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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. FR-6250-P-01; Affirmatively Furthering Fair Housing

To Whom It May Concern:

These comments on HUD's proposed Affirmatively Furthering Fair Housing (AFFH) regulation are submitted on behalf of the National Fair Housing Alliance (NFHA).¹ NFHA leads the fair housing movement. It seeks to eliminate housing discrimination and ensure equitable housing opportunities for all people and communities through education and outreach, public policy, advocacy, housing and community development, enforcement, and consulting and compliance programs.

Introduction

Fifty-five years ago this month, Congress enacted the Fair Housing Act following the horrific assassination of Dr. Martin Luther King Jr. President Johnson intended the legislation to be a gift to the King family to honor the civil rights leader's work. According to one of its co-authors, Senator Walter Mondale, the Act's goal was to secure "truly integrated and balanced living patterns" for all Americans.² The Act's other co-author, Senator Ed Brooke declared that without passage of the Fair Housing Act, people would suffer from "the awful impact of blighted neighborhoods, inadequate schools, and lack of job opportunity."³ He went on to state that America's future lied in

¹ The National Fair Housing Alliance (NFHA) leads the fair housing movement. NFHA works to eliminate housing discrimination and ensure equitable housing opportunities for all people and communities through its education and outreach, member services, public policy, advocacy, housing and community development, tech equity, enforcement, and consulting and compliance programs. NFHA is the only national civil rights organization solely dedicated to eliminating all forms of housing and lending discrimination and creating equitable opportunities for all people. NFHA is a consortium of more than 200 private, nonprofit fair housing organizations and state and local civil rights agencies from throughout the United States.

² *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (quoting 114 Cong. Rec. 3422).

³ See Sen. Edward Brooke on Fair Housing Act of 1968 – Congressional Record (1968), Congressional Black Caucus Foundation, <https://avoice.cbcfinc.org/exhibits/fair-housing/attachment/sen-edward-brooke-on-fair-housing-act-of-1968-congressional-record-1968-2/>

the “elimination of compulsory segregation in housing, education, and employment.”⁴ Though important progress has been made, our nation has fallen woefully short of this ambition. NFHA welcomes HUD’s Affirmatively Furthering Fair Housing Proposed Rule (“Proposed Rule”) as an important step toward making this promise real for all who live in this country.

From the very beginning, the Biden-Harris administration has voiced a strong commitment to advancing equity and redressing the harms that are the lasting legacy of our country’s history of racial segregation and discrimination, perpetuated in large part by the federal government. On January 20, 2021, his first day in office, President Biden signed an Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (EO 13985), stating that it is “the policy of my Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.”⁵ Less than a week later, on January 26, 2021, the President issued a memo on “Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies.”⁶ That memo stated that “it is the policy of my Administration that the Federal Government shall work with communities to end housing discrimination, to provide redress to those who have experienced housing discrimination, to eliminate racial bias and other forms of discrimination in all stages of home-buying and renting, to lift barriers that restrict housing and neighborhood choice, to promote diverse and inclusive communities, to ensure sufficient physically accessible housing, and to secure equal access to housing opportunity for all.”⁷ It went on to direct HUD to reexamine the changes made to the AFFH and disparate impact regulations during the previous administration and take the steps necessary to implement HUD’s programs in a manner that affirmatively furthers fair housing and to prevent practices with an unjustified discriminatory effect. More recently, the President has reaffirmed his administration’s commitment to racial equity through Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (EO 14091).⁸

Done well, the Affirmatively Furthering Fair Housing (AFFH) regulation can be a powerful tool to advance equity for people of color and other members of protected classes under the federal Fair Housing Act. By providing HUD’s program participants with the framework, data, guidance and oversight to ensure that their housing and community development programs and activities are carried out in a manner that topples the

⁴ Ibid.

⁵ Exec. Order No. 13985, “Advancing Racial Equity and Support for Underserved Communities,” 86 Fed. Reg. 7009 (Jan. 20, 2021).

⁶ Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies: Memorandum for the Secretary of Housing and Urban Development, 86 Fed. Reg. 7847 (Jan. 26, 2021).

⁷ *Id.* at 7488.

⁸ Exec. Order 14091, “Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” 88 Fed. Reg. 10825 (Feb 16, 2023).

barriers caused by segregation and creates equitable access to crucial community assets and resources, the AFFH regulation can help advance equity in a way that benefits local communities and the nation as a whole. Further, it is a significant step in HUD's efforts to fulfill its own obligations, as stated in the Fair Housing Act and noted in the January 26, 2021, Presidential memorandum, to affirmatively further fair housing.

NFHA's own mission is aligned with the AFFH goal, and NFHA supports the Proposed Rule's partial restoration of and improvements upon the 2015 AFFH rule. Nonetheless, the Proposed Rule needs revision to fulfill the statutory mandate that "[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes."⁹

Overarching Concerns

NFHA has three overarching concerns about the Proposed Rule: its failure to address the full scope of HUD's AFFH obligation under the Fair Housing Act, its failure to distinguish effectively and consistently between fair housing and affordable housing and the need for the rule to compel program participants to identify and eliminate technological bias from their systems and programs. These are discussed in more detail below.

Scope of the AFFH Obligation

The Proposed Rule covers only a portion of HUD's programs and activities related to housing and urban development, but the statutory AFFH mandate covers them all. For HUD to fulfill its AFFH obligations comprehensively, it should assess the full scope of those obligations, and then adopt a policy addressing the steps it will take and the policies it will implement to ensure that it administers all of its programs, policies and activities—both those that are covered by this regulation and those that are not—in a manner affirmatively to further fair housing.

For example, with multiple complaints filed over the years against program participants, HUD has an obligation under the AFFH principle to embed fair housing principles in its grant programs including the CDBG and CDBG-Disaster Recovery programs. Just as it is unacceptable for a local jurisdiction to simply analyze how it will operate its programs for affordable housing, without considering race, national origin, or other protected classes, HUD may not operate its programs without imbedding fair housing principles in those programs. Serving people of low- and moderate-income is not a proxy for race or

⁹ 42 U.S.C. 3608(e).

national origin discrimination. HUD has not been fully successful in doing this in any of its programs.

We call for HUD to make a robust and clear commitment to affirmatively further fair housing in its own programs and activities, including taking actions itself to support victims of discrimination in their claims against program participants by conditioning or suspending funding to the program participants. HUD should also include in its programs requirements the collection and analysis of data suitable for determining whether proposals for use of HUD funding will affirmatively further fair housing, whether use of project-based Section 8 funds are protecting or harming tenants of color, whether public housing actions in demolishing or failing to maintain housing operate in a discriminatory way, whether the siting of public housing increases the concentration of poverty and segregation or truly expands open housing opportunities for underserved groups, and whether Federal Housing Administration lending policies and practices prevent lending redlining and discrimination in the making of residential loans or affirmatively support economic development in communities of color and increased lending opportunities for communities of color.

In the Preamble to the Proposed Rule, HUD's analysis of the legal authority framing its interpretation could benefit from an explicit recognition that HUD's obligation to affirmatively further fair housing as implemented in this rule includes both compliance with the Act's anti-discrimination provisions and the obligation to take affirmative steps with respect to programs and activities relating to housing and urban development. In *N.A.A.C.P. v. Sec'y of Hous. & Urb. Dev.*, the U.S. Court of Appeals for the First Circuit held that HUD's obligation to AFFH requires that "HUD do more than simply not discriminate itself"; rather, HUD must "use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."¹⁰ This mandate goes beyond a narrow focus on HUD programs and includes using the capacities of HUD-funded activities to change the landscape of all forms of housing, market rate and affordable, to reduce all forms of exclusion and disparities in opportunity.

This understanding of the broad scope of the obligation is affirmed in Executive Order 12892,¹¹ signed by President William J. Clinton, focusing on use of the power of federal financial regulatory agencies to assure that all programs and activities, including regulatory authority over financial institutions, affirmatively further fair housing. Similarly, application of a variety of actions by HUD-funded and supported entities impact market rate housing, whether through the exercise of planning and zoning authority, through requiring that all multifamily housing be accessible, both market rate and affordable, and where private actions support or undercut the ability of local jurisdictions to act affirmatively to further fair housing. The Proposed Rule is mostly

¹⁰ 817 F.2d 149, 155 (1st Cir. 1987).

¹¹ Exec. Order 12892, "Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing," 59 Fed. Reg. 2939 (Jan 17, 1994).

silent about the ways that the AFFH obligation addresses lending, zoning decisions, real estate sales and rental discrimination, appraisals and a variety of other applications of the Fair Housing Act to private or government actions which are themselves covered by the Fair Housing Act and which are discriminatory. The obligation to affirmatively further fair housing should not be limited to publicly supported housing or to affordable housing. Neither the Preamble nor the proposed regulations make the scope of the obligation clear.

HUD is not the only federal agency with an obligation to affirmatively further fair housing; that obligation applies to all executive agencies and departments, including those with regulatory or supervisory authority over financial institutions.¹² For example, many of the community development financial institutions that are certified to receive funding through the U.S. Treasury Department's Community Development Financial Institutions (CDFI) Fund offer mortgages and other loans for community development purposes. The activities of these institutions should be carried out in a manner that affirmatively furthers fair housing, with oversight to ensure that the mortgages and other loans they make are safe, fairly-priced and sustainable and do not perpetuate segregation.

During the COVID-19 pandemic, Treasury also had the responsibility to oversee two major housing programs, the Emergency Rental Assistance Program and the Homeowner Assistance Fund, both of which should have been administered in a manner to affirmatively further fair housing. The importance of doing so was only magnified by the disparate impact of the pandemic's health and economic effects on people and communities of color. To achieve this goal, HUD and Treasury should consider a memorandum of understanding (MOU) between the two agencies to ensure fair housing and lending compliance in all of Treasury's housing and community development related programs. The MOU can be modeled after the existing one between HUD and the Federal Housing Finance Agency.¹³

This is but one example of the special role that HUD must play in providing leadership to and coordinating with other agencies to ensure they administer their programs and activities that relate to housing and community development in a manner consistent with their AFFH obligations. HUD should adopt a policy detailing how it will carry out this function, along with a concrete plan for doing so.

¹² See 42 U.S.C. §3608 (d).

¹³ See, *Memorandum Of Understanding By And Between The U.S. Department Of Housing And Urban Development And The Federal Housing Finance Agency Regarding Fair Housing And Fair Lending Coordination* (Aug. 21, 2021), <https://www.fhfa.gov/Media/PublicAffairs/Pages/HUD-AND-FHFA-Announce-Collaboration-to-Advance-Fair-Housing-and-Fair-Lending-Enforcement.aspx>.

Recommendations:

1. HUD should separately undertake an analysis of its own operations, identify the actions that it should take with respect to its program implementation and its own decision making to ensure that the operations of its own programs and activities affirmatively further fair housing.
2. The Preamble should be clarified to indicate that the Proposed Rule is intended to address private acts of discrimination as well as public acts relating to housing and urban development. Program participants, as part of their AFFH obligations, should be explicitly required to identify and address a variety of discriminatory actions, funded and unfunded, private and public, as part of their obligation to affirmatively further fair housing.

Clarifying the distinction between fair housing and affordable housing

It is not uncommon for policymakers and others to be confused about the difference between fair housing and affordable housing. Nor is it uncommon to conflate the two. They are, however, distinct if overlapping concepts, and understanding both the distinction between fair housing and affordable housing and how they may overlap is critical for effective fair housing planning. The Proposed Rule fails to address that distinction clearly and, as a result, runs the risk of providing misguided direction to HUD's program participants, leading them to focus their attention on the supply of housing affordable to low- and moderate-income people while overlooking other pressing fair housing concerns, such as fair lending, discrimination against people with disabilities in market rate or group home settings, real estate steering, hate crimes, and other pressing fair housing concerns.¹⁴ Conflating affordable housing and fair housing perpetuates the misconception that most people of color and members of other protected classes are poor and that income is the key barrier that prevents them from being able to live in housing that suits their needs and is located in the neighborhood of their choice. The logical remedy to a problem like this would be to create more housing that is affordable to people at lower income levels regardless of where it is located, an outcome which is clearly inconsistent with the Fair Housing Act's prohibition of segregation.

It is true that higher percentages of Black and Hispanic households live in poverty compared to White households or compared to the country overall.¹⁵ But that does not

¹⁴ See, e.g., *U.S. ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester Cnty., N.Y.*, 668 F. Supp. 2d 548, 562-63 (S.D.N.Y. 2009), in which the court found that the addressing the need for affordable housing did not satisfy Westchester County's obligation to affirmatively further fair housing.

¹⁵ In 2021, the poverty rate for the nation overall was 12.8%. The rates for White, Hispanic, Black and Asian/Native Hawaiian/Pacific Islander households were 9.5%, 17.6%, 21.7% and 10.2%, respectively. KFF, *Poverty Rate by Race/Ethnicity* (2021), <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22American%20Indian%20Alaska%20Native%22,%22sort%22:%22desc%22%7D/>

mean that all, or even most, of these households are poor. Analysis from the Federal Reserve Bank of St. Louis indicates that, as of the fourth quarter of 2022, 43 percent of Black households and 48.4 percent of Hispanic households own their own homes.¹⁶ According to research from the Pew Charitable Trusts, in 2021, nearly half of all Black households had incomes of \$50,000 or more. 11 percent of those had incomes between \$75,000 and \$99,999, and 20 percent had incomes of \$100,000 or more.¹⁷

However, neither income nor homeownership inoculates these households from housing discrimination. Rather, there is ample evidence that Black and Latino households with incomes well above the poverty line face discriminatory barriers in the housing market and in gaining access to important community assets and resources. That evidence includes the disproportionate rate at which Black and Latino homeowners were targeted for toxic subprime loans in the run-up to the foreclosure crisis,¹⁸ the recent redlining cases settled by the U.S. Department of Justice,¹⁹ the increasing evidence of racial bias in home appraisals,²⁰ the disproportionate rate at which banks are closing branches in high income Black neighborhoods as compared to low-income White neighborhoods,²¹ and much more. All of these problems are related to race; none can be solved by creating more affordable housing, as much as that is desperately needed.

It is critical, in the context of this Proposed Rule, to recognize that the AFFH provisions of the Fair Housing Act are not intended simply to promote the creation of more affordable housing. Rather, they are intended to ensure that the resources of the federal government, including HUD and other agencies, are used to end housing discrimination and residential segregation and to provide equitable access to resources and opportunity for members of protected classes. The courts have upheld this mandate numerous times, including in the 1987 *N.A.A.C.P.* case, cited above, and in the

¹⁶ Federal Reserve Bank of St. Louis, *FRED Economic Data, Housing and Homeownership: Homeownership Rate Q4 2022*, <https://fred.stlouisfed.org/release/tables?eid=784188&rid=296>.

¹⁷ Moslimani, Mohamad, Christine Tamir, Abby Budiman, Luis Noe-Bustamante and Lauren Mora, *Facts About the U.S. Black Population*, Pew Charitable Trusts (Mar.2, 2023), <https://www.pewresearch.org/social-trends/fact-sheet/facts-about-the-us-black-population/#household-income>.

¹⁸ See Debbie Gruenstein Bocian, Keith S. Ernst and Wei Li, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages*, Ctr. for Responsible Lending (May 31, 2006), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/rr011-Unfair_Lending-0506.pdf.

¹⁹ A description of the Department of Justice's Redlining Initiative can be found here: <https://www.justice.gov/crt/page/file/1580441/download>. A list of the redlining cases the Department has settled is available here: <https://www.justice.gov/crt/recent-accomplishments-housing-and-civil-enforcement-section#home>.

²⁰ See Debra Kamin, *Widespread Bias Found in Home Appraisals*, N.Y. Times (Nov. 2, 2022), <https://www.nytimes.com/2022/11/02/realestate/racial-bias-home-appraisals.html>.

²¹ Zach Fox, Zain Tariq, Liz Thomas and Ciaralou Palicpic, *Bank branch closures take greatest toll on majority-black areas*, S&P Global Market Intelligence (July 25, 2019), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/bank-branch-closures-take-greatest-toll-on-majority-black-areas-52872925>.

1973 *Otero* case, in which the Second Circuit held that AFFH requires that, “[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunity the Act was designed to combat.”²²

This mandate recognizes our nation’s long history of pernicious racial discrimination and segregation along with the harmful history of unjust and prejudicial treatment based on gender, color, ethnicity, disability, religion and familial status. It underscores the need to take deliberate steps to overcome the barriers created by that history and rectify its harms. Those harms have been borne primarily by people of color, but have fallen on members of other protected classes, as well. But income has not been the factor that has determined who has experienced those harms. And although income, or lack thereof, may exacerbate the harmful effects of our history, it cannot be the central factor in our strategies to overcome them.

In drafting this rule, HUD must take greater care to ensure that, in addition to analyzing the very real barriers that lower-income members of protected classes face, and to crafting goals, strategies and meaningful actions to overcome those barriers, program participants must also analyze and address the barriers faced by members of protected classes who may not be low-income. Creating more affordable housing can certainly be a useful goal, providing steps are taken to ensure it is accessible to members of protected classes and that it offers residents access to community assets. Similarly, increasing access to community assets for residents of R/ECAPs (while simultaneously guarding against their displacement) may be an important goal. But to fulfill the AFFH mandate of the Fair Housing Act, attention must also be paid to the lack of access to resources in communities of color that are not low-income, and to the kinds of barriers cited above that impede access to resources and opportunities, and which the Act was intended to combat.

Elimination of technological bias from program participants’ systems and programs

NFHA urges HUD to specifically call out to program participants their responsibility to ensure the technologies they use do not harm or discriminate against consumers or perpetuate segregation. Program participants must also ensure they are not facilitating the use of technologies that generate biased outcomes. For example, certain tenant screening selection, credit scoring, property valuation, tax assessment, risk-based pricing, marketing, underwriting, and other algorithmic-based models can discriminate against people with disabilities, women, and communities of color. No federal dollars must be used in any way to support biased technologies.

The AFFH mandate is meant to rectify our nation’s deep inequities in access to opportunity, resulting from unfair housing policies put in place by local, state, and federal government officials as well as private actors over many decades. These

²² *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973).

policies have created unfair tech-driven systems that derive data from biased housing and finance systems -- unfair appraisals, residential segregation, a dual credit market, restrictive zoning policies and many more -- depriving millions of people access to secure and healthy housing and finance opportunities. Those tech-based systems, in turn, are driving disproportionate outcomes in health, credit, housing, education, wealth, environment, climate, employment and other areas. They can work in synergy to impede access to housing and economic opportunities, especially for people of color.

AFFH is a major tool for removing those unfair data-driven and algorithm-centric structures and replacing them with fair systems that benefit everyone. This will not only lead to better outcomes for individuals, but it will also strengthen and integrate our communities and boost our nation's economic prosperity.

The rest of our comments follow the section numbers in the Proposed Rule.

Definitions (§5.152)

The definitions included in the Proposed Rule are important for providing clarity about what is intended by various provisions of the rule. To achieve that clarity, the definitions must be crafted carefully, and use language that conveys their meaning effectively. Some of the definitions are particularly central to the purpose of the rule, and it is important that they be preserved in the final version. Others may not convey HUD's intent as clearly as needed and therefore may not serve the goals of the regulation as effectively as they could. Those should be amended. Below are recommendations for clarifying and strengthening those definitions.

Affirmatively furthering fair housing – The definition of “affirmatively furthering fair housing” is very similar to that in the 2015 AFFH regulation and the 2023 Interim Final Rule and comports with the statutory mandate to end discrimination and overcome the harms caused by segregation, created and sustained in significant part by policies, programs and actions taken by the federal government. The definition acknowledges that this requires deliberate efforts to eliminate disparities in housing needs, create more equitable access to the opportunities that are associated with the place in which one lives and foster compliance with fair housing and civil rights obligations. It also notes that the AFFH obligation extends to all of a program participant's activities, services and programs relating to housing and community development. However, in comparison to the 2015 Rule, a notable addition to the current proposed definition is the statement that AFFH also requires “*a program participant to take actions, make investments, and achieve outcomes that remedy the segregation, inequities, and discrimination the Fair Housing Act was designed to redress.*” This last part of the definition, with its emphasis on actions and outcomes, is important and helps to dispel the misunderstanding some program participants may have that simply creating an Equity Plan is and should be enough to satisfy their AFFH obligations. That is not the case, and it is helpful to make that clear in the very definition of AFFH.

Recommendation:

1. NFHA recommends that the final rule maintain the definition of AFFH, including the new language regarding taking actions, making investments and achieving remedial outcomes.

Affordable housing opportunities – The 2015 rule did not include a definition of affordable housing opportunities, and its inclusion here raises several concerns. First, it is not clear whether “affordable housing” refers to housing that is subsidized in one form or another by the government, be that at the federal, state or local level, or whether it includes unsubsidized housing that is affordable (by some unspecified standard) to people at some unspecified income level. This lack of clarity is likely to cause confusion among program participants and complicate their efforts to conduct the analysis of housing needs that is required for their Equity Plans.

A second concern is the potential conflation of affordable housing with fair housing, as noted above. While preserving and/or increasing the supply of housing affordable to low- and moderate-income households, whether subsidized or not, may be an important component of a fair housing strategy in many communities, HUD must take care not to reinforce the all-too-common misperception that the two are one and the same, as may happen given the lack of clarity in this definition. This may lead program participants to adopt strategies related to affordable housing that are not crafted in a fashion that will advance fair housing goals. That would be contrary to the purpose of AFFH.

To the extent that it is useful for program participants to assess the adequacy of the supply of housing affordable to low- and moderate-income households, subsidized and/or not, it would be helpful to have a definition that provides more granularity. The definition should specify what is meant by “low-income” and “moderate-income” and should guide program participants to consider the housing opportunities that are affordable to “extremely low income” and “very low income” households, as well. This distinction is particularly important for people with disabilities, who are often among the lowest income people in their communities, with incomes of 15 percent or less of area median. Unless special consideration is given to their circumstances, they may not be able to obtain suitable, accessible housing that is affordable. In addition, the reference to affordable housing opportunities for people with disabilities would be strengthened by incorporating the principles articulated in the *Olmstead* decision,²³ thereby reinforcing for program participants their obligation to provide housing for people with disabilities that is not only affordable and accessible, but also enables them to live in

²³ See *Olmstead v. L.C.*, 527 U.S. 581 (1999). See HUD, *Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of Olmstead* (June 4, 2013), <https://www.hud.gov/sites/documents/OLMSTEADGUIDNC060413.PDF#:~:text=The%20Department%20of%20Housing%20and%20Urban%20Development%20%28HUD%29,homes%2C%20adult%20care%20facilities%2C%20and%20other%20restrictive%2C%20segregatedsettings.1>.

the most integrated settings possible so that they may participate fully in the lives of their communities.

In addition, many communities today are experiencing a severe shortage of housing that is affordable to people at all but the highest income levels, and members of protected classes who are not low- and moderate-income may face obstacles obtaining housing that is affordable to them, including both homes for rent and homes for sale. In some places, this problem is exacerbated by the actions of large-scale investors making cash purchases of homes, sometimes at a premium and often in communities of color, that would otherwise be available and affordable to prospective owner occupants.²⁴ Individual purchasers cannot compete with such investors, and investor purchases can constrain the supply and increase the cost of homes for sale, putting homeownership out of the reach of families who are otherwise qualified purchasers.

Further, even where housing cost is not a barrier per se, members of protected classes may face other barriers to housing opportunities, whether that housing is for rent or sale. These barriers may include biased appraisals, unfair credit scoring systems, algorithmic or other bias affecting both the rental and home purchase markets, real estate steering, lending and insurance redlining, and lack of downpayment assistance for home purchases, among others. HUD should ensure that the definition of affordable housing opportunities does not discourage program participants from assessing and responding to the needs of these households, along with those of households whose incomes may be more modest.

In addition, the definition of “affordable housing opportunities” should be amended to better reflect a broader range of housing options. The current definition appropriately considers factors such as proximity to community assets, promotion of integration, and accessibility. The definition could be improved by specifying that affordable housing opportunities include diverse housing types that meet the needs of people with disabilities, and others. These housing types—including market rate as well as affordable accessible housing, manufactured housing,²⁵ accessory dwelling units,²⁶ group homes,²⁷ and supportive housing arrangements²⁸—can provide flexibility that

²⁴ Kevin Schaul, and Jonathan O’Connell, *Investors Bought a Record Share of Homes in 2021: See Where*, Wash. Post (Feb. 16, 2021), <https://www.washingtonpost.com/business/interactive/2022/housing-market-investors/>. See also Emmanuel Martinez, Kevin Schaul and Hamza Shaban, *See how many all-cash buyers snagged houses in your neighborhood*, Wash. Post (Feb. 9, 2023), <https://www.washingtonpost.com/business/interactive/2023/all-cash-buyers-housing-market/>.

²⁵ Shannon Guzman, *Manufactured Housing as an Affordable Option for Older Adults*, AARP Pub. Pol’y Inst. (June 17, 2019), <https://www.aarp.org/ppi/info-2019/manufactured-housing.html>.

²⁶ *All About Accessory Dwelling Units*, AARP Livable Communities (2019), <https://www.aarp.org/livable-communities/housing/info-2019/accessory-dwelling-units-adus.html>.

²⁷ Sally Abrahms, *Group Homes: A Small-Scale Option for Assisted Living*, AARP (Oct. 26, 2022), <https://www.aarp.org/caregiving/basics/info-2020/group-homes.html>.

²⁸ Shannon Guzman, *Affordable Supportive Housing Fills Gap for Older Adults and People with Disabilities*, AARP Pub. Pol’y Inst. (June 17, 2019), <https://www.aarp.org/ppi/info-2019/affordable-supportive-housing.html>.

meets the needs of these constituencies, but too often are prohibited or unduly limited by local regulations and private restrictions. The unavailability of these housing types in livable, well-resourced neighborhoods is a primary reason why people are shut out of these areas.²⁹ Program participants, especially local governments, are well-positioned to alleviate barriers that impede these housing types and make housing unavailable for underserved populations.

A second defined term “affordable housing opportunities” appears to be linked to the type of well-resourced neighborhood that is described elsewhere. However, the rule should make clear that there may be tradeoffs between the types of resources in different neighborhoods, and different people may place different value on specific neighborhood characteristics. For example, a family with children may place particular value on well-resourced schools in the neighborhood, and parks and playgrounds that are within walking distance. People with disabilities may place the highest value on units that are accessible and affordable, and neighborhoods that offer easy access to their doctors, other social services, friends and family, places of worship, jobs and the like. Given the different weight that different people may place on particular neighborhood assets and resources, an affordable housing opportunity that is not necessarily located in an area of with the highest overall level of resources, but which has the attributes that a given household values, may still be an important option. An affordable housing opportunity that is located in an integrated area that has community assets but is not a very well-resourced area may still be an important and desired housing choice for someone. As described below, we recommend that HUD define the term “opportunity” as it is used in “disparities in access to opportunity,” consistently throughout the final rule and affordable housing be defined without requiring that it be located in very well-resourced or so-called “high opportunity” areas, although it should be located outside of R/ECAPS.

HUD should also consider adding language access as a factor that might limit access to upward mobility, opportunity, or programs. This issue has repeatedly arisen in HUD compliance and enforcement activity.

Recommendations:

1. HUD should amend the definition of affordable housing to make it clear whether it is intended to refer to housing that is subsidized, or whether it is intended to prompt an analysis of which segments of the housing market overall are affordable to people at different income levels. If the latter, HUD should be clear about how affordability is to be measured.
2. HUD should clarify the distinction between affordable housing and fair housing and remind program participants that while strategies to increase the supply of

²⁹ See Rodney Harrell et al., *Which Older Adults Have Access to America’s Most Livable Neighborhoods? An Analysis of AARP’s Livability Index*, AARP (Oct. 30, 2020), <https://www.aarp.org/ppi/info-2020/which-older-adults-have-access-to-americas-most-livable-neighborhoods.html>.

affordable housing may be an important part of a fair housing strategy, they do not and cannot constitute the entirety of that strategy.

3. The definition should specify what is meant by “low- and moderate-income,” and should include categories for extremely low-income and very low-income, as well as low- and moderate-income. The extremely low-income definition, including a category for people with incomes between 0 and 15 percent of the area median income, is particularly important for ensuring an adequate supply of housing for people with disabilities.
4. If the rule is going to include a broad definition of affordable housing, that definition should be amended to acknowledge the current crisis in housing affordability for middle-income household that include members of protected classes and the need to ensure that their needs are considered in the Equity Plan process.
5. Amend the “affordable housing opportunities” definition to:
 - Modify subsection (2) of the definition to include “flexible housing types, including market rate and affordable accessible housing, manufactured housing, accessory dwelling units, group homes, and supportive housing arrangements;”
 - Clarify that the definition encompasses both market-rate and subsidized or supported “affordable” housing units;
 - Add aging and disability to subsection (3)(iii) as factors that adversely affect housing stability; and
 - Acknowledge language barriers as an issue that must be addressed to enable access to affordable housing opportunity for people with limited English proficiency.

Balanced approach – NFHA supports the central tenet of this definition, which states, in part, that “To achieve a balanced approach, community planning and investment would need to balance place-based strategies with mobility strategies. Both place-based and mobility strategies that are part of a balanced approach must be designed to achieve positive fair housing outcomes.” However, several changes are needed to make this definition clearer and more consistent with the broad AFFH mandate.

First, the definition connects place-based investments only with high-poverty neighborhoods. However, as noted above, poverty is not a proxy for protected class status under the Fair Housing Act, and when developing strategies to achieve fair housing goals, if poverty is to be considered, it must be done in conjunction with the presence of members of protected classes. The distinction between poverty and race, national origin or other protected class characteristics is important.

Second, and conversely, the definition should also acknowledge that not all communities of color are high poverty (or even low-income), and that moderate, middle-income, and affluent communities of color may also have suffered from discrimination and disinvestment and require place-based investments in order to have the equitable access to important resources that the Fair Housing Act intends. For example, it is well known that there is a dearth of grocery stores located in Black neighborhoods resulting

in neighborhoods that are food deserts.³⁰ Recent research from the Brookings Institution shows that this trend extends to more affluent Black neighborhoods as premium grocery stores are absent from wealthy Black-majority communities.³¹

Third, the definition should recognize that investments may increase pressure on housing prices and that program participants must take steps to ensure that place-based investments do not result in the displacement of existing residents, depriving them of the benefits of those investments.

Recommendations:

1. Clarify that, for purposes of fulfilling a program participant's AFFH obligations, place-based investment must be linked to the protected classes under the Fair Housing Act, particularly to communities of color, many of which have historically suffered from disinvestment.
2. Clarify that the need for place-based investments may not be limited to areas of high poverty, and that program participants should assess the need for various types of investments in moderate, middle, and affluent-income communities of color in order to achieve equitable access to community assets.
3. Direct program participants to evaluate the potential negative impacts of place-based investments on existing residents, such as higher housing costs, loss of affordable housing and displacement, and to incorporate into their Equity Plans strategies to mitigate those harmful impacts.

Community assets – The definition of community assets contains a robust list of assets that offer important resources to community residents, although the definition would be strengthened by several amendments. For example, in addition to quality daycare and childhood educational services, the definition should include adult daycare services. These services are integral to livable communities and key to ensuring people are not limited in their housing options by their own or a family member's age, disability or familial status.

In addition to including banking and financial institutions (which should be clarified to mean regulated financial institutions and not high-cost, risky fringe financial service providers), the definition should specify that community assets also include access to safe, affordable, and sustainable banking services and lending products, which the presence of financial institutions may or may not entail.

³⁰ McKinsey & Company, *Too many Black Americans live in food deserts* (Sept. 21, 2021), <https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/chart-of-the-day/too-many-black-americans-live-in-food-deserts>.

³¹ DW Rowlands, Manann Donoghoe, and Andre M. Perry, *What the lack of premium grocery stores says about disinvestment in Black neighborhoods*, Brookings Inst. (April 11, 2023), <https://www.brookings.edu/research/what-the-lack-of-premium-grocery-stores-says-about-disinvestment-in-black-neighborhoods/>.

Another important factor that is missing from the definition is any mention of climate impacts, many of which fall disproportionately on communities of color. Too often, these communities have not had the benefit of investments to increase climate resilience, either at the individual property level or at the community-wide level. As a result, they may suffer disproportionate harm from climate-related events or impacts and have less ability to recover.³²

NFHA also recommends amending “desirable employment opportunities” to read “desirable employment opportunities, including employment opportunities for low- and very low-income persons” to focus attention on that population.

Recommendations:

1. Add adult daycare services to the list of community assets.
2. Modify the reference to “banking and financial institutions” to include access to safe, sustainable, and affordable banking services and loan products.
3. Add “climate resilience” as a community asset.
4. Supplement the definition of “community assets” to include “employment opportunities for low- and very low-income persons.”

Equity or equitable – The definition of “equity or equitable” may be reasonable for a situation in which equity has been achieved and the goal is to sustain it over the long term. However, that is not the case in most communities in this country, given the plethora of inequitable programs and policies that have been carried out over many years. Given that history, achieving equity will require distributing resources in a manner that, in the near term, may take into consideration the immutable characteristics of individuals and communities that have been harmed and disadvantaged in the past. Some may view such actions as inequitable, and the definition should make it clear that the “concerted actions to overcome past discrimination” are not only permitted, but required where they are needed to achieve equity now and sustain it in the future.

Recommendation:

1. HUD should clarify that the terms “equity” and “equitable” allow for protected class- conscious treatment of previously members of protected classes that

³² See, e.g., Lily Katz, “A Racist Past, a Flooded Future: Formerly Redlined Areas Have \$107 Billion Worth of Homes Facing High Flood Risk—25% More Than Non-Redlined Areas, Redfin News (Mar. 14, 2021), <https://www.redfin.com/news/redlining-flood-risk/>; Jeremy S. Hoffman et al., *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas* (Jan. 13, 2020), <https://www.mdpi.com/2225-1154/8/1/12/html>; U.S. Environmental Protection Agency, *Climate Change and Social Vulnerability in the United States* (Sept. 2021), https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf; FEMA National Advisory Council, *National Advisory Council Report to the FEMA Administrator* (Nov. 2020); https://www.fema.gov/sites/default/files/documents/fema_nac-report_11-2020.pdf; Junia Howell and James R. Elliott, *As Disaster Costs Rise, So Does Inequality, Socius* (Dec. 4, 2018).

have been disadvantaged by past discriminatory policies and practices so as to achieve equity going forward.

Fair housing goal categories – Because the fair housing goal categories set the contours for the analysis that is central to program participants' Equity Plans, the way they are defined is critical to the effectiveness of the AFFH rule. Because the individual goal categories are not defined elsewhere in the Proposed Rule, we offer comments on how they should be interpreted here.

Goals one through three—segregation and integration, racially and ethnically concentrated areas of poverty, and disparities in access to opportunity—were included in the 2015 rule and were helpful in guiding program participants to focus on important fair housing issues. Other goal categories are new and would benefit from changes to strengthen or clarify their intent. Disparities in access to opportunity is a broad area and can include things like access to quality, affordable credit; well-resourced schools; fresh air land and water; ample green spaces; high-speed internet or broadband; safe recreation; and other amenities. HUD should be sure to provide a number of examples so participants are clear about the scope of this goal category. One of the goal categories from the 2015 rule, namely, the program participant's fair housing enforcement and fair housing outreach capacity has been dropped from the current Proposed Rule; it should be restored.

Goal category #4 is "Inequitable access to affordable housing opportunities and homeownership opportunities." NFHA supports the inclusion of this category, although as noted above, the definition of "affordable housing opportunities" should be clarified. It will be important for HUD to provide more guidance, either in the rule itself or separately, about how to identify impediments that might prevent equitable access to housing opportunities for members of protected classes, regardless of their income levels.

Goal category #5, "Laws, ordinances, policies, practices, and procedures that impede the provision of affordable housing in well-resourced areas of opportunity, including housing that is accessible for individuals with disabilities," is helpful as far as it goes, as it should prompt an analysis of zoning, land use decisions, permitting and other local policies and practices that may limit the amount, type and location of affordable housing that can be provided in a community. However, its impact would be enhanced by drilling down further into the kinds of legal, regulatory and policy barriers that people with disabilities may face at different income levels. HUD should also guide program participants to examine the legal and policy framework that affects access to other community assets, including the concentration of environmental hazards in communities of color, among others. For example, a program participant might have a neighborhood with ample affordable housing, but that area might be highly segregated with non-White populations, zoned for non-residential use, and have higher instances of pollution or contaminated land and water. These outcomes might be the result of a

participant's historical discriminatory practices. The rule should be clear that program participants must examine these types of fair housing issues in their Equity Plans.

Goal category #6, "Inequitable distribution of local resources, which may include municipal services, emergency services, community-based supportive services and investments in infrastructure," could be broadened to include the full range of community assets over which program participants may have control or whose distribution they may influence. That would include transportation, schools, parks and recreation, and others.

With respect to goal category #7, "Discrimination or violations of civil rights law or regulations related to housing or access to community assets based on race, color, national origin, religion, sex, familial status, and disability," it will be important to ensure that program participants do not simply respond to this goal category with a laundry list of individual complaints and lawsuits that have been filed in or about their jurisdictions. Rather, they should be directed to analyze the most common types of complaints and emerging complaint trends or fair housing issues as a basis for determining how best to direct their fair housing resources. Program participants should also describe reports and studies that document the nature and extent of discrimination within the participant's jurisdiction. In addition, they should describe any complaints or lawsuits that have been filed against the program participants themselves, the current status of such actions, and the steps they are taking to resolve them.

Additional goal category needed. The list of seven fair housing goal categories, with the revisions suggested above, provide a useful framework for conducting an Equity Plan analysis, but there is one important omission from that list, namely, an assessment of the fair housing outreach, education and enforcement infrastructure in the program participant's jurisdiction and the local funding and coordination efforts that program participants provide to those activities. The most comprehensive set of anti-discrimination laws and regulations will have little impact unless people in the jurisdiction are aware of their fair housing rights, understand how to ensure they are enforced and have the assistance they need to do so. That only happens when the necessary resources are devoted in four key areas: outreach and education about the fair housing rights and responsibilities of all of the players in the housing market, the intake and investigation of fair housing complaints, the initiation of enforcement actions where those are warranted, and the inclusion of fair housing considerations in public policy decisions related to housing and community development activities.

Program participants' support for and collaboration with fair housing organizations may be the most straightforward way to address these needs in a comprehensive fashion, although other organizations may play a role in addressing some of them. Program participants should be required to consider whether such organizations exist in their communities and whether those that do exist are provided the necessary resources to serve their communities effectively. They should also be asked to describe the steps

they themselves are taking or plan to take to ensure such organizations are established where needed and are well-resourced. In addition, program participants should be asked to describe any collaborations they are undertaking with fair housing groups to promote robust fair housing compliance within their jurisdictions.

Recommendations:

1. Goal category #4 - Clarify what is meant by affordable housing consistent with previous comments and provide guidance about how to identify potential barriers faced by members of protected classes, at all income levels, in gaining access to housing that is affordable and meets their needs.
2. Goal category #5 – Expand the range of laws, ordinances, policies, etc. that should be evaluated beyond those related to the provision of affordable housing in well-resourced areas to include more detail about those that impact access to housing for people with disabilities, as well as those laws, etc. that affect the location of environmental hazards and those that affect other aspects of access to opportunity.
3. Goal category #6 – Broaden the analysis of access to local resources to encompass all of the types of resources included in the definition of community assets.
4. Goal category #7 – Clarify that this category is not intended to be an itemization of all of the fair housing complaints and lawsuits that have been filed in the program participant’s jurisdiction. Rather, it should elicit major types of fair housing complaints, emerging issues and trends, and the status and/or resolution of enforcement actions brought against the program participant itself.
5. Add a goal category addressing the program participant’s fair housing outreach and enforcement capacity.

Geographic area of analysis – Given the regional nature of fair housing problems, it is important to ensure that program participants take a regional approach to the analysis conducted for their Equity Plans. The descriptions of the geographic area of analysis for each type of program participant requires them to analyze circumstances outside of their jurisdictions or service areas that impact fair housing issues within those geographic areas. While this is appropriate as far as it goes, HUD should require an analysis that better reflects the reciprocal nature of fair housing issues across jurisdictions. It is just as likely that fair housing issues within a program participant’s jurisdiction or service area have impacts outside those areas as the reverse, and this should be reflected in the definition.

In addition, the definition of geographic area of analysis for states appropriately excludes a neighborhood-by-neighborhood basis but suggests that a county-by-county level analysis is sufficient. However, there are many places where a county-level analysis is unlikely to be appropriate, such as in New England, where towns are the basic unit of local government. And whether or not that is the case in a particular state, the patterns of residential segregation and other fair housing issues may vary

significantly within a county, such that a county-level analysis will not serve to identify them. A more effective approach would be to require states to conduct an analysis that includes both counties, where appropriate to assess conditions in unincorporated areas, and within counties, at the jurisdiction level.

Recommendations:

1. Amend the definition of geographic area of analysis to clarify that, in addition to analyzing circumstances outside of their jurisdictions or service areas that impact fair housing issues within those areas, program participants must also assess the impact of fair housing issues within their jurisdictions or service areas on communities outside of those areas.
2. Amend the definition of geographic area of analysis for states to require analysis at a smaller geographic area than a county, such as a town or municipality, in places where that is a more appropriate level of analysis to identify patterns of segregation and integration and other relevant factors.

Homeownership opportunities – The Proposed Rule defines homeownership opportunity to mean, “the actual choice to own, sell, buy and finance a home, without discrimination based on protected characteristic.” The definition should be amended to include reference to insurance (i.e., “own, sell, buy, finance *and insure* a home”) since without insurance, anyone who needs a mortgage to buy a home cannot obtain one. And whether or not one has a mortgage, access to high quality, fairly priced homeowners insurance is important to protect one’s home in the event of loss, but such insurance is not always readily available. The availability and affordability of flood insurance is another factor that should be considered, particularly in areas that are prone to severe storms and flooding, and where the cost of flood insurance can significantly impact housing affordability.

Further, the definition of homeownership opportunities should be amended to reflect three other related issues. One is the ability to obtain a fair appraisal, either to purchase or refinance a home. There is growing evidence of systemic bias in the appraisal industry, as noted by the Interagency Task Force on Property Appraisal and Valuation Equity (PAVE),³³ which HUD chairs. In two recent cases filed by NFHA members on behalf of clients, Black homeowners who received unjustifiably low appraisals “white-washed” their homes, removing all evidence that a Black family lived in the home and had a White friend be in the home for a subsequent appraisal. The second appraisal in both cases was significantly higher, in one case 135 percent higher.³⁴ This kind of

³³ Property Appraisal and Valuation Equity (PAVE) Task Force, *Action Plan to Advance Property Appraisal and Valuation Equity*, (Mar. 2022), <https://pave.hud.gov/actionplan>.

³⁴ The initial appraisal of the Duffy family home, in Indiana, was \$110,000. After “white-washing,” the home appraised at \$259,000, a 135 percent increase. The initial appraisal on the Austin family home, in Marin County, CA was \$995,000. After “white-washing,” the home appraised at \$1,482,500, a 49 percent increase in value. See *Black Homeowners are Getting Lower Appraisals Than White Neighbors*, Scripps News (Feb. 2, 2022), <https://scrippsnews.com/stories/black-homeowners-get-lower-appraisals-than-white-neighbors/>.

appraisal bias can upend a home sale, forcing the seller to lower their price substantially, the buyer to come up with a much greater cash contribution, or both. In the case of a refinance, it can considerably limit the homeowner's ability to use the equity in their home to pay for a child's college education, finance a small business, make changes to the home needed to age in place, add an accessory dwelling unit, or any number of other purposes. Program participants may play an important leadership role in identifying bias in the appraisal industry and instituting controls to limit this bias in the market.³⁵ The impact of appraisal bias is not captured clearly in the Proposed Rule's definition of homeownership opportunities.

Another important aspect of homeownership opportunities is the ability to sustain homeownership once someone has purchased a home. This ability rests on several factors that are not related to the homeowner's income or the occurrence of such life events as the loss of a job, divorce or the death of a spouse. One is the ability to obtain a mortgage that is safe, fairly-priced and sustainable. Another factor is access to high-quality mortgage servicing, particularly when an unforeseen life event does occur. Access to effective pre- and post-purchase homeownership counseling, preferably from HUD-certified housing counselors, may be one way to ensure that homeowners can navigate these challenges effectively, but homebuyers also must have access to fair and sustainable mortgages and mortgage servicers that are responsive to homeowners' needs.

Finally, all aspects of the home purchase and homeownership process may be more challenging for people who are not proficient in English. Mortgage transactions are very complex and involve a significant amount of technical language, both at the origination stage and during mortgage servicing. Unless information about the transaction, both written and verbal, is available in the borrower's preferred language, borrowers who are not proficient in English may run the risk of not understanding the loan they receive or being able to obtain the assistance they need to hold onto their homes if they run into difficulty making their payments.

Recommendation:

1. The definition of "homeownership opportunity" should be amended to include insurance, and to reflect some of the other major issues that may affect a person's access to homeownership opportunities. These include appraisal bias, the quality of mortgage servicing, access to safe and fairly-priced mortgages, and language access.

Protected characteristics – NFHA supports the recommendations of the National Women's Law Center and other commenters to amend the definition of sex where it used throughout the Proposed Rule to be consistent with Executive Order 14075 of

³⁵ See e.g., "Philadelphia Home Appraisal Bias Task Force Final Report and Recommendations," available at: http://phlcouncil.com/wp-content/uploads/2022/07/PhiladelphiaHomeAppraisalBiasTaskForce_Report_FINAL.pdf.

June 15, 2022 (Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer and Intersex Individual), as well as rules and guidance from other federal agencies, including the Department of Justice, the Department of Education, and the Department of Health and Human Services regarding sex discrimination.

Recommendation:

1. Amend the definition of sex to read, “sex (including pregnancy, sexual orientation, gender identity, and non-conformance with gender stereotypes, and sex characteristics).”

Publication – The definition of publication in the rule refers only to publication of specific documents by HUD itself on HUD-maintained web pages. Notably, neither the definition nor the other references to publication in the rule indicate that HUD intends to publish program participants’ final Equity Plans, incorporating any revisions that HUD may require. Nor are program participants required to publish those documents, although they are encouraged to do so. And while the Proposed Rule states that program participants’ annual progress evaluations are to be public documents, and that HUD intends to make these available on a website that it maintains, there is no requirement for program participants to make those progress evaluations available on their own websites or in any other manner. This formulation may result in significant gaps in the public’s access to important documents related to the equity planning process, including the final Equity Plan for their jurisdiction or PHA and the annual progress evaluations. HUD should amend the definition, and the relevant sections of the rule, to require program participants to publish their draft and final Equity Plans on their own websites, and to make them available to the public at no cost upon request.

Recommendation:

1. Amend the definition of publication to require that program participants must publish, on their own websites, copies of the draft and final versions of their Equity Plans and their annual progress evaluations.

Underserved communities – The definition of underserved communities is a new feature of the Proposed Rule and was not included in HUD’s previous AFFH regulations. NFHA applauds HUD’s inclusion of communities of color (without reference to their income level), the LGBTQ+ community, survivors of domestic violence, and persons with criminal records as groups that disproportionately represent or are likely to disproportionately represent protected classes and should be factored into program participants’ fair housing planning efforts. Immigrant communities should be added to the list, as well.

However, some of the examples of underserved communities included in the definition may not be relevant for fair housing planning purposes. For example, not all low-income communities or neighborhoods disproportionately include members of protected classes. The same is true for rural communities, where access to housing and

community-related opportunities may or may not be a function of protected class status. HUD should either eliminate the examples of underserved communities that are not clearly linked to protected class status or clarify that, for Equity Planning purposes, such a link must be documented.

Further, the definition uses the term “community” to refer to both groups of people (or, as HUD notes in the parenthetical, “underserved populations”) and geographic areas; this dual definition can be confusing as applied throughout the rule. One example of this is the illustrative fair housing goal to ensure that underserved communities have equitable access to homeownership. Does this refer to eliminating barriers to homeownership for people who are members of protected classes, or to increasing the homeownership rate in neighborhoods whose current residents are disproportionately people of color (which may or may not be the case for in-coming homeowners)? Or take the goal of ensuring that underserved communities have equitable access to housing assistance programs. Does this suggest that such programs be targeted to specific geographic areas, or based on individual characteristics? HUD could alleviate this kind of confusion by distinguishing throughout the rule between underserved communities (meaning geographic areas) and underserved populations.

Recommendations:

1. Add “immigrant communities” to the list of examples of communities that may be underserved.
2. Either eliminate the references to potential underserved communities that may not necessarily have a disproportionate number of residents of protected classes (rural communities, low-income communities or neighborhoods) or clarify that for the purposes of the Equity Plan, program participants must establish a link between those kinds of geographic areas and the protected class status of a disproportionate number of their residents.
3. Distinguish between underserved geographic areas and underserved populations, both in the definition and throughout the rule, to avoid confusion among program participants about which is meant in specific references throughout the rule.

There are several other terms that are used in the regulation but are not defined. Because they have different meanings in different contexts, HUD should consider adding definitions for these terms to provide greater clarity for program participants. Among these terms are:

Accessible or accessibility – We recommend that HUD include a definition for the term “Accessible or accessibility” to cover housing that complies with one or more standards for physical accessibility, including the design and construction requirements of the Fair Housing Act, the requirements for federal financial recipients under Section 504 of the 1973 Rehabilitation Act and the Americans with Disability Act (ADA) Title II to provide housing that is in compliance with specific standards for accessibility including

the Uniform Federal Accessibility Standards and the ADA Standards for Accessible Design. The definition should also note the need to comply with the requirements of the Olmstead decision, which requires that program participants provide housing for people with disabilities in the most integrated setting possible, so that they are not isolated in institutions that limit their ability to participate fully in the lives of their communities.

Opportunity – The term “opportunity” is used through the Proposed Rule in a number of different contexts. Confusingly, and as noted above, it is used in a defined term “homeownership opportunity” where it is apparently not addressing the same type of opportunity that is used elsewhere in the Proposed Rule. A second defined term, “affordable housing opportunities” appears to be linked to the type of well-resourced neighborhood that is described elsewhere. However, an affordable housing opportunity that is not located in a well-resourced area with lots of amenities and low levels of poverty may still be a valuable housing choice for someone because of other neighborhood features on which that person places high value.

Equity Plan (§5.154)

General §5.154(a) – The form that an Equity Plan will take is not clearly set out in the Proposed Rule or the Preamble. We strongly urge HUD to develop and provide a standardized format and template required for all Equity Plans that will be completed by program participants and that will contain an outline of the required content for an Equity Plan. Consistency in format is important for many reasons: providing a standardized approach will help program participants provide and describe the required components of their Equity Plans and assist HUD in reviewing and analyzing multiple Plans. It will also support the ability of community groups and the public to review the Equity Plans and provide feedback on them. We support the general framework of the Equity Plan that includes an analysis of fair housing issues and challenges as well as a description of fair housing goals and, for each fair housing goal, strategies and proposed meaningful actions. Having an orderly structure for laying out the information will be critical to an understanding of how the goals, strategies and actions work. This will benefit HUD, program participants and the public.

§5.154(a) lays out the steps in the Equity Planning process, including engaging with the community, prioritizing fair housing issues, establishing fair housing goals, and submitting the Equity Plan to HUD for review. Two important steps are missing from this process, neither of which is spelled out elsewhere in the Proposed Rule. First, as noted above, the rule should require that community stakeholders be engaged in the process of deciding which fair housing issues should be given priority status, meaning that goals will be developed to address those issues, and should have the opportunity to provide input into and feedback on proposed strategies to achieve those goals. Second, the public should have the opportunity, after appropriate notice, to review and submit comments on a program participant’s Equity Plan before it is submitted to HUD for review.

Recommendations:

1. HUD should develop a standardized format and template for required use by program participants in completing their Equity Plans.
2. HUD should require program participants to provide community stakeholders the opportunity to offer input into the decisions about which fair housing issues should be prioritized, what goals should be set to address them and what strategies should be used to achieve those goals.
3. HUD should require program participants to give the public, upon proper notice, the opportunity to review and provide feedback on the program participant's draft Equity Plan before it is submitted to HUD.

Content of the Equity Plan §5.154(c) – Generally, we support HUD's view of the proposed contents of the Equity Plan. We repeat our support for a template that program participants will use to develop and frame the Equity Plan and reiterate our recommendations about the specific fair housing goal categories, discussed elsewhere in these comments.

With respect to the scope of analysis (§5.154(c)(3)), as noted previously, the seven fair housing goals should be more carefully defined and we recommend one additional fair housing goal, as described above.

The term "disparities in access to opportunity" (§5.154(c)(3)(iii)), should be described at the neighborhood level. Without the neighborhood context local communities could describe disparities in access to opportunity at the individual level and that would not provide the systemic approach that is needed here.

Recommendations:

1. HUD should develop a template for program participants to use for the purposes of developing their Equity Plans and mandate its use to ensure that the plans have a consistent framework and are comprehensive.
2. As noted above, the seven fair housing goal categories should be defined, and an additional category should be added relating to the local capacity for fair housing education and enforcement.
3. The reference to disparities in access to opportunity should be defined in a manner that will focus program participants appropriately on neighborhood level access, rather than individual access.
4. Amend § 5.154(c)(3)(i) to read "Racial and ethnic residential segregation and integration."
5. Amend § 5.154(c)(3)(iii) to read "Racial and ethnic disparities in access to opportunity by neighborhood, including language barriers."
6. Amend § 5.154(c)(3)(iv) to read "Lack of access to affordable housing located outside of R/ECAPS and lack of access to homeownership choices."

7. Amend § 5.154(c)(3)(vii) to read “Existence of adequate support for fair housing enforcement and outreach; evidence of systemic discrimination that adversely affects any of the remaining fair housing issues.
8. Add access to information in-language.

Content: Analysis – local governments, States and insular areas §5.154(d) – This section lays out a series of questions for program participants to answer in analyzing barriers to fair housing and opportunity in their communities. Under the 2015 rule, questions like these were not included in the rule itself; rather, they were incorporated into the Assessment Tool for Local Governments and the Assessment Tool for PHAs. Including these questions in the rule, as has been done here, poses some challenges. It is difficult to offer a comprehensive set of questions in a regulation on issues as broad and nuanced as those raised by this provision of the Fair Housing Act, rather than in guidance that might (and should) accompany a rule like this. Inevitably, conditions will change, and new issues will arise, and if the questions posed to program participants must change, that may require a new rulemaking process, which can be cumbersome and time-consuming, preventing anything approaching a rapid response.

Further, in the Proposed Rule, HUD has included more and more detailed questions on some issues than others. Additional questions could be included in guidance, but if additional questions are only in guidance and not in the regulatory text, program participants are likely to conclude that they are less important and deserve less attention than those included in the regulation itself, even when that is not HUD’s intent. We recommend that HUD consider ways to address this problem. The most straightforward approach may be to remove from the rule the specific questions that go to the content of the Equity Plans and incorporate them into separate guidance. An alternative approach would be to make reference in the rule to supplementary guidance that HUD may provide from time to time and indicate that program participants must address any questions included in that guidance along with the questions contained in the text of the regulation itself.

There is a misalignment of the categories for analysis in the previous section of the Proposed Rule (§5.154(c)(3) - the scope of analysis) and the required content of the Equity Plan for local governments, States and insular areas as described in §5.154(d) and that for PHAs as described in §5.154 (e). Of the seven areas listed under the scope of analysis, which align with the definition of fair housing goal categories, only two are described in the same terms in the section of the rule addressing the content of Equity Plans: segregation and integration, and R/ECAPs. §5.154(d)(i) describes “Demographics,” which are certainly important to understand in this context, but not listed among the areas in the scope of analysis. §5.154(c)(3) lists “Disparities in access to opportunity” as an area for analysis, while in the content section that appears as “Access to community assets.” §5.154(c)(3) mentions “Inequitable access to affordable housing opportunities and homeownership opportunities,” while the content section breaks those into two separate categories, “Access to affordable housing

opportunities” and “Access to homeownership and economic opportunities.” “Economic opportunities” is not listed among the fair housing goal categories in §5.154(c)(3), nor is it defined anywhere in the Proposed Rule. §5.154(c)(3) lists “laws, ordinances, policies, practices and procedures that impede the provision of affordable housing in well-resourced areas of opportunity, including housing that is accessible to people with disabilities.” In the content section this shows up as “Local and State policies and practices impacting fair housing,” which encompasses a series of issues—including some related to the local fair housing infrastructure and the status of any unresolved fair housing or civil rights-related findings, lawsuits, enforcement actions, settlements or judgments in which the program participant has been a party—that would be better broken out into a separate area for analysis. It also includes specific mention of R/ECAPS but makes no mention of housing for people with disabilities.

This lack of a parallel structure between the two sections of the regulation that speak to the issues that program participants must consider and address in their Equity Plans is unnecessarily confusing, and we recommend that HUD revise these sections so that they are better aligned and comprehensive.

With respect to the areas of analysis that are described in §5.154(d), we offer the following observations and recommendations.

With respect to “segregation and integration” (§5.154(d)(2)), the rule could be improved by describing segregation and integration in terms of race and national origin and limiting the analysis to “residential” segregation and integration. Without that specificity, the goal is too broad, leaving it open to program participants to consider issues that are not integrally linked to the purposes behind the Fair Housing Act. For example, a program participant in a highly racially segregated city may decide to focus on exclusively segregation of families with children, determine that no neighborhoods exclude families with children, and, without looking at potential segregation by race or national origin, conclude that there is no segregation problem.

Under “RECAPs,” §5.154(d)(3)(iii)(A), we suggest that a more precise question would be “how does the location of publicly supported housing relate to the R/ECAP areas?”

We recommend that “Access to Community Assets” in § 5.154 (d)(4)(ii)(A) be reframed to say “Identify locations in the geographic area of analysis in which protected class groups experience significant disparities in access to community assets listed above in (d)(4)(i).” Identification of specific areas, rather than asking a more general question about whether they exist, will be important in the process of prioritizing strategies and goals.

In the same section, §5.154 (d)(4)(iii), the listing of areas where barriers exist for people with disabilities should use the proposed defined term “Accessible” to ensure that program participants focus on the gap between people with disabilities and the types of

housing that they require because of their disabilities. In addition, “affordable housing opportunities” should include specific types of affordable housing needed by persons with disabilities and seniors.

In § 5.154(d)(4)(v), HUD uses the term “underserved communities,” and asks program participants to identify whether there is a disproportionate need in underserved communities for place-based community or economic development. This belated and limited reference to the need for economic development should be directed at R/ECAPS and areas of segregation, expanded significantly and not be limited to underserved communities. Identification of economic development, including commercial and retail development, infrastructure and increase in community assets in R/ECAPs is a critical component of the balanced approach that HUD ostensibly supports. HUD makes only passing reference to this issue and limits concerns to underserved communities and residents. HUD should emphasize the importance of program participants evaluating the need for investments in communities of color, and assessing the ways in which those communities should be strengthened, as well as evaluating disparities in access to community assets in those communities.

In § 5.154(d)(6), HUD’s description of access to homeownership opportunities fails to address head on the role that redlining has played in creating barriers to and disparities in homeownership. This section should include an analysis of access to safe and fairly-priced lending opportunities and homeowners insurance that create barriers to access, which requires an analysis of mortgage lending patterns to understand what types of lenders may be active in different neighborhoods, what types of loan products are available, what factors may contribute to loan denials (including issues related to collateral, which may indicate potential bias in home appraisals), and real estate steering, among others. Further, this analysis should also consider issues related to the supply of affordable homes for sale and potential competition from investors who can outbid prospective owner-occupants. A related issue that should be analyzed is whether borrowers who seek or are steered to FHA loans are at a competitive disadvantage when bidding against others who have access to conventional mortgages.

§5.154(d)(6)(ii) should be reframed to discuss barriers to homeownership, not “other economic opportunities,” which is not defined in the Proposed Rule, making it a confusing tangent rather than a helpful point of analysis with respect to access to homeownership. For example, it is not clear how program participants should connect access to livable-wage jobs (which is not defined) with access to homeownership. Some of the examples given in this section relate to homeownership and mortgage lending but should be better defined or described. How are program participants to determine whether a particular mortgage lender or financial institution is reputable? And does access to its services require access to mortgage loans, or does it include credit cards, auto loans, other personal loans and/or deposit accounts? Rather than

referring to reputable financial counseling services, this section should refer to HUD-certified housing counselors.

Other issues to consider with respect to access to homeownership include the availability of assistance for downpayment, closing costs, and other forms of financial assistance targeted to first generation homebuyers; access to Special Purpose Credit Programs or other vehicles for mortgage lending designed to address the needs of members of protected classes, the availability of fairly-priced, high-quality homeowners insurance rather than policies that are overpriced and/or offer protection against a limited set of hazards, and language barriers that may pose particular challenges for people with limited English proficiency. In addition, HUD should include a discussion of the challenges confronted by voucher holders and people with disabilities in access to homeownership.

We are concerned that the terms “access to affordable housing opportunities,” and “access to homeownership and economic opportunity” (§ 5.154(d)(5)-(6)), are neither sufficiently broad or sufficiently clear, as discussed in more detail in our comments on the Definitions section of the rule (§ 5.152). As just one example, “affordable” housing as currently defined does not include market rate housing that is inaccessible or many forms of housing that serve people with disabilities and seniors such as group homes. Greater clarity and specificity are needed to guide program participants’ analysis of access to housing opportunities in their Equity Plans.

We also recommend that the issue “discrimination or violations of civil rights laws and regulations” (§5.154(c)(3)(vii)), be revised to focus on community support for fair housing enforcement. It continues to be inappropriate for jurisdictions to list a litany of complaints that have arisen in their community without reference to the resources that they provide to address those issues. Most relevant are questions about the amount of support the community provides for fair housing enforcement, and a summary, prepared in conjunction with local fair housing advocates, of systemic fair housing issues whether in complaints or not, that are tied to any fair housing goal.

The Equity Plan process could be improved by requiring participants to consider adequately impediments to fair housing for people with disabilities by adding a goal for consideration of issues that are specific to people with disabilities.

Program participants should be required to consider and encourage initiatives that facilitate aging in place. Housing choice is at the heart of the Fair Housing Act and disability and inaccessibility pose major impediments to living successfully in housing: 71 percent of households require accessibility-related home modifications to continue living at their current residence in the event they need physical assistance.³⁶ These barriers to aging in place prevent people with disabilities from enjoying the benefits of

³⁶ Joanne Binette, *2021 Home and Community Preference Survey: A National Survey of Adults Age 18-Plus* (Nov. 2021), <https://doi.org/10.26419/res.00479.001>.

their current home and undermine their ability to find accessible housing within their communities. Black and Latino residents often face disproportionate barriers to aging in place because of older, inaccessible housing stock. At the same time, Black and Latino individuals are more likely to say that accessible home features like no-step entries, wide doorways, and first-floor bedrooms are extremely or very important to have in their community.³⁷

HUD's discussion of local and State policies and practices impacting fair housing could be improved by creating different sections for laws and for policies, to encourage a more a precise analysis of the impact of each, separately. In particular, any analysis of zoning and land use laws and practices should include siting of affordable housing and its impact on current patterns of segregation and integration and on zoning decisions that result in exclusion of affordable housing opportunities in neighborhoods and in communities. Subsection ii should not focus only on access to homeownership and economic opportunities but also on access to affordable housing opportunities of all types. Subsection iii should focus on local policies and practices such as funding decisions, agreement to community opposition and NIMBYism, environmental practices, displacement actions, loss of affordable housing opportunities, and lack of language access provisions.

As already noted in the discussion about fair housing goals, local practices impacting fair housing should focus on the efforts by the program participant to fund and support fair housing and civil rights enforcement, an issue that is not directly addressed by HUD's discussion of local laws and policies impacting fair housing.

Recommendations:

1. Align the fair housing goal categories listed in § 5.154(c)(3) - the scope of analysis with the categories for analysis listed in §5.154(d) and (e).
2. In § 5.154(d)(2), clarify that "segregation" and "integration" refer to residential segregation, not other forms of segregation or integration.
3. In § 5.154(d)(3)(iii)(A), revise the question about R/ECAPs to ask, "How does the location of publicly supported housing relate to the R/ECAP areas?"
4. In § 5.154(d)(4)(iii), use the proposed defined term, "Accessible" to ensure that program participants focus on the gap between the available supply of housing and the types of housing that people with disabilities need. Clarify that "affordable housing opportunities" includes specific types of housing needed by people with disabilities and seniors.
5. Amend and expand § 5.154(d)(4)(v) to apply to need for community assets in R/ECAPS and insert the resulting section in the R/ECAPS analysis.

³⁷ AARP, Home and Community Preferences 2021 at 35 (2021), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/liv-com/2021/2021-home-community-preferences-annotated-questionnaire-ethnicity-lgbtq.doi.10.26419-2Fres.00479.003.pdf.

6. § 5.154(d)(5) should be amended to include a question about barriers to living at home with a disability, including both (1) remaining in one's own home and (2) downsizing or relocating within one's community.
7. In § 5.154(d)(6), expand the required analysis to include a more robust discussion of barriers to and disparities in access to homeownership, as described above.
8. § 5.154(d)(6) focuses on barriers to buying a home but does not address barriers to keeping and staying in one's home. This subsection should be amended to include a question about barriers to homeowners remaining in their homes.
9. In § 5.154(d)(6)(ii), eliminate the reference to "other economic opportunities," clarify the terms used that are not defined elsewhere in the Proposed Rule, and expand the barriers to homeownership that program participants should consider, including barriers faced by voucher holders, people with limited English proficiency and people with disabilities, among others.
10. Section 5.154(d)(7) should ask about how local laws, policies, ordinances, and other practices impede or promote housing choice, including by impeding or promoting the development of flexible housing types such as manufactured housing, accessory dwelling units, group homes, and supportive housing arrangements as well as by failing to provide adequate housing choices that include accessibility and supportive services.
11. Expand § 5.154(d)(7) to separate the evaluation of laws from the evaluation of policies and address zoning and land use practices explicitly. Include access to affordable housing of all types as a framing issue. Identify actions that are not laws, including funding decisions, agreement to community opposition, environmental issues and language barriers among the items to be discussed by program participants.
12. Consider including a question, paralleling questions asked with respect to other fair housing issues, such as "What state or local policies or practices may have contributed to the patterns described in the responses to the analysis of the other fair housing goals?"

Content: Analysis – public housing agencies § 5.154(e) – It is important to ensure that the analysis PHAs conduct for their Equity Plans covers the full scope of housing they own or administer, and that the analysis include consideration of segregation and integration in each. In many communities, the geographic locations and the demographics of the occupants of public housing, for example, differ considerably from the locations and demographics of residents of project-based Section 8 units, housing for the elderly, and residents who hold Housing Choice Vouchers, Veterans Affairs Supportive Housing (VASH) vouchers, Non-Elderly Disabled (NED) Vouchers, etc. These patterns may reflect the PHA's policies and practices in administering each of these programs rather than the preferences of the residents, as well as the degree to which different programs offer access to a range of neighborhoods. To get at these concerns, it is important to look at the demographics of each type of housing owned or administered by the PHA at both the individual property level and the category-wide

level, and to assess the demographic characteristics and geographic location of all units administered by the PHA, including those occupied by residents who hold vouchers for each of the voucher programs administered by the PHA.

The questions that guide PHAs analysis of fair housing issues in § 5.154(e) do not include any that relate to access to homeownership. However, Housing Choice Vouchers can be used for homeownership, through what is generally known as the Section 8 Homeownership Program. The Proposed rule should ask PHAs to indicate whether or not they operate such a program and what efforts they make to work with local lenders to make appropriate mortgage financing available for HCV holders who wish to use their vouchers to purchase a home.

Nor do the questions for PHAs in § 5.154(e) require PHAs to assess the extent to which the units under their control are located on or near sites that contain significant environmental hazards, occupancy of which may pose a health risk for residents. As documented in research from the Shriver Center for Poverty Law and Earthjustice, “[T]ens of thousands of families living in federally assisted housing are living on dangerously contaminated land,” and “70 percent of [SuperFund hazardous waste sites] are located within one mile of federally assisted housing.”³⁸ It is not wise policy to use federal resources to build, manage, maintain and in some cases, rehabilitate or rebuild housing on or near sites that expose residents to environmental hazards and attendant health risks. Certainly it is inconsistent with the goal of ensuring equitable access to environmentally healthy neighborhoods, as this rule intends. Therefore, it is critical for PHAs to assess the extent to which the units under their control pose such risks for their residents, and where appropriate, take steps to provide alternative housing for affected residents and coordinate with the relevant local, state and federal agencies to remediate those environmental risks.

To address these and related concerns, we recommend the following amendments to the provisions of the proposed rule that address the content of the Equity Plan for PHAs.

Recommendations:

1. Amend the first sentence of § 5.154(e) Content: Analysis – public housing agencies to read as follows: “PHAs must include in their Equity Plan an analysis of the area in which the PHA operates, whether the PHA operates in all parts of its authorized service area, and the PHA’s programs, including public housing, any projects that have been or are under development through the Rental Assistance Demonstration, and any other housing owned or operated by the PHA.”

³⁸ Emily Coffey, Kate Walz, Debbie Chizewer, Emily A. Benfer, Mark N. Templeton and Robert Weinstock, *Poisonous Homes: The Fight for Environmental Justice in Federally Assisted Housing*. Shriver Center on Poverty Law and Earthjustice, June 2020.

2. Amend § 5.154(e)(1)(ii)(A) to read, "What are the current demographics of the occupants of different categories of other PHA owned or administered housing, and how have those demographics changed over time?"
3. Amend § 5.154(e)(1)(ii)(B) to read, "What are the current demographics of the occupants of different categories of other publicly supported housing in the PHA's geographic area of analysis, and how have those demographics changed over time?"
4. Amend § 5.154(e)(1) Demographics, subsection iii(A) and *other sections as appropriate* as follows to make them consistent with the defined term "Publicly Supported Housing."
5. Amend § 5.154(e)(1)(iii)(A) to read, "How do patterns of segregation and integration in the geographic area of analysis align with the demographics and location of publicly supported housing ~~developments~~?"
6. Amend § 5.154(e)(3)(iii)(A) as follows: "How many units of the PHAs' publicly supported housing are located in R/ECAPS?"
7. Add the following question to § 5.154(e)(3)(iii)(A): "How many units of the PHA's publicly supported housing are located outside R/ECAPS?"
8. Where Housing Choice Vouchers are mentioned throughout this section, the Proposed Rule should be amended to include all forms of vouchers administered by the PHA, including not just Housing Choice Vouchers, but also VASH vouchers, NED vouchers and any others administered by the PHA.
9. Add a question about whether or not the PHA offers residents access to the Section 8 homeownership program and what efforts it makes to work with lenders to ensure access to safe and sustainable mortgages for voucher holders who wish to participate in the program.
10. Include a question about any units under the PHAs control are located on or near sites where environmental hazards pose significant health risks to the residents. If there are such units in the PHA's inventory, the Proposed Rule should ask further questions about whether the PHA has informed those residents of the risks they face, made alternative units available, and made plans and/or taken steps to mitigate those hazards.

Content: Fair housing goals § 5.154(g) – A regulation is not the best medium through which to provide program participants with detailed or comprehensive guidance about potential fair housing goals for the different goal categories. This is evidenced, in part, by the considerable variation in the number and level of detail for the different types of fair housing goals that are provided in this section for illustrative purposes. Such variation may lead program participants to overemphasize some types of goals, underemphasize or overlook others, and disregard goals that may be important for their communities, but which are not mentioned in the Proposed Rule. For these reasons, NFHA recommends that the examples of fair housing goals be deleted from the rule and included in accompanying guidance.

Recommendation:

1. Eliminate the examples of fair housing goals from the Proposed Rules and provide them to program participants in guidance instead.

Progress evaluation § 5.154(i) – Under the rule, program participants must conduct and submit annual progress evaluations to HUD. The rule requires program participants “engage in continual evaluation of their progress . . . to determine whether any changes, adjustments, or new information requires a revision to the Equity Plan or a subsequent planning document.”³⁹ The rule provides that annual progress evaluations must be provided to HUD.⁴⁰ The progress evaluations must detail “[a]n evaluation of the progress on each goal established in the prior Equity Plan,” “[a]n identification of any barriers that impeded the progress or achievement of the fair housing goals,” “[a] description of any changes or adjustments to the goals undertaken during the prior Equity Plan cycle and how those changes or adjustments impacted the progress toward achievement of the goal,” “[a] description of HUD funds or other Federal, State, local funds, or philanthropic support that were used toward achievement of the goal; and “[a]n explanation of the outcomes based on the achievement of the goal.”⁴¹

We fully support the requirements for progress evaluation included in the rule. This is an improvement over the 2015 rule, which did not provide a comparable annual progress reporting requirement. This requirement will help ensure that program participants are working diligently to accomplish the goals they have set out, keeping them accountable both to HUD and to their communities. This provision of the rule is especially important since most Equity Plans will cover a five-year period, which is a relatively long time – too long to go without any updates on program participants’ progress. The annual progress evaluations will also allow for course corrections to be made in a timely manner, where needed.

Publication § 5.154(j) – NFHA supports HUD’s plan to maintain an AFFH website where all submitted Equity Plans will be posted for public view, along with HUD’s action on the plan and the annual progress evaluation. We also support HUD’s suggestion of providing a technical assistance website to post and identify information and updates, best practices, and recommend that HUD create a facilitated opportunity, perhaps by conference call, for discussion about issues and solutions among program participants and the public, particularly local and national advocates.

We also commend the provisions of the Proposed Rule that state that the Equity Plans, progress reports and HUD notifications regarding the Equity Plan are public documents that will be published on a HUD-maintained website. HUD also encourages program participants to publish HUD-approved Equity Plans on their websites in a manner that is accessible to people to disabilities and people who have limited English proficiency.⁴² It is critically important for HUD to consider additional ways to publish the Equity Plans as there are broad swaths of the nation that lack reliable broadband access.

³⁹ Proposed Rule at § 5.156(i)(1).

⁴⁰ *Id.* at § 5.156(i)(2).

⁴¹ *Id.*

⁴² *Id.* at § 5.154(j)(2).

Publishing Equity Plans on HUD-maintained websites may prove to be a useful, centralized source for finding progress evaluations and making comparisons between them. However, we urge HUD to also require, rather than simply encourage, program participants to make these reports publicly available on their own websites and in other public mediums. This is an important step to facilitate access to those reports by local stakeholders and to increase their value as a mechanism for local accountability.

The Proposed Rule provides that members of the public may submit comments to HUD during its review of draft Equity Plans.⁴³ This will allow community stakeholders to alert HUD to potential problems that require particular review. Those could include a program participant's failure to adhere to the community engagement requirements of the rule, consider important local data or knowledge that has been brought to its attention, address concerns raised during the development of the plan, set goals that will result in meaningful action and measurable results, or other flaws in the development of the Equity Plan.⁴⁴ Establishing a mechanism through which community stakeholders can flag issues of concern early on will allow HUD to take corrective action when needed before a plan is finalized. This, in turn, will improve the quality and effectiveness of Equity Plans and enhance HUD's oversight capacity.

Recommendation:

1. Insert "required" instead of "encouraged" in proposed § 5.156(j)(2). The revised regulation would state, "Program participants are also required to post their HUD-accepted Equity Plans on their official websites and in other public mediums, in formats that satisfy civil rights requirements including title VI of the Civil Rights Act of 1964 and the regulation at 24 CFR part 1; section 504 of the Rehabilitation Act of 1973 and the regulation at 24 CFR part 8; and the Americans with Disabilities Act and the regulations at 28 CFR parts 35 and 36, as applicable."

Equity Plan incorporation into subsequent planning documents (§ 5.156)

The Proposed Rule states the requirement that the strategies adopted in the Equity Plan must be incorporated into the Consolidated Plan and PHA plan and the resources (from HUD and elsewhere) that will be allocated to implementing those strategies must be identified in those plans. Further, the annual progress evaluations under the Equity Plan and the annual action plans must detail the progress that has been made toward achieving the goals of the Equity Plan. This is a stronger and more straightforward set of requirements than the 2015 rule contained and will be important for measuring progress and providing accountability. We specifically recommend that these provisions remain in the final rule.

We agree that program participants must include their goals, proposed meaningful actions and implementation strategies in their planning documents such as the

⁴³ *Id.* at § 5.154(j)(3).

⁴⁴ *Id.*

Consolidated Plan and, for public housing agencies, in the PHA Plan. We agree that the Annual Action Plan need only include strategies and meaningful actions that are intended to be taken or funded in that particular year. We suggest that although HUD has identified several strategies and meaningful actions in § 5.156(b), this list is merely illustrative and HUD should eliminate it here. More detailed examples should be provided by HUD in technical assistance documents.

Subsections (b) and (e) are inconsistent. Subsections (a) and (b) appear to require both goals and meaningful actions and strategies to be included in Consolidated Plans, Annual Action Plans and PHA plans. Subsection (e) only addresses a failure to incorporate fair housing goals into a Consolidated Plan or PHA plan. Annual Action Plans should be included here, at a minimum, because AAPs include funding commitments and updates. Moreover, subsection (e) only provides for penalties when HUD determines that the fair housing goals from the Equity Plan have not been incorporated into plans, seemingly meaning Consolidated Plans and PHA plans and not mentioning Annual Action Plans. Moreover, as written, the HUD penalties only apply when fair housing goals from the Equity Plan have not been incorporated into “subsequent” plans. Sanctions should be available and used when fair housing goals, strategies and meaningful actions have not been incorporated into any HUD-required planning document.

We recommend that HUD’s Office of Fair Housing and Equal Opportunity be instructed and authorized through appropriate delegations of authority to have the sole authority to determine whether or not a Consolidated Plan, Annual Action Plan, PHA Plan or other planning document is complete and includes the required fair housing goals, strategies and meaningful actions.

We recommend that HUD provide templates or formats for inclusion of goals, strategies and meaningful actions in program participant documents for submission of Consolidated Plans, Annual Action Plans and PHA Plans.

The Proposed Rule also requires grantees to incorporate the strategies from their Equity Plans into other plans that may be required in conjunction with the receipt of other types of Federal financial assistance. This appears to refer to funding from agencies other than HUD, such as the Department of Transportation. This is an important first step toward ensuring the broad reach of AFFH to all federal agency programs and activities related to housing and urban or community development. HUD should clarify how it will coordinate with other federal agencies to implement this requirement.

Recommendations:

1. Amend § 5.156(b) to remove the list of Strategies and Meaningful Actions from this Section and add them to a separate section of the Final Rule, or define them, providing examples.

2. Amend § 5.156(e) to include a failure to include fair housing goals, strategies and meaningful actions in a Consolidated Plan, Annual Action Plan or PHA plan and provide for sanctions for all such failures.
3. Amend § 5.156(e) to provide for these sanctions when a program participant fails to act consistently with its adopted goals, strategies or meaningful actions or when it takes actions that are inconsistent with its established goals, strategies or meaningful actions.
4. Authorize FHEO to review and determine, in its sole authority, Consolidated Plans, Annual Action Plans and PHA Plans to determine their consistency with the Equity Plan's goals, and that the strategies and meaningful actions are consistent with the goals.
5. Amend § 5.156(c) to provide that HUD will coordinate its requirement that Equity Plan strategies be incorporated into other federal planning documents with other federal agencies through MOUs or other similar mechanisms.

Community engagement (§ 5.158)

The preamble to the proposed rule highlights community engagement as a “key component of the development of the Equity Plan,” and says that “the community engagement process is intended to be a robust discussion across all sectors of the community so that program participants can make informed choices about how to overcome existing fair housing issues, such as barriers to fair housing choice, and make equitable funding decisions.”⁴⁵ We note that decisions relevant to the Equity Planning process extend beyond those relating to funding; they also affect laws, ordinances, policies and practices relating to housing and community development. Nonetheless, we support the emphasis on a robust community engagement process. The experience under the 2015 AFFH rule was that the best plans were produced with just such engagement.

The provisions of § 5.158 require grantees to be proactive in engaging with their communities, recognizes that some community members may not be familiar with the AFFH mandate and requires grantees to help them understand its intent, and acknowledges that community residents are in a unique position to offer insights into local fair housing issues. It requires grantees to use outreach methods that will reach the broadest possible audience, to make special efforts to reach members of protected classes that historically have been denied equal and/or equitable opportunity, and to conduct their community engagement efforts in ways consistent with federal fair housing and civil rights statutes, so that they address the barriers that impede the ability of people with disabilities, those with limited English proficiency and others to participate fully in the Equity Planning process. It requires grantees to ensure that community members have an opportunity for involvement in determining how the fair

⁴⁵ 88 Fed. Reg. 8537.

housing goals from the Equity Plan are incorporated as strategies and meaningful actions in the ConPlan, PHA plan and other planning documents.

This is exactly the combination of elements critical to a successful community engagement effort, and NFHA supports the vision articulated in this section of the rule. However, the mechanics of the community engagement process, as discussed in more detail below, are not designed in a manner to yield the desired result, and we urge HUD to make the necessary changes to ensure this vision of a community engagement process becomes a reality under the AFFH regulation. There are three key elements that must be clarified: the range of individuals and organizations with whom program participants must engage, the timing and methods by which they should do so, and the specific roles that local stakeholders should play in setting priorities among fair housing issues. We address each of these below.

1. **Types of individuals and organizations to be engaged.** There are four groups of stakeholders that should be involved in the community engagement effort for any Equity Plan. Those include members of protected classes and organizations that represent them, fair housing groups and others engaged in fair housing enforcement, agencies and organizations that provide members of protected classes with housing, health and other services relevant to the fair housing goal categories, and agencies and organizations engaged in work related to the various categories of community assets (transportation, education, employment, environment, etc.). Each of these sets of stakeholders can provide program participants with important insights and information relevant to the Equity Plan. However, the proposed rule does not clearly articulate these groups of stakeholders as those with whom program participants should engage when developing their Equity Plans.

The community engagement provisions of the 2015 AFFH rule did a better job in this regard, although it did so in a somewhat fragmented manner that could be confusing and should not be repeated here. That rule stated that jurisdictions “*shall consult with other public and private agencies that provide assisted housing, health services, and social services (including those focusing on services to children, elderly persons, persons with disabilities, persons with HIV/AIDS and their families, homeless persons), community-based and regionally-based organizations that represent protected class members, and organizations that enforce fair housing laws.*”⁴⁶

In the amendments to the ConPlan regulations, the 2015 rule went on to state that in preparing both the ConPlan and the AFH, “*The jurisdiction shall consult with community-based and regionally-based organizations that represent protected class members, and organizations that enforce fair housing laws, such as State or local fair housing enforcement agencies (including participants in the*

⁴⁶ 24 C.F.R. § 91.100(a)(1) (emphasis added).

Fair Housing Assistance Program (FHAP)), fair housing organizations and other nonprofit organizations that receive funding under the Fair Housing Initiatives Program (FHIP), and other public and private fair housing service agencies, to the extent that such entities operate within its jurisdiction.”⁴⁷ Together, these provisions clearly established the expectation that jurisdictions must consult with fair housing organizations and other organizations that have deep knowledge of and extensive experience with fair housing enforcement, as well as an understanding of the fair housing issues and trends in the area. In addition, that consultation was required to include groups that represent members of protected classes and therefore have firsthand knowledge of the barriers to fair housing they encounter, as well as other organizations that serve protected classes and are in a position to offer insight into their needs on a range of issues that intersect with housing and are appropriate to consider during the fair housing planning process.

Where the language cited above appears in the proposed rule, it refers only to the ConPlan, not to the Equity Plan—the process for which this input is most important, as it determines which goals, strategies and actions will be included in the ConPlan.

The proposed rule’s community engagement requirements for the Equity Plan, in contrast, offer much less detail and specificity about the groups with which grantees must consult during the Equity Plan process. It includes general language about engaging with members of the community or the public at large (§ 5.158(a)(1)) or engaging with a wide variety of diverse perspectives (§ 5.158(a)(6)). This language does not provide the same degree of the clarity and specificity as the 2015 rule, and raises concerns that grantees will not, in fact, consult with those organizations and individuals that best understand local fair housing and related concerns or those that represent protected class members themselves, and best understand their lived experiences and the barriers they face.

The proposed rule does require grantees to, “Connect with and provide information about fair housing planning to local community leaders, which may include, but are not limited to advocates, community-based organizations, clergy, healthcare professionals, educational leaders or teachers, and other service providers such as social workers and case managers to provide and solicit the views of the communities they serve.” However, the reference here to “advocates” and “community-based organizations” is both broad and vague and does not compel the robust engagement jurisdictions and public housing agencies should have with fair housing organizations and groups that represent protected class members and that should be central to the fair housing planning process. Nor does it require grantees to expressly incorporate critical feedback from fair housing experts in the development of strategies and goals for the

⁴⁷ *Id.* at §91.100 (a)(3)(e) (emphasis added).

Equity Plans. Further, the phrase “to provide and solicit the views of the communities they serve” is confusing. While these types of individuals may have useful insights to share, getting their input should not be a substitute for directly soliciting the views of affected communities, as this language seems to suggest.

We recommend that the final rule include the language from 24 C.F.R. §§ 91.100(a)(1) and § 91.100(a)(5)(e) in the community engagement provisions of § 5.158. Similar revisions should be made to the community engagement requirements for PHAs. This will ensure that grantees consult with the organizations and individuals best positioned to offer informed input as the grantees go through the various stages of developing their Equity Plans.

2. **How and when to engage with the community.** The proposed rule states at § 5.158(c)(1) that grantees must engage with their communities prior to and during the development of the Equity Plan. § 5.158(d)(1) states that they must hold at least 3 public meetings during the development of the plan and § 5.158(d)(2) requires that they hold at least 2 public meetings in developing their annual progress evaluations. We recommend that HUD provide grantees with more specificity about the points during the Equity Planning process at which they should engage with their communities. These would include prior to the development of the plan, during the drafting stage, and to solicit feedback on the draft once it is completed.

We also recommend that HUD reconsider the number of meetings grantees are required to hold. In some smaller jurisdictions, three meetings may be sufficient. But for grantees that serve large populations or large geographic areas, that number is too low to allow for meaningful participation by the affected communities.

Further, we recommend that HUD provide greater direction and flexibility about the various formats that may be used to engage the community. The use of the term “public meeting” rather than “public hearing” suggests that formats that are less formal than the traditional public hearing may be acceptable, which is a positive change. However, experience under the 2015 rule and during the pandemic suggests that a wider variety of formats—including smaller, targeted focus groups and virtual meetings that do not require participants to travel from their homes—may enhance the opportunity for meaningful engagement by a range of community members.

§ 5.158(a)(7) reminds program participants that their community engagement efforts must comply with fair housing and civil rights requirements, including Title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the regulations implementing those statutes. Together, these statutes and their regulations are intended to ensure that people who are not proficient in English and people with disabilities have the resources they need to engage fully in the Equity Planning process. This is extremely important, as these groups represent protected classes who

often encounter significant barriers in accessing the housing and community assets they need. As such, their views and experiences should inform the Equity Plan.

This message would be clearer if stated directly, rather than simply by reference to other statutes. While those statutory references are useful, most members of the public and many public officials are unlikely to have those references at hand and may not be familiar with their requirements. The proposed rule should simply state that *community engagement must be conducted in a manner to enable full participation by people with disabilities and those with limited English proficiency*, as required under Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the regulations implementing those statutes.

3. **Clarifying the role of community stakeholders in setting priorities** among the fair housing issues identified. Decisions about which issues should be given priority will determine what goals and strategies are to be incorporated into the final Equity Plan. As currently drafted, the proposed rule states that community members must have the opportunity to provide meaningful input into the identification of fair housing issues, which occurs earlier in the planning process, and the setting of fair housing goals to address those issues, which occurs later.⁴⁸ However, the Proposed Rule fails to require that community members have the opportunity to provide meaningful input into the critical interim stage: the establishment of priorities among fair housing issues. Program participants may identify many fair housing issues in any goal category and the rule is clear that HUD does not expect them to set goals for each and every issue identified. Therefore, unless community stakeholders have input into setting priorities among those issues, the Equity Plans may fail to elevate those fair housing issues that community stakeholders find most pressing. We recommend that HUD correct this oversight in the final rule. In addition, we recommend that HUD clarify that community stakeholders should have input into the strategies that are adopted to achieve those goals.

In § 5.158(a)(3), the Proposed Rule states that program participants may combine the community engagement efforts required for the Equity Plan with those required for other HUD programs and processes. The most common and the most pertinent of those are the Consolidated Plan with its Annual Action Plan and the PHA plan. The provision notes that if a program participant combines these community engagement efforts, they must “explain the Fair Housing Act’s affirmatively furthering fair housing duty and ensure the engagement regarding the Equity Plan meets all of the criteria set forth” in the rule.

While the idea of combining community engagement efforts for more than one planning requirement may be attractive to some program participants, the reality is that it will be

⁴⁸ Proposed Rule at § 5.158(a)(1).

nearly impossible to do so effectively. The types of input, likely stakeholders, and formats for engagement that are needed to comply with the community engagement requirements of the Equity Plan are significantly different from those other plans. Those plans focus on how HUD funding will be spent, while the Equity Planning process seeks to engage community stakeholders in an effort to identify barriers to fair housing and equitable access to opportunity, which is a significantly different kind of interaction. The stakeholders that are typically involved in the ConPlan process, in particular, are those organizations that receive funding through the programs covered by that plan. A different and broader set of stakeholders must be involved in the Equity Planning process. And the ConPlan process involves a formal hearing during which stakeholders can offer their views about the Plan, while the Equity Planning process requires a more varied set of formats for interaction in order to allow for meaningful engagement by a wide range of stakeholders.

Further, the timelines of the respective planning processes may not align, as the Equity Plan must be submitted to HUD one year in advance of the ConPlan or PHA plan, which means that community engagement efforts must take place even earlier. In all, it is difficult to see how the two can be combined and still comply with the requirements of this section. Program participants that attempt this approach may be at risk of having their Equity Plans rejected for failure to comply with the community engagement requirements. We recommend HUD delete this section from the final rule.

Recommendations:

1. HUD should provide grantees with more specificity about the points during the Equity Planning process at which they should engage with their communities, namely prior to development of the Equity Plan, during the drafting stage, and after the draft is complete but before it is submitted to HUD.
2. The rule should guide program participants to consider a range of formats for community engagement, including small group meetings, focus groups, virtual and/or hybrid meetings, among others, to facilitate engagement with a variety of stakeholders.
3. HUD should consider amending the requirement that program participants hold three meetings while they are developing their Equity Plans, as that number may be too low for program participants that serve large populations or large geographic areas.
4. Rather than relying on references to relevant civil rights statutes that apply to the community engagement process, the rule should state directly that *community engagement must be conducted in a manner to enable full participation by people with disabilities and those with limited English proficiency*, as required under Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and the regulations implementing those statutes.
5. HUD should amend the rule to clarify that community stakeholders should have input into the decisions about which fair housing goals should be given the

highest priority, not just input into the earlier process of identifying what may be a large number of fair housing issues. HUD should also clarify that community stakeholders must have the opportunity for input into the later processes of setting goals and identifying strategies and meaningful actions to achieve them.

6. HUD should eliminate the provision that suggests that community engagement efforts for the Equity Plan can be combined with those for the ConPlan and/or PHA plan.

Submission requirements § 5.160

With respect to the publication of the Equity Plan, the Proposed Rule could be clearer if it requires HUD to describe the ways in which an accepted Equity Plan differs from the initially submitted Equity Plan, not just that it is different.

With respect to HUD's receipt of information submitted by the public during its review of a submitted equity plan with respect to whether the Equity Plan was developed in compliance with regulatory requirements as described, we support HUD's view on accepting this information and urge HUD to state affirmatively that it will consider this information in determining whether or not the submitted Equity Plan complies with the regulations. In that regard, we urge HUD to create a new Section of the Proposed Rule, § 5.155 contains the content described in current § 5.154(j)(3).

Recommendation:

1. Create a new Section of the Proposed Rule, § 5.155, essentially as written in current § 5.154(j)(3) which states that HUD will accept and consider information from the public during its review of the submitted Equity Plan and may rely on such information in making a decision on whether or not to accept a submitted Equity Plan.

Submission Requirements (§ 5.160)

With respect to program participants who are required to update or conduct an Analysis of Impediments (AI) or an Assessment of Fair Housing (AFH) as described in § 5.160(c), the Proposed Rule does not, but should, describe whether or when HUD will review those plans and the actions that HUD will take if such plans are not accepted. At a minimum, the new or updated document should include an update on previous recommendations and goals from earlier AIs or AFHs. HUD should also require that these documents be subject to the community engagement requirements in the final rule.

Recommendations:

1. Amend § 5.160(c) to require that submissions of AIs and AFHs after the effective date of the Final Rule are required to comply with the public engagement requirements in the Final Rule.
2. HUD should also amend the Section to provide a commitment that HUD will review these updated plans and related documents, provide technical assistance and take identified actions for any program participant that does not make such a submission.

Review of Equity Plans (§5.162)

HUD's provision of examples of a basis to not accept an Equity Plan is helpful, but incomplete. It would be helpful to develop and have in one location all of the criteria by which an Equity Plan will be reviewed. We recommend that HUD's examples be revised into criteria that include, but are not limited to, the items that HUD references as examples in § 5.162(b)(i). We recommend addition of a criterion that makes the basis of a decision not to accept an Equity Plan that fails to include goals or strategies that will lead to meaningful actions to address significant disparities in housing needs and access to opportunity, or replace segregated living patterns with truly integrated and balanced living patterns, or transform racially or ethnically concentrated areas of poverty into mixed income, well-resourced areas, or foster and maintain compliance with civil rights and fair housing laws, as described in the Final Rule.

Incentives, including public recognition, can be a helpful way to encourage program participants to use their best efforts in developing an Equity Plan. We particularly support the use of such incentives with respect to the availability of discretionary funding, if the funding is needed to accomplish the fair housing goals.

With respect to program participants that fail to have an accepted Equity Plan at the time the Consolidated Plan or the PHA Plan is due, HUD should confirm that the Responsible Civil Rights Official, not the program office, will determine whether or not a program participant has provided or complied with special assurances. In addition, § 5.162(e) should be amended to state "Failure to provide or comply with special assurances will constitute evidence that a program participant's AFFH certification is inaccurate . . . or that the program participant's AFFH certification is inaccurate." Finally, if there is not an accepted Equity Plan at the required time for approval of the Consolidated Plan or PHA plan, the rule should provide that the Secretary will challenge the validity of the AFFH certification.

Recommendations:

1. Amend § 5.162(b)(1) to replace examples with criteria for HUD's decision not to accept a submitted Equity Plan.

2. Amend § 5.162(b)(1)(v) to read, “The Equity Plan was developed without one or more elements of the required community engagement.”
3. Amend § 5.162(b)(1)(vii) to read, “The Equity Plan fails to identify or address one or more fair housing issues identified during community engagement.”
4. Amend § 5.162(e) to provide, “Failure to provide or comply with special assurances will constitute evidence that a program participants AFFH certification is inaccurate...or that the program participant’s AFFH certification is inaccurate....”
5. Amend § 5.162(e) to provide that “if there is not an accepted Equity Plan at the required time for approval of the Consolidated Plan or PHA plan, the Secretary will challenge the validity of the AFFH certification.”

Revising accepted Equity Plans (§ 5.164)

§ 5.164 sets out the circumstances under which previously accepted Equity Plans are required to be revised or may be revised voluntarily. The circumstances under which program participants would be required to revise their Equity Plans include a presidentially-declared disaster affecting the program participant’s jurisdiction that is expected to result in additional Federal financial assistance for the jurisdiction, under Title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.⁴⁹ Under those circumstances, program participants are required to submit a revised Equity Plan to HUD within two years of the disaster declaration, although HUD may extend that deadline, upon request, for two years.

As significant fair housing concerns have arisen in the wake of many major disasters,⁵⁰ it is appropriate for HUD to take affirmative steps to ensure that fair housing considerations are factored into the planning for disaster recovery and mitigation efforts. However, in order for such considerations to have an impact on the way disaster-related resources are used, HUD must align the requirements for revisions to the Equity Plan with the planning requirements associated with disaster recovery and mitigation funds. Currently, there is no set schedule by which Congress appropriates disaster-related funding, or by which HUD allocates those funds to the affected jurisdictions. Local plans for disaster response efforts may be developed in less than two years after a disaster declaration, and disaster-related funds may start to flow before a program participant revises its Equity Plan and HUD reviews and accepts it.

⁴⁹ See 42 U.S.C. §§ 5121 *et seq.*

⁵⁰ See NFHA, *No Home for the Holidays: Report on Housing Discrimination Against Hurricane Katrina Survivors* (Dec. 20, 2005). See also *Fair Housing and Civil Rights Groups File Federal Lawsuit in Post-Katrina Housing Discrimination Case*, NAACP LDF (Nov. 12, 2008), https://www.naacpldf.org/wp-content/uploads/road_home_factsheet.pdf; John Henneberger, *Housing advocates tell HUD that TX Disaster recovery plan fails to disclose how the money will be spent*, Texas Housers (Mar. 4, 2009), <https://texashousers.org/2009/03/04/housing-advocates-tell-hud-that-tx-disaster-recovery-plan-fails-to-disclose-how-the-money-will-be-spent/>; *Advocacy Groups Settle Civil Rights Complaint Against State of New Jersey Involving Superstorm Sandy*, Relman Colfax PLLC (May 30, 2014), <https://www.relmanlaw.com/news-Sandy>.

Further, as the proposed rule is currently structured, there is no specific requirement for any plans that are required as a condition for receiving disaster-related funds to incorporate any relevant goals, strategies or actions from the program participant's Equity Plan.

To ensure that decisions about how to use disaster-related funds are consistent with program participants' AFFH obligations, HUD must better align the revision of the Equity Plan and the development of plans for using disaster recovery and mitigation funding. It should require that Equity Plans be revised before or simultaneously with any plans are developed for the expenditure of disaster funding, and that those plans for the use of disaster recovery funds incorporate the relevant goals of the Equity Plan. In the absence of such alignment, the two planning processes may proceed at different speeds and on separate tracks. By the time the Equity Plan is revised and accepted, it may be too late to ensure that its goals have helped to shape the plans for spending the disaster recovery and mitigation funds. Alignment of the two planning processes is particularly important given that the amount of funding that flows through disaster recovery programs can dwarf the typical annual allocations under CDBG and other housing programs, and that people in communities of color may be both most vulnerable to the impacts of disasters and least likely to be able to recover from disasters without equitable access to federal disaster-related funding.⁵¹ The result is that disasters may serve to widen the racial wealth gap in affected communities, an outcome that is inconsistent with the AFFH mandate.

In addition, while § 5.164 acknowledges the relationship between federal funds program participants in disaster-affected areas may receive and those program participants' Equity Plans, it fails to address other circumstances in which program participants may receive additional federal funding for purposes related to housing and urban development. In the last several years, Congress has appropriated enormous amounts funding for housing and community development purposes: the American Rescue Plan included more than \$46 billion for the Emergency Rental Assistance Program and nearly \$10 billion for the Homeowner Assistance Fund. The Inflation Reduction Act included \$369 billion for energy efficiency and climate resilience purposes that are clearly related to housing and community development. Some of the funding appropriated under the \$1.2 trillion Infrastructure Investment and Jobs Act (also known as the Bi-partisan Infrastructure Law) will be used for community development purposes. Yet, for the most part, none of these programs and activities have or will incorporate AFFH considerations into the decisions about how and where these funds will be spent. The failure to do so represents an enormous lost opportunity to advance the goals of the Fair Housing Act.

⁵¹ Christopher Flavelle, *Why Does Disaster Aid Often Favor White People?*, N.Y. Times (June 7, 2021), <https://www.nytimes.com/2021/06/07/climate/FEMA-race-climate.html>; *Natural disasters widen racial wealth gap*, Rice U. (Aug. 20, 2018), ; Manny Fernandez, *A Year After Hurricane Harvey, Houston's Poorest Neighborhoods Are Slowest to Recover*, N.Y. Times (Sept. 3, 2018), <https://www.nytimes.com/2018/09/03/us/hurricane-harvey-houston.html>.

To ensure that future infusions of federal resources into local communities avoid this problem, HUD should amend this section of the rule to direct program participants to revise their Equity Plans in the event of any significant new infusion of federal funds for purposes related to housing and community development. Further, to provide certainty about when this requirement will apply, HUD should notify program participants, per § 5.164 (a)(1)(11), when federal funding triggers this requirement, and per § 5.156(c), HUD should require the goals of the Equity Plan to be incorporated into any plans required in conjunction with the receipt of funding under such programs.

Such efforts to ensure that fair housing considerations inform the deployment of such significant new infusions of federal funding would be facilitated by the establishment of infrastructure at the federal level to facilitate coordination among federal agencies. To that end, NFHA recommends that HUD enter into memoranda of understanding with its key sister agencies to coordinate the planning and program requirements that will be associated with funding that may flow in the future, as well as the monitoring and oversight of the use of such funds at the state and local levels. That includes the Department of Transportation, the Treasury Department and the Environmental Protection Agency, among others.

Recommendations:

1. HUD should align the requirements to revise Equity Plans after a presidentially-declared disaster with the planning requirements associated with disaster recovery programs to ensure that the latter effectively incorporate the relevant goals of the revised Equity Plans.
2. HUD should expand the circumstances under which Equity Plans must be revised to include major new infusions of federal funds for housing and community development-related purposes, such as those that occurred under the American Rescue Plan, the Inflation Reduction Act and the bi-partisan infrastructure bill.
3. When such funding is made available, HUD should require program participants to incorporate goals from their revised Equity Plans into any plans required in conjunction with the receipt of that funding.
4. HUD should enter into memoranda of understanding with other federal agencies to coordinate the planning requirements for such funding to ensure they incorporate fair housing considerations, as well as the procedures for oversight and monitoring of the use of those funds by program participants.

Certifications (§ 5.166)

There is a significant body of law that addresses HUD's authority to act when a program participant acts in a way that is inconsistent with the obligation to AFFH. We urge HUD to include in its final rule discussion of case law where HUD's efforts to affirmatively further fair housing has been upheld by courts or acceded to by grantees. These decisions help frame the scope of the AFFH obligation as well as support HUD's actions to assure compliance with the obligation through the enforcement of certifications. HUD's recognition of these decisions will be important justifications for actions that it

takes in moving ahead with a final Rule, and for future actions that it may take to enforce it.

For example, the Second Circuit has supported HUD actions in relation to the AFFH obligation in a series of decisions.⁵²

These holdings, and others, support HUD's rejection of certifications by grantees in the future based on evidence that a program participant is failing to AFFH.

HUD is authorized to require that a program participant take specific actions to analyze and evaluate local policies and to develop a plan to overcome any discriminatory practices and to take adverse action when a certification by the program participation is inaccurate.

Thus:

No federal law *requires* HUD to accept a jurisdiction's AI, particularly if HUD concludes that the analysis on which the AI is based is unreliable or methodologically unsound. Rather, the statute requires that a jurisdiction's certification to HUD be accurate and based on "supporting evidence," and HUD is permitted to reject a housing strategy as "substantially incomplete" if it decides that the AI and the associated certification are flawed or inaccurate.⁵³

Reliance on this judicial analysis will assist HUD in making changes to the Proposed Rule to support compliance with obligation to affirmatively further fair housing.

⁵² See, e.g., *United States ex rel. Anti-Discrimination Ctr. Of Metro N.Y., Inc. v. Westchester Cty.*, No. 06cv2860 (DLC), 2016 WL 3566236 (S.D.N.Y. June 27, 2016), *aff'd sub nom. United States v. Westchester Cty.*, No. 16-2272-cv, 2017 WL 78458 (2d Cir. Jan. 9, 2017) (public education provisions); *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, No. 06cv2860 (DLC), 2016 WL 3004662 (S.D.N.Y. May 24, 2016) (appeal filed July 22, 2016) (requirement to use "all available means" to ensure development of 750 housing units); *Cty. of Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 116 F. Supp. 3d 251 (S.D.N.Y.), *aff'd*, 802 F.3d 413 (2d Cir. 2015) (requirement to submit analysis of impediments "deemed acceptable by HUD"); *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, No. 06cv2860 (DLC), 2012 WL 1574819 (S.D.N.Y. May 3, 2012), *aff'd*, 712 F.3d 761 (2d Cir. 2013) (failure to promote source-of-income legislation). See also *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester Cty.*, 495 F. Supp. 2d 375, 376 (2007), holding that a grantee that certifies to the federal government that it will affirmatively further fair housing as a condition to its receipt of federal funds must analyze "the existence and impact of race discrimination on housing opportunities and choice in its jurisdiction," recognizing that false certifications of compliance with the AFFH obligation made in an Action Plan submission were material to a False Claims Act claim. See also, *County of Westchester v. U.S. Department of Housing and Urban Development*, 802 F.3d 413 at 421 (2d Cir. 2015), upholding HUD's withholding of funds for three funded programs on the basis that HUD had found that the jurisdiction failed to meet the annual requirement of certifying that it was affirmatively furthering fair housing, in a decision based on an external analysis of the County's actions.

⁵³ *Cnty. of Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 802 F.3d 413, 433 (2d Cir. 2015).

Recommendations:

1. Use existing law to develop concrete and clear standards to determine when and on what basis HUD will reject a certification.
2. Authorize a certification to be rejected if it is based on a false or insufficient submission.
3. Authorize a certification to be rejected for failure to follow one or more of the required citizen participation elements.

HUD's analysis of challenges to certifications is an important addition to its rulemaking on the obligation to affirmatively further fair housing. We note, however, that the language for challenging a PHA's certification is not parallel to some of the important language that applies to consolidated plan program participants. For example, the PHA section could read "If HUD has evidence that challenges the validity of a PHA's certification, the Secretary will provide written notice that HUD intends to reject the PHA's certification."

HUD's language with respect to PHAs fails to identify clearly that a PHA must provide evidence that provides a legal defense to HUD's evidence and establishes that it has complied with the regulatory requirements that apply to PHAs with respect to the obligation to AFFH. HUD's language with respect to remedies is weak and includes consideration of the PHA's circumstances and characteristics of its housing stock—all irrelevant to a certification about compliance with civil rights requirements. HUD should require the PHA to take steps that are appropriate in the circumstances to resolve the failure to comply with its certification and omit the exculpatory language found in the Proposed Rule.

Recommendation:

1. Amend § 5.166 (b)(2) to strengthen and clarify the language regarding notice to PHAs about evidence that challenges the validity of a certification, clarifies the language about the PHA's response to allow it to comment and submit additional evidence, and eliminate language that is irrelevant to a decision about compliance with the regulations.

Compliance procedures (§ 5.170)

NFHA strongly supports the Proposed Rule's provision for a complaint process in §5.170. NFHA has previously urged HUD to "provide a process by which interested members of the public can file a challenge with HUD in cases where they raise legitimate concerns and provide evidence that indicates that a participant has failed to meet the requirements of the regulation or failed to meet its obligation to affirmatively further fair housing."⁵⁴ This backstop is especially necessary given the insufficiency of

⁵⁴ National Fair Housing Alliance, Comment Re: Docket No. FR-5173-P-01, Affirmatively Furthering Fair Housing (Sep. 17, 2023).

HUD's staffing levels to process and review equity plans. For example, HUD's Office of Fair Housing and Equal Opportunity had 548 full-time employees (FTEs) in 2022,⁵⁵ down from 750 FTEs in 1994. Section 5.170 provides such a process, representing a crucial improvement upon previous regulations that omitted such a mechanism.

To ensure that the complaint process is effective—and that the Proposed Rule is enforced—the complaint process must be maintained. In particular, NFHA emphasizes the importance of the provision for complaints submitted by “an individual, association, or other organization[.]”⁵⁶ While violations of AFFH obligations may and do cause acute harm to individuals, their impact is likely to be more diffuse than violations of other civil rights statutes and regulations, decreasing the likelihood of individual complainants.

Consequently, the Proposed Rule necessarily authorizes submission of complaints by organizational entities, many of whom possess the technical knowledge and organizational impetus to uncover and submit complaints concerning violations. Fair housing organizations are especially well positioned to know what fair housing issues are prevalent in a given jurisdiction: in 2022, 80 NFHA member organizations processed 22,674 housing discrimination complaints—representing 72.64% of all complaints filed nationwide, more than 2.6 times the number processed by state, local, and federal government agencies combined.⁵⁷ Indeed, the prefatory text to the Proposed Rule recognizes that “during implementation of the 2015 AFFH Rule, . . . fair housing groups and other non-profit organizations[] assisted program participants in analyzing and understanding HUD-provided data for purposes of identifying fair housing issues and establishing fair housing goals in their AFHs.”⁵⁸ The complaint process prudently leverages the assistance of these organizations to ensure that the Proposed Rule is effectively carried out.

This enthusiastic support for § 5.170 notwithstanding, NFHA supports a few changes to the section to ensure that the complaint process operates as intended.

Borrowing from the analogous regulations implementing the Housing and Community Development Act of 1974 (“HCD Act”)⁵⁹ and the Rehabilitation Act,⁶⁰ the Rule should incorporate a concrete deadline by which HUD will complete its investigation of a filed complaint. The Rule should also incorporate a deadline by which HUD will review complaints for acceptance, rejection, or referral.⁶¹ Already, over 2,000 fair housing complaints were newly or already “aged cases” in 2021—meaning the investigation was not completed within the prescribed 100-day deadline—representing the highest mark

⁵⁵ HUD, 2024 BUDGET IN BRIEF 31 (Mar. 13, 2023),

<https://www.hud.gov/sites/dfiles/CFO/documents/2024-Budget-in-Brief-Final.pdf>.

⁵⁶ Proposed Rule at § 5.170(a)(1).

⁵⁷ NFHA, 2022 TRENDS REPORT 4 (Nov. 30, 2022), <https://nationalfairhousing.org/wp-content/uploads/2022/11/2022-Fair-Housing-Trends-Report.pdf> at 4.

⁵⁸ 88 Fed. Reg. 8520 n.4.

⁵⁹ See 24 C.F.R. § 6.11(a)(8).

⁶⁰ See 24 C.F.R. § 8.56(g).

⁶¹ See 24 C.F.R. § 8.56(e)(1)(i) (applying such a deadline for Rehabilitation Act complaints).

since 2014.⁶² The omission of any deadlines from the Proposed Rule would likely result in complaints languishing indefinitely, especially if priority is given to complaints filed through other channels that do come with prescribed deadlines. In addition, the Rule should explicitly allow for amendment to complaints at any time, as is allowed under regulations implementing the HCD Act⁶³ and the Rehabilitation Act.⁶⁴

Further clarity is needed regarding the Proposed Rule's statute of limitations. NFHA supports a statute of limitations that is longer than those in analogous regulations, given the latent nature of violations that may not be immediately apparent. For the same reason, NFHA supports the allowance of an extension for good cause. Still, more concrete guidance is necessary. Some violations of the Rule—such as a failure to respond to certain questions included in § 5.154 or abide by the community engagement procedures in § 5.158—may be triggered by discrete incidents. But other violations—such as a program participant's noncompliance with its equity plan commitments or actions inconsistent with the obligation to affirmatively further fair housing—are likely to be more oblique. In many instances, such violations may not become apparent until after the 365-day statute of limitations has expired, in large part because they often stem not from action but from *inaction*. Section 5.170(a)(3) should therefore clarify that complaints regarding ongoing violations will not be time-barred simply because there has not been a concrete triggering incident within the limitations period.

Although the complaint process provides an important mechanism, HUD must also take an active role in ensuring ongoing compliance with the Rule and with participants' equity plans. The Proposed Rule does contemplate that HUD officials “may periodically conduct reviews of program participants” in the absence of a complaint,⁶⁵ but does not establish a process or criteria regarding which participants would be subject to review and how frequently those reviews would be. Especially in jurisdictions where fair housing enforcement infrastructure is lacking, department-initiated reviews are necessary to induce compliance. While ongoing review of all program participants is not feasible, NFHA supports establishing a process under which HUD would randomly audit a subset of program participants each year. Such a process would both encourage compliance among all program participants and give HUD insight into the extent to which participants are complying with their obligations under the Rule.

The proposed voluntary compliance provision should be amended to ensure that complaints are sufficiently addressed. Proposed § 5.170(e)(1) states that a program participant may enter into a Voluntary Compliance Agreement “at any stage of processing” of a given complaint. Most concerning, the responsible official “may seek, in lieu of a Voluntary Compliance Agreement, assurances or special assurances of

⁶² See National Fair Housing Alliance, *supra* note 57, at 19.

⁶³ See 24 C.F.R. § 6.11(a)(6).

⁶⁴ See 24 C.F.R. § 8.56(c)(6).

⁶⁵ Proposed Rule at § 5.170(b)(1).

compliance.” At a minimum, this escape hatch for noncompliant jurisdictions must require a formal Voluntary Compliance Agreement, rather than unspecified “assurances.” Even where an entity is noncompliant with the Rule, complainants would be left with only a non-binding assurance of future action. This result would undoubtedly lead to outcomes in which assurances are insufficient or participants do not follow through on their assurances. If an investigation uncovers violations of the Rule, the responsible official must require entry into a compliance agreement at the very least to guard against future violations.

Recommendations:

1. Preserve and strengthen the complaint process in the final Rule, including the provision for complaints by associations and organizational entities.
2. Amend § 5.170(a)(2) to require that within twenty calendar days of acknowledgement of the complaint, the responsible civil rights official will review the complaint for acceptance, rejection, or referral to the appropriate Federal agency.
3. Further amend § 5.170(a)(2) to allow that complaints may reasonably and fairly amended at any time. Amendments to complaints such as clarification and amplification of allegations in a complaint or the addition of other recipients should be allowed at any time during the pendency of the complaint and any amendment should be deemed to be made as of the original filing date.
4. Clarify in § 5.170(a)(3) that complaints regarding an ongoing failure to affirmatively further fair housing will not be time-barred for want of a concrete “last incident” within the last 365 days.
5. Add to § 5.170(b) a requirement that the responsible civil rights official or his or her designee shall, within 180 days of receipt of the complaint, notify the recipient and the complainant (if any) of the results of the investigation.
6. Revise the language in § 5.170(b)(1) stating that HUD “may periodically conduct reviews of program participants” to “will periodically conduct reviews of a subset of program participants each year.”
7. Delete the following from § 5.170(e)(1): “The Responsible Civil Rights Official, in appropriate circumstances, may seek, in lieu of a Voluntary Compliance Agreement, assurances or special assurances of compliance. Any informal resolution shall include actions that will prevent the occurrence of such violations in the future.”

Procedures for effecting compliance (§5.172)

The Proposed Rule must include effective enforcement remedies to achieve its stated aims. Program participants have been under a legal obligation to affirmatively further fair housing for fifty-five years. The persistence of segregation and other barriers to fair housing choice across the country—due in large part to the actions of program

participants⁶⁶—reveals the inadequacy of such obligations without strong measures taken to bring about compliance. Relative to the 2015 Rule, the Proposed Rule is clearer about the tools at HUD’s disposal for effecting compliance, including (1) referral to the Department of Justice; (2) suspension or termination or refusal to grant or continue to grant Federal financial assistance; (3) “declaratory, injunctive, or monetary relief”; (4) debarment; and (5) proceedings under State or local law.⁶⁷

NFHA supports the availability of this range of remedies to effect compliance while recognizing the need for more definite guidance on when these measures will be taken. The prefatory text suggests that “[t]he proposed rule would provide HUD with the ability to tailor remedies appropriately for particular circumstances.”⁶⁸ To be sure, HUD officials must possess discretion in effecting compliance. But the Proposed Rule provides no guidance at all about the circumstances under which a given action is warranted. The prefatory text cautions against “drastic remedies (such as the suspension or termination of funding)” in light of “substantial impacts on consolidated plan program participants and public housing authorities and the people that they serve,”⁶⁹ but does not mention the substantial impacts that a continued failure to affirmatively further fair housing has on the people served by program participants. This imbalance, paired with the omission of any guidelines in the Rule’s operative text, threatens both to chill enforcement and to dampen the urgency for noncompliant program participants to affirmatively further fair housing.

The Rule should prescribe concrete, predictable consequences for noncompliance. Where there has been a determination of noncompliance and attempts at informal resolution have failed, certain funding streams should be suspended by default. Already, the voluntary compliance process not only allows for but expressly encourages resolution “by informal means through entry into a Voluntary Compliance Agreement at any time,” even after a Letter of Findings of Noncompliance has been issued.⁷⁰ This process gives HUD officials ample flexibility to tailor the terms of that agreement as needed where program participants are engaging in good faith. But where program participants refuse to do so, there is no reason to introduce uncertainty about the consequences. To the extent that certain funding sources, such as public housing programs under section 8 or section 9, should not be suspended or terminated, the text of the Rule should say so. If some program participants, such as small PHAs or small consolidated plan participants, should be given greater rope, the text of the Rule should

⁶⁶ See, e.g., Brief of Housing Scholars as Amici Curiae Supporting Respondent, *Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, No. 13-1371, <https://haasinstitute.berkeley.edu/sites/default/files/Amicus%20Brief%20EPI%20and%20Haas%20Institute%20Texas%20Housing%20Dec%202014.pdf> (“By 1968, when the Fair Housing Act was adopted, black-ghetto/white-suburb segregation was firmly established. . . . Jurisdictions locked-in these patterns with exclusionary zoning rules and other “race-neutral” practices.”).

⁶⁷ Proposed § 5.172(a).

⁶⁸ 88 Fed. Reg. 8530.

⁶⁹ *Id.*

⁷⁰ Proposed Rule at § 5.170(c).

also say so. The consequences of noncompliance must be predictable and certain to engender compliance. The Rule must make clear—to program participants and to officials administering and enforcing the Rule—that noncompliance will be met with such consequences.

The Rule must also state more clearly what remedies are available and how they may be secured. Proposed § 5.172(a)(2) states that HUD may seek “other declaratory, injunctive, or monetary relief.” First, this language should be revised to include the full range of remedies available under 42 U.S.C. § 3613, including actual damages and the award of attorneys’ fees and costs to private parties who have filed complaints. Second, the Proposed Rule’s mechanism for obtaining that relief appears to foreclose its availability: proposed § 5.172(a) channels these proceedings into the hearing process for “non-Fair Housing Act matters,”⁷¹ which does not provide for declaratory, injunctive, or monetary relief.⁷² Third, the apparent oddity of treating AFFH complaints as “non-Fair Housing Act matters” aside, splitting up AFFH and FHA complaints is inadvisable since many complaints may identify violations of both the Rule and the FHA itself. Even where a complaint does not allege such a violation, the investigation may well reveal direct violations of §§ 3604, 3605, 3606, or 3617 of the FHA. Complainants, respondents, and HUD are all best served by remediation of claims in one proceeding. For these reasons, the Rule must be revised so that the full range of remedies available for direct violations are also available for violations of the Rule and so that charges for violations of the FHA and Rule may be resolved in one proceeding.

Similarly, complaints may be filed through the HUD housing discrimination complaint process that may involve violations of FHA provisions and compliance complaints associated with requirements under this regulation. It is efficient and effective for all parties for HUD to also use the housing discrimination complaint process for complaints that involve both sets of issues, AFFH and FHA complaints, interrelated as they may be.

Recommendations:

1. Amend § 5.172(a) to state that the Responsible Civil Rights Official *will* (as opposed to may) initiate an administrative proceeding by filing a Complaint and Notice of Proposed Adverse Action upon a determination of noncompliance and that compliance cannot be secured by voluntary means.
2. Specify in the Rule itself those funding sources and/or program participants that ordinarily will not be subject to termination or suspension of Federal financial assistance.
3. Amend § 5.172(a)(2) so that adverse actions are not noticed pursuant to the procedures for non-Fair Housing Act matters, but instead are processed in such a way that allows for damages awards, injunctive relief, and other remedies along

⁷¹ See 24 C.F.R. § 180.415.

⁷² See 24 C.F.R. § 180.670(c)(1).

with disposition of complaints that raise both violations of the Rule and the FHA directly.

4. Replace the language in § 5.172(b) stating that “HUD is not required to provide assistance during the pendency of the administrative proceeding” with “HUD will not provide assistance during the pendency of the administrative proceeding.”
5. Specify that HUD housing discrimination complaints involving both allegation of direct violations of §§ 3604, 3605, 3606, or 3617 of the FHA and compliance under this regulation may be processed through that avenue in one proceeding and with the full range of remedies available under 42 U.S.C. § 3613.

Hearings (§ 5.174)

The Proposed Rule provides that an administrative proceeding can be initiated by filing a Complaint seeking “appropriate relief necessary to remedy the non-compliance, including but not limited to conditioning the use of Federal financial assistance, and other declaratory, injunctive, or monetary relief.”⁷³ The Proposed Rule also provides for complaints seeking “suspension or termination of or refusal to grant or to continue to grant Federal financial assistance.”⁷⁴

As discussed above, the rule appears to channel AFFH complaints to the procedures governing “non-Fair Housing Act matters.”⁷⁵

But some provisions of the existing regulations for non-Fair Housing Act matters are inconsistent with allowing for “declaratory, injunctive or monetary relief” necessary to remedy the non-compliance.⁷⁶ The relief described in these sections of the existing regulations is limited to suspension, conditioning or termination of Federal financial assistance. *Id.*

Recommendation:

1. Amend existing regulations in 24 CFR part 180 applicable to AFFH administration complaints to make them consistent with awarding relief “conditioning the use of Federal financial assistance, and other declaratory, injunctive, or monetary relief.”

⁷³ Proposed Rule at § 5.172 (a)(2). As noted above, NFHA recommends that this language be amended to include to full range of remedies available under 42 U.S.C. § 3613, including actual damages and the award of attorneys’ fees and costs to private parties who have filed complaints.

⁷⁴ *Id.*

⁷⁵ Proposed Rule at § 5.174(a) (notice shall be provided pursuant to 24 CFR 180.415); *id.* at § 5.174(b) (“Hearings shall be conducted in accordance with 24 CFR part 180.”).

⁷⁶ See 24 C.F.R. § 180.670(c)(1) (the initial decision of the ALJ will provide for “the suspension or termination of, or refusal to grant or continue, Federal financial assistance”); 24 C.F.R. § 180.100 (defining notice of proposed adverse action as the “statement of facts issued pursuant to a non-Fair Housing Act matter upon which HUD has found reason to terminate or refuse to grant or continue Federal financial assistance.”). AFFH complaints are also not included in the definition of “Non-Fair Housing Act Matters” under 24 C.F.R. § 180.100.

Amendments to ConPlan regulations

The Proposed Rule amends the consolidated plan regulations, codified at 24 C.F.R. Part 91, to reflect the incorporation of the Equity Plan process into the consolidated planning process. In chief, the amended regulations (1) require consultation with PHAs regarding fair housing strategies and actions that will implement fair housing goals from the Equity Plan; (2) require consultation with “community-based and regionally-based organizations that represent protected class members and organizations that enforce fair housing laws”; and (3) allow for, but do not require, program participants to include the policies and procedures they will undertake for community engagement in their citizen participation plan.

Clarification of the consultation requirements for consolidated plan jurisdictions is warranted. Proposed § 91.100€(1) distinguishes the Equity Plan community engagement requirements from the consolidated plan consultation requirements. Proposed § 91.100€(3) then states that consultation “must occur at various point in the fair housing planning process,” including “in both the development of both the Equity Plan and the consolidated plan. Consultation on the consolidated plan shall specifically seek input into how the fair housing goals identified in an accepted Equity Plan will be achieved through the priorities and objectives of the consolidated plan.” This provision creates unnecessary ambiguity regarding the consultation that is requirement. For that reason, as stated above, NFHA favors embedding the consultation requirement within § 5.158 of the Rule itself. Second, the provision would be improved by specifically mentioning the incorporation of fair housing goals into funding allocations, as stated in the prefatory text.⁷⁷

In addition, NFHA supports mandatory inclusion of the policies and procedures jurisdictions will undertake for their equity plans in their citizen participation plans. As stated above, NFHA does not believe that jurisdictions can achieve satisfactory participation by combining community engagement efforts for their equity plans and their consolidated plans. If these processes are nevertheless combined, the citizen participation plan should reflect how that process will provide for sufficient opportunity to have in-depth discussions of fair housing issues, as required by proposed § 5.518(a)(8)(i), especially in light of the concerns raised above. If the engagement is conducted separately, then the plan should reflect that as well, detailing how the standalone Equity Plan process will satisfy the requirements of § 5.518. Whether the processes are combined or not should not affect whether the citizen participation plan should account for the Equity Plan part of the equation. This is especially important because the Rule itself does not require a plan for how program participants with satisfy the requirements of § 5.158.

⁷⁷ See 88 Fed. Reg. 8540 (“The AFFH-related consultation on the consolidated plan shall specifically seek input into how the fair housing goals identified in the accepted Equity Plan will be incorporated into the consolidated plan, *including funding allocations*” (emphasis added)).

Finally, HUD should also clarify its proposed language in § 91.500(b) to provide that “the requirements for HUD’s review of the Equity Plan and Consolidated Plan are in addition to and distinct from the actions described in this section” to account for situations in which where there is both a program violation and an Equity Plan/Consolidated Plan violation.

Recommendations:

1. Add the consultation requirement contained in proposed § 91.100(e)(1) to § 5.518.
2. Add “including funding allocations” to the end of § 91.100(e)(3).
3. Require all consolidated plan jurisdictions to include the citizen engagement plans for their equity plans within their citizen participation plans.
4. Amend § 91.500(b) to state that “the requirements for HUD’s review of the Equity Plan and Consolidated Plan are in addition to and distinct from for the actions described in this section.”

Amendments to PHA plan regulations

The Proposed Rule amends the public housing agency (PHA) plan regulations, codified at 24 C.F.R. Part 903, to reflect the incorporation of the Equity Plan process into the PHA plan process. NFHA strongly supports the incorporation of fair housing goals into the PHA’s 5-year plan, consistent with proposed § 5.156.

If the Proposed Rule is not amended to require consultation with community-based and regionally-based organizations that represent protected class members and organizations that enforce fair housing laws as part of the Equity Plan process, the PHA plan regulations should be amended to require that consultation. These organizations have informed insight into the barriers faced by current and prospective residents of public housing, including but not limited to disability-related impediments and limited access to jobs and social services. Consultation is likely not only to flag issues that the PHAs may otherwise be unaware of, but also to point toward solutions. Even for small PHAs, the benefits of this consultation are likely to exceed the costs, since these entities are well-positioned to curate the issues that PHAs should focus on in their equity plans.

Recommendations:

1. Amend the Proposed rule to require consultation during the Equity Plan process with community-based and regionally-based organizations that represent protected class member and organizations that enforce fair housing laws. Alternatively, amend the PHA plan regulations to require such consultation.

Other resources needed for AFFH implementation

In addition to necessary revisions to the Proposed Rule itself, HUD must consider other resources that will be needed for implementation of the final AFFH regulation. These resources will be critical to ensure that program participants have the information and support they need to create Equity Plans that meet HUD's requirements and chart an effective course of action to create greater equity in their communities. These resources include:

1. Data – HUD has asked for feedback about the types of data that it should provide to program participants to aid in the analysis they conduct for their Equity Plans. NFHA endorses the recommendations made by researchers from the Poverty & Race Research Action Council, Northeastern University, National Community Reinvestment Coalition, Community Change and PolicyLink in a comment letter submitted on April 17, 2023. (ID HUD-2023-0009-0300) As noted below, NFHA suggests that HUD consider incorporating some additional data sources into its data and mapping tools or otherwise making them available to program participants.

In addition, to gather more information about what data and analytical tools have proven most useful for fair housing planning in the past, and what changes or additions would be useful going forward, HUD should consider convening a group of those who have been involved in such efforts and have used the AFFH-T data and mapping tool and other resources for that purpose. This would include fair housing organizations, program participants, technical assistance providers, selected consultants that have produced AIs or AFHs, academics and attorneys with fair housing expertise, and other stakeholders. Facilitating a discussion among this array of stakeholders may be both the most effective and the most efficient way for HUD to gain an understanding of the advantages and challenges stakeholders have experienced with the AFFH-T tool, including both the data incorporated in it and the analytical tools it provides and how those can best be addressed for the equity planning process. It would also enable HUD to get input on what additional types of data stakeholders would find most useful.

Recommendations:

- HUD should work with Freddie Mac to make available information about the mortgage readiness of residents of various geographic areas. Freddie Mac identified mortgage ready individuals as those who are 45 years of age or younger and do not have a mortgage but have the credit characteristics to qualify for one. These data, which are broken out by race and national origin, would be extremely valuable for developing strategies and targeting resources to address homeownership gaps in program participants' geographic areas.

- HUD should also work with the Federal Housing Finance Agency to incorporate information from its Uniform Appraisal Dataset into the data and mapping tool for the Equity Plan, or otherwise make the data available to program participants. Using these data, researchers have been able to quantify disparities in the appraised value of comparable homes in communities of color and predominantly White communities, adjusting for a variety of factors related to neighborhood-level economic characteristics and amenities. This kind of analysis would be valuable to help program participants identify potential problems with appraisal bias that may create barriers to homeownership for members of protected classes.
- HUD should coordinate with the Environmental Protection Agency to incorporate into the Equity Planning process the data about environmental hazards that are available through EPA's EJScreen: Environmental Justice Screening and Mapping Tool (epa.gov/ejscreen). EJScreen provides access to 12 environmental indicators at the block group level and may be a useful way to help program participants assess the environmental health of neighborhoods in their geographic areas of analysis, and, conversely, identify areas at risk because of exposure to specific environmental hazards. EJScreen includes important demographic data that make it possible to analyze the data with respect to a number of protected classes under the Fair Housing Act.
- Another useful tool for understanding both environmental and climate risks may be the Climate and Environmental Justice Screening Tool developed by the Council on Environmental Quality ("CEQ") pursuant to Executive Order 14008. (<https://screeningtool.geoplatform.gov/en/#3/33.47/-97.5>) As described by the Council, this tool, "has an interactive map and uses datasets that are indicators of burdens in eight categories: climate change, energy, health, housing, legacy pollution, transportation, water and wastewater, and workforce development. The tool uses this information to identify communities that are experiencing these burdens. These are the communities that are disadvantaged because they are overburdened and underserved." HUD should coordinate with the CEQ to integrate these data sets into any data and mapping tool developed for the Equity Plan, or direct program participants to this tool for their analysis of environmental and climate risks in their geographic areas.
- HUD should convene a group of stakeholders in the equity planning process, including fair housing groups, program participants, researchers, technical assistance providers and other, to obtain feedback about the data, mapping and analytical tools that would be most useful for the equity planning process.

2. Guidance, training and technical assistance – Successful implementation of the final AFFH regulation will require the allocation of significant resources to provide guidance, training and technical assistance to program participants, and it is crucial that HUD begin working immediately to put those resources in place. The urgency of this effort is amplified by the fact that based on the phase-in schedule outlined in § 5.160, states constitute a great many of the program participants in first groups that will be required to comply with the provisions of the rule. No state was required to comply with the 2015 rule, nor were any PHAs (although some participated voluntarily in collaboration with their jurisdictions), so the process will be largely unfamiliar to them. Without similar past experience to draw on, it will be critical for these program participants to have access to guidance, training and technical assistance that is tailored to the scope of analysis they will be required to conduct and the types of issues they will likely need to address.

As suggested above with respect to scoping the data needed for the equity planning process, it would be prudent for HUD to seek feedback from program participants and other stakeholders who participated in the Assessment of Fair Housing process, and from States and large PHAs who will be among the first to go through the new equity planning process, about the types of guidance, training and technical assistance that will be most helpful to their efforts to create effective Equity Plans.

Recommendations:

1. Begin immediately to prepare the necessary guidance, training and technical assistance resources that will be needed to help the first rounds of program participants go through the Equity Plan process successfully.
2. Seek feedback from program participants and stakeholders who went through the Assessment of Fair Housing process, and from States and large PHAs, about the types of guidance, training and technical assistance that they would find most useful in conducting their Equity Plans.

Conclusion

AFFH can be a powerful tool for eliminating the many unfair systems and structures that deprive millions of people in our country of access to secure and healthy housing opportunities and drive disproportionate outcomes in health, education, wealth, homeownership, technology, environment, climate, employment and other areas. Those systems include unfair appraisals, biased technologies, a dual credit market, restrictive zoning policies, health and food deserts and many more. A strong AFFH rule, administered and enforced effectively, can guide HUD's program participants to identify those unfair systems and replace them with systems that benefit everyone. This will not only lead to better outcomes for individuals, but it will also strengthen our

communities and boost our nation's prosperity. NFHA commends HUD for proposing this new proposed AFFH rule and urges that it be amended as needed and finalized quickly, so that implementation of the rule can begin as soon as possible. We look forward to working with HUD and its program participants in that effort.

Thank you for the opportunity to submit these comments. If you have questions or need further information about them, please contact Nikitra Bailey, NFHA's Executive Vice President (NBailey@nationalfairhousing.org) or Debby Goldberg, Vice President for Housing Policy and Special Projects (dgoldberg@nationalfairhousing.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa Rice". The signature is fluid and cursive, with the first name "Lisa" and last name "Rice" clearly distinguishable.

Lisa Rice
President and CEO
National Fair Housing Alliance