, and HOME consortia at §91.425, as well as for housing authorities as in the Interim Rule. HUD grantees, in addition to affirmatively taking steps to advance fair housing, must not take actions that have the opposite effect. HUD must make clear that all program participants are required to ensure that they are complying with the AFFH obligation not only by taking steps to AFFH, but also by safeguarding against steps that would impair the AFFH aims, as by, for example, perpetuating segregation through other policies or practices. The inclusion of this provision will be critical to HUD’s ability to effectively provide oversight, as well as for fair housing groups or others who seek to challenge the validity of the certification when they have identified policies counter to fair housing within the jurisdiction.

Further, while we acknowledge HUD’s careful return to observing the rule of law and the Administrative Procedure Act in its process for reinstating the AFFH obligation, fair housing and civil rights groups also know from long experience (and extensive evidence) that bare certifications result in little action. We underscore the importance of the return to a standardized planning and review process, as discussed below, to support the certification. In the immediate term, however, HUD should at a minimum adjust the certification provision to not only make clear that program participants must AFFH, but to set forth basic parameters for how this will be assessed – conveying to its grantees within the corners of the certification requirement itself that their AFFH actions must be adequately meaningful and supportable.

While we understand that HUD has chosen not to reinstate the Assessment of Fair Housing (AFH) process, and thereby the references to the AFH in the previous certification provisions, HUD should still require (as supported by its previous documented reasoning, past notice and comment, and federal court holdings) that the certifications reflect that the recipient has committed to identifiable meaningful actions, that these are supported by demographic and regional data and by public input (including that of fair housing groups), and that the recipient have a plan in place for its actions. We discuss the need for a robust planning process at greater length below.

5) HUD should require grantees to conduct fair housing planning

Throughout the preamble to this interim final rule, HUD emphasizes the necessity for its grantees to assess in some systematic fashion the relevant local conditions that form the context in which their efforts to affirmatively further fair housing must be made and serve as the benchmark against which to determine whether their actions have been meaningful enough to create measurable change. These include the degree of racial and other segregation and integration, undue housing burdens, racially and ethnically concentrated areas of poverty, access to opportunity, and the like. HUD cites the legislative history of the Fair Housing Act, including remarks by co-sponsor Senator Walter F. Mondale, about what the Act was intended to achieve.³² It cites court cases ranging from the 1970 *Shannon v. HUD*³³ decision, which held

³² 86 Fed. Reg. 30781 (June 10, 2021).

³³ *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970).

that, “HUD is obligated to “utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties” under the Fair Housing Act,”³⁴ to the 2018 case, *National Fair Housing Alliance v. Carson*.³⁵ That case challenged HUD’s withdrawal of the Assessment Tool that was the structure through which its grantees conducted their fair housing analyses and planning under the 2015 AFFH regulation, which the withdrawal of the tool effectively suspended.

In ruling for HUD and finding that plaintiffs lacked standing to challenge the rule’s effective suspension, the court relied on the fact that (in its interpretation) several significant AFFH measures remained in place, including three key factors. First, although the Assessment Tool had been withdrawn, the 2015 rule’s definition of AFFH remained in place. Second, the requirement that grantees certify compliance with that definition also remained in place. Third, and particularly relevant here, the requirement to conduct fair housing planning – in the form of the Analysis of Impediments (AI) that was required under the pre-2015 rule – also remained in effect. The court was persuaded that this combination of factors – a definition of AFFH that was faithful to the legislative, judicial and agency history, a requirement for grantees to certify compliance with that definition of AFFH, and a requirement that grantees conduct fair housing planning that would serve as the basis for evaluating that compliance – was sufficient to enable HUD to ensure that its grantees were, in fact, complying with their statutory obligation to AFFH. By ensuring their compliance, HUD thereby takes an important and necessary step toward fulfilling its own AFFH obligation with regard to oversight of its grantees.

Without that third prong, the requirement for grantees to conduct some form of fair housing planning, HUD cannot ensure that its grantees are affirmatively furthering fair housing. If it cannot do that, it cannot ensure its own compliance with that statutory obligation.³⁶

HUD notes that it has taken different approaches to fair housing planning at different times. It fails to acknowledge, however, the history of past approaches failing to advance fair housing prior to the mandatory requirements put in place in 2015. Under the 1995 AFFH rule, grantees were required to conduct an AI³⁷ (though as noted below, this approach was drastically insufficient, because it was unstandardized, precatory, and lacked a review process).³⁸ Under the 2015 rule, they were required to conduct an AFH. The interim final rule does not dictate what approach grantees should use now. However, in declining to adopt any specific requirement for fair housing planning, HUD is effectively declining to require fair housing planning at all. Indeed, HUD says so explicitly, “HUD anticipates that many program participants *may wish to engage in voluntary* fair housing planning.”³⁹ (emphasis added.) The message this sends to the cities, counties, states and other entities that are the recipients of the billions of federal dollars that HUD distributes annually is that adherence to their statutory obligation to AFFH is not a priority, and that HUD will not discharge its own obligation to ensure that its grantees are in compliance.

³⁴ *Id.* at 821.

³⁵ *National Fair Housing Alliance v. Carson*, 330 F. Supp. 3d 14 (D.D.C. 2018).

³⁶ See, e.g., *Shannon v. HUD*; *Anderson v. City of Alpharetta, Ga.*, 737 F.2d 1530, 1537 (11th Cir. 1984) (citing *Client’s Council v. Pierce*, 711 F.2d 1406, 1422-23); *Gautreaux v. Romney*, 448 F.2d 731, 739 (7th Cir. 1971).

³⁷ Previously codified at 24 C.F.R. Part 570.

³⁸ See, e.g., The Opportunity Agenda, Reforming HUD’s AFFH Regulations (2010), <https://opportunityagenda.org/sites/default/files/2017-03/2010.03ReformingHUDRegulations.pdf>; see also Nikole Hannah Jones, *Living Apart*, *supra* note 1.

³⁹ 86 Fed. Reg. 30788 (June 10, 2021).

HUD goes on to say that, whether or not grantees conduct fair housing planning, they must maintain some form of documentation to support their certifications that they are affirmatively furthering fair housing. It does not say what that documentation must comprise. It does, however, telegraph once more that it will not be checking to see whether such documentation exists or whether it is sufficient to support grantees' AFFH certifications. It states, "HUD *may review* recipients' records and documents to confirm the validity of certifications submitted to HUD in connection with the receipt of Federal funds. *HUD only intends to undertake such a review when it has reason to believe the certifications submitted are not supported by the recipients' actions. HUD expects these instances to be rare* and will provide all required notice to recipients of any review to be undertaken."⁴⁰ (emphasis added) This reinforces the message that HUD is not making AFFH a priority and grantees may similarly evade their obligations, likely without suffering any consequence.

History demonstrates that the kind of voluntary, unstructured system for fair housing planning that HUD is instituting under this interim final rule will not suffice. The system that was in place before the 2015 rule did not specify the timing, content or structure for fair housing plans, and did not provide for a system of HUD review. In a 2010 report on HUD's fair housing oversight⁴¹, the Government Accountability Office noted that HUD's AFFH implementation lacked a consistent framework and standards for fair housing planning by its grantees, a regular schedule on which such planning was to be conducted, and review by HUD of its grantees' fair housing plans to ascertain their adequacy. The result, GAO found, was 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, many AIs were out of date, incomplete or even missing altogether. The 2015 rule responded to these and other flaws identified by GAO, and to the expressed desire of grantees to have better guidance on fair housing planning from HUD.

Since the 2015 rule was suspended, grantees have once again operated without clear guidance from HUD about what they must do to AFFH. This lack of clarity has given rise to some of the same problems that GAO identified more than a decade ago.

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 2005 - was 16 years old. HUD has stated its intention of promulgating a new AFFH regulation. Presumably, that regulation will include some type of fair housing planning requirement. However, given the timeline for rulemaking and the subsequent phase in period for a new regulation, 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 a scenario will call into question not only the AFFH compliance of HUD's grantees, but that of HUD itself. This approach is inconsistent with HUD's statutory obligations and unacceptable as a means to advance the Fair Housing Act's AFFH mandate.

To address this gap in the immediate term, we recommend that HUD include in this final rule a requirement for grantees to conduct up to date fair housing planning. In addition, HUD should issue guidance to grantees about best practices in fair housing planning, based upon the core principles laid out in the planning process established by the 2015 rule. These include strategic data analysis and analysis of policies/practices, focused on the key elements of the AFFH definition, robust community engagement,

⁴⁰ *Id.* at 30788, 30789.

⁴¹ See GAO Report (2010), *supra* note 7.

establishment of meaningful goals for addressing those barriers to fair housing that are of highest priority, identification of effective strategies to achieve those goals, and incorporation of those strategies into the grantee’s Consolidated Plan or PHA plan. (Guidance is important to aid recipients, but precatory guidance is not a replacement for clear obligations.)

In addition, HUD should move quickly to fulfill the commitment it has outlined in this interim final rule to providing relevant, timely training and technical assistance to its grantees on matters related to AFFH and fair housing planning, and to review and provide feedback on its grantees’ draft fair housing plans. Only by instituting such measures can HUD ensure that it and its grantees are fulfilling their statutory obligation to affirmatively further fair housing.

While these immediate steps are critically needed, we also emphasize that they will not replace the need for HUD to expeditiously issue a complete final rule that restores a full fair housing planning process (one that is standardized and mandatory) and review framework.

6) HUD should move quickly to restore a thorough process for planning and accountability

As reflected in the restored definition of AFFH, the focus of our collective efforts going forward must be on “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.”⁴² This framing rightly emphasizes action and results, not analysis for the sake of analysis. Thus, in designing a new planning process and publishing a Notice of Proposed Rulemaking in the coming months, HUD’s focus must be on ensuring that planning and analysis translate into concrete actions that drive measurable change. Although the 2015 AFFH Rule dramatically increased meaningful compliance with the AFFH obligation,⁴³ some AFHs produced under the rule were heavier on data analysis and narrative data discussion than they were on solutions to entrenched inequities. Policy analysis was at times spread thin over a lengthy list of contributing factors, without placing sufficient emphasis on the policies or practices that are common significant barriers to fair housing. In order to address that disbalance, HUD should follow the recommendations below, as well as consulting further with fair housing groups, civil rights groups, public housing resident advocacy groups (including but not limited to advisory boards), and others with expertise on these issues.

Consistent with the need to emphasize outcomes and actions, HUD’s reviews should have a strong focus on the adequacy of the actions to which grantees commit (and in later cycles, how well grantees have followed through). HUD should make clear at the outset in the regulatory language, content of technical assistance, and guidance (including any successor framework to the AFH) that the main focal point of compliance will be whether the grantee is taking sufficient actions to redress significant barriers to fair housing. This is a more important element of review than whether a grantee has crossed every single “i” and dotted every “t” in its data discussion and analysis. Acknowledging in the review process that the end result of meaningful action is of paramount importance would not undermine the data discussion and analysis components of fair housing planning. Instead, it would imbue them with greater meaning, making clear to grantees and stakeholders that fair housing planning is not just a paper exercise. Where HUD reviews fair housing plans (whether it attempts to review all plans or rely on a system of audit- and complaint-based review), clear standards should govern the review process throughout.

HUD could also significantly improve the fair housing planning process by creating a formal mechanism for stakeholders and members of the public to file complaints regarding grantees’ AFFH compliance,

⁴² Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779, 30,790 (Jun. 10, 2021).

⁴³ See Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29 HOUS. POLICY DEBATE 85 (2019).

including their fair housing plans. Indeed, civil rights groups urged such an approach in their comments regarding HUD's 2013 AFFH proposed rule.⁴⁴ Currently, no such formal system exists. Although HUD has undertaken compliance reviews of grantees' AFFH efforts in response to complaints from advocates at times, advocates who submit complaints have no formal seat at the table in the compliance review process (and therefore no say over how HUD attempts to resolve alleged violations), and the process is entirely discretionary on HUD's part. The Department can always opt not to undertake a compliance review. By creating a formal complaint process, HUD could remedy these weaknesses. Doing so would also result in a significant benefit for HUD. Based on current staffing levels, it would be a significant challenge for HUD to thoroughly review all of its grantees' fair housing plans, particularly under a regime that connects the timing of the fair housing planning process to the Consolidated Plan process.⁴⁵ A complaint process would operate as a fail-safe in case inadequate fair housing plans slip through the cracks of HUD's review.

It will remain important going forward that HUD require a standardized planning process for grantees in order ensure that important policies are not overlooked. However, HUD should better tailor the topics that it directs grantees to analyze to focus on specific policies and practices. It should also require more extensive detail in the areas where a particular type of grantee has direct control and influence and that have been shown to be common significant fair housing issues. For states, for example, that may mean a greater focus on the repeal of laws that preempt local governments from enacting local tenant protections or inclusionary zoning, the fair housing implications of Qualified Allocation Plans for the Low Income Housing Tax Credit (LIHTC) program, issues facing rural areas, and the structures that incentivize excessive municipal incorporation and opportunity hoarding within fragmented metropolitan areas. For municipalities, areas for targeted analysis may include, among others, land use and zoning laws, ensuring equity in the provision of infrastructure and basic public services, tenant protections, and local strategies for increasing available resources for housing and community development needs.

Grantees would have greater capacity to assess important fair housing-related policies and practices and develop and adopt responsive strategies if the data discussion and analysis component of a fair housing planning process were more streamlined. To do that, HUD should develop a tool that describes in narrative form what key data tables and maps really mean for fair housing. It is not an efficient use of a grantee's time (or its resources in paying a consultant) to produce paragraphs that simply describe what percentage of the population of a jurisdiction or region is part of which protected group. If HUD is able to provide a template in which that aspect of the work is already complete, grantees can focus on more genuinely analytical parts of the work.

HUD should also take this opportunity to craft a process that is conducive to regional analysis and works for both counties and cities. Despite complaints about the burden of the AFH process, the cities that went through that process were able to complete their analyses with relative ease and efficiency and without an unduly long end product.⁴⁶ For regional collaborations, however, AFHs could quickly become unwieldy and unreadable. Take, for instance, a regional collaboration between a large county, ten entitlement cities within that county, and five PHAs. In such a case, each map would have to be produced, discussed, and analyzed several times over. In addition to contributing to extreme length, the resulting AFH would be

⁴⁴ See, e.g., Joseph D. Rich et al., RE: COMMENTS ON DOCKET NO. FR-5173-P-01, AFFIRMATIVELY FURTHERING FAIR HOUSING (AFFH) 2-4 (Sep. 17, 2013); Shanna L. Smith, RE: DOCKET NO. FR-5173-P-01, AFFIRMATIVELY FURTHERING FAIR HOUSING 17 (Sep. 17, 2013).

⁴⁵ A majority of Consolidated Plan program participants have 5-year Consolidated Plans that are submitted in years that end in 5 and 0.

⁴⁶ Some prominent examples of lengthy AFHs conducted by cities – including that of Philadelphia – were the result of cities choosing to include more neighborhood-level mapping and analysis than a straightforward use of the Assessment Tool would have dictated. That is not to say that the City of Philadelphia should not have looked so closely at its neighborhoods but rather to correctly identify the causes of the length of its plan.

virtually unreadable for a member of the public due to its redundancy. HUD should seek out ways to nest local and regional analyses that result in plans that simultaneously catch key local micro-level context and do not bury high-level regional themes in an avalanche of data.

With respect to counties, the difficulty lies in the qualitative analysis of the policies that drive segregation and other fair housing issues, rather than data analysis. It is simple enough for a city, with sufficient guidance and instruction, to analyze the fair housing ramifications of its zoning and land use regulations. But a county may have nearly one hundred units of general local government within it. HUD should create a framework that ensures that, for example, a county like St. Louis County, Missouri thoroughly addresses the zoning and land use policies of its 88 municipalities while not expecting St. Louis County to analyze each of those municipalities' zoning and land use policies in the level of detail that it would ask if one of those cities were an entitlement jurisdiction itself. In the AFH process, it was unclear how HUD expected counties to thread that needle.

While streamlining the amount of time spent on data analysis, HUD should establish requirements for robust community engagement that help hold grantees accountable to stakeholders, residents, and members of protected classes, in particular. These requirements should strike an effective balance between reflecting how technology has changed how the world works – making the process accessible to people trying to engage digitally and not holding out publication of a notice in the classified section of a print newspaper as the *sine qua non* of advertising – while also addressing the ramifications of the digital divide. HUD should require grantees to solicit input from stakeholders and the public both *before* they draft their fair housing plans in order to ensure that the drafts reflect community views and *after* the draft is complete in order to provide for revisions based on public comments. This should include not only community meetings, but also direct outreach and engagement with fair housing and other advocacy groups. Far too many advocates have had the experience of only being able to provide input in a planning process after a public sector entity had already made up its mind about the outcome. Lastly, with respect to community engagement, it is absolutely essential that community engagement opportunities be accessible to persons with disabilities, individuals with limited English proficiency, and members of protected classes more broadly. HUD should direct grantees to consider the times of day at which public meetings are held, whether meeting venues are transit-accessible and accessible by people with disabilities, and whether food and child care are available, among other issues.

Importance of application to PHAs, and better tailoring for PHA policies and practices:

As noted above, subsidized housing plays a crucial role in fair housing and in advancing access to opportunity and housing stability for many households; and PHAs are the administrators of critical subsidized housing resources. Given this, PHA policies and practices can have significant impacts on either advancing or impeding fair housing. It will remain critical that PHAs engage in fair housing planning and follow through on fair housing commitments, including changes to their program administration as needed. While the 2015 rule set forth this obligation for PHAs, the accompanying guidance (the local assessment tool and the PHA tool, as well as the AFFH Guidebook) was not as effectively tailored to PHA policies and practices as it could have been, and future requirements should better reflect the ways that PHAs operate and how their policies and practices impact fair housing. HUD should ensure that a future AFFH process looks squarely and comprehensively at PHA policies - breaking this down by policy and program and posing specific questions as to what policies are in place and what steps are being taken. Actual procedures, protocols, and actions should also be assessed (in other words, references to general regulatory requirements in the language of PHA planning documents should not be considered sufficient for purposes of the analysis). HUD should consider how to advance PHA regional coordination, in policy development as well as analysis, and how to advance jurisdictional and state actions that specifically aid subsidized households (for example, through source of income protections

and coordinated redevelopment policies). PHA planning documents (including PHA Plans, ACOPs, MTW Plans, and others) should contain specifics about fair housing steps and be subject to detailed review.

While a new rule is under development, HUD should guide PHAs to begin to identify and rectify any of their policies and practices that may be inconsistent with their obligation to AFFH. Technical assistance materials should be developed for PHAs and to guide localities and states toward plans that meaningfully incorporate PHAs and subsidized housing concerns. The suite of technical assistance materials should also reflect the differences among PHAs in terms of geography, size, number and type of units under their control.

Conclusion

We thank HUD for this opportunity to comment, and for taking the important step of restoring critical components of the 2015 regulation, in keeping with HUD's statutory obligations and those of its grantees. We also look forward to working with the agency to design effective oversight and planning mechanisms, which will be also be needed. Please feel free to reach us via following emails: Debby Goldberg, dgoldberg@nationalfairhousing.org; Megan Haberle, mhaberle@naacpldf.org; Thomas Silverstein, tsilverstein@lawyerscommittee.org; and Peter Kye, pkye@prrac.org.

Sincerely,

Center for Responsible Lending
Disability Rights Advocates
Human Rights Campaign
Lawyers' Committee for Civil Rights Under Law
The Leadership Conference for Civil and Human Rights
NAACP Legal Defense and Educational Fund, Inc. (LDF)
National CAPACD – National Coalition for Asian Pacific American Community Development
National Center for Lesbian Rights
National Community Reinvestment Alliance
National Council of Asian Pacific Americans (NCAPA)
National Fair Housing Alliance
National Low Income Housing Coalition
Poverty & Race Research Action Council (PRRAC)
PolicyLink
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