

Summary of Selected Comments from Housing and Community Development Organizations on HUD's Proposed AFFH Rule

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National Housing Conference

The National Housing Conference's (NHC) letter expresses support for the Proposed Rule and appreciation of HUD's extensive efforts to engage with stakeholders before publishing the rule. NHC states that there is broad-based agreement in the housing community about the core principle behind the rule, namely the need for more integrated living patterns. More specifically on the positive side, the letter praises the rule's emphasis on regionalism, its integration of the AFH process with other planning efforts, the provision of uniform national data, and the rule's mention of both mobility and investment strategies. The letter suggests that HUD could improve the rule by adopting a both/and rather than an either/or approach to mobility and investment strategies, requiring more ambitious goals for better resourced program participants, requiring program participants to consider actions that do not involve the use of federal funds, acknowledging that demographic change (such as gentrification) takes place at varying rates in different communities), either securing additional funds to increase HUD's capacity to review AFHs or making sure that program funds are not tied up while review is ongoing, and crowdsourcing the data tools in order to enhance their accuracy and utility.

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National Housing Law Project

The National Housing Law Project (NHLP) submitted a very detailed comment letter. In general, the letter is supportive and commends HUD for its efforts



with respect to AFFH. In particular, the letter praises the Proposed Rule for drawing out the connection between fair housing and related issues like transportation, providing extensive data to program participants, and encouraging regionalism. Most of the letter is comprised of suggested improvements to the Proposed Rule.

With respect to the balance between mobility and revitalization, the letter urges HUD to take a balanced approach that emphasizes making every community a community of opportunity. To that end, the letter recommends specifying that preservation and rehabilitation can be actions that address fair housing issues. Also to that end, the letter suggests clarifying that such actions are not materially inconsistent with AFFH. The letter recommends specifying that the inability of a member of a protected class to find housing within a given geographic area (including an RCAP) is fair housing issue. On a related but somewhat different note, NHLP urges HUD to take a strong stand against involuntary displacement in the rule. The letter recommends that the rule state that involuntary displacement is inconsistent with AFFH, that the rule require one-for-one replacement of affordable housing, that the rule require program participants to track data on participants in mobility programs, and that the rule require program participants to assess the AFFH impact of any planned disposition or demolition.

The letter also includes several comments on the subject of enforcement. First, the letter recommends that FHEO be the office responsible for reviewing AFHs and that HUD extend the review period from 60 days to 90 days. Second, the letter urges HUD to revise the Proposed Rule to require the inclusion of specific goals with benchmarks and timetables for achieving them. Third, the letter recommends that HUD require the submission of annual progress reports on those goals and post those reports on both the program participants' and HUD's websites. Fourth, the letter suggests that each AFH submission have a tracking number in order to make the review and approval processes transparent to stakeholders and advocates. Fifth, the letter recommends that a failure to meet the rule's procedural requirements or the substantive benchmarks set out in a prior AFH should trigger a re-submission requirement whereby program participants are forced to explain their deficiencies. Sixth and most importantly, the letter urges the creation of a formal complaint process. To that end, the rule would be revised to include instructions on how to file a complaint, the grounds for a complaint (including an unacceptable AFH, a failure to involve the public, or a failure to implement an AFH), a right to object during HUD's AFH review process, deadlines for meaningful and timely review of the complaint by HUD, options for sanctions (including the withholding of funds when the program participant has acted in bad faith or, if reducing funding would make it harder to cure the violation, a temporary disqualification from the receipt of discretionary funding or waivers), a right to appeal a field office determination to FHEO at the national level, and a right to appeal the approval of an AFH as a stakeholder even in the absence of a complaint. The letter stresses that public participation requirements are not a substitute for meaningful HUD review.

The letter also covers issues relating to PHAs in some detail. There are few thematic threads tying those comments together so I have included them below:

- The letter recommends including a definition of PHA hard units. NHLP would include Section 202, Section 8 Moderate Rehabilitation, units assisted with Project-Based Vouchers, and RAD conversions in the definition of hard units.
- The letter recommends clarifying the definition of development-related activities with respect to Housing Choice Vouchers. Examples of such activities include adjustments to payment standards, allowing extended search time, counseling residents with respect to neighborhood choices, and determining how to assist tenants with security deposits.
- The letter recommends requiring descriptions of actions for goals and the results of those actions in PHAs' annual plan civil rights certifications.
- The letter urges HUD to make the PHA public participation process as robust as that for consolidated plan jurisdictions. Additionally, the letter recommends investing in the capacity of community groups, particularly CDCs, to participate in the AFH process.
- The letter urges HUD to require PHAs that are participating in the Moving to Work demonstration to submit AFHs.

- Lastly, the letter asks HUD to explain how the Proposed Rule will work in tandem with HUD's plan to eliminate the annual plan requirement for all PHAs.

The letter contains a few comments about the content of the AFH. First, the letter recommends that HUD require program participants to identify more than one fair housing goal. Second, the letter asks HUD to include more examples of what would constitute a substantially incomplete AFH. Third, the letter encourages HUD to better define "community assets." Fourth, the letter recommends that HUD require program participants to go beyond the classes protected under the FHA in assessing fair housing issues and to also look at the needs of GLBT people, voucher holders, victims of domestic violence, and migrant workers.

The letter has a few recommendations with respect to the accessibility of the AFH process to persons with limited English proficiency. The letter recommends that HUD define the "vital documents" that must be translated in the rule itself in addition to in supplemental guidance. NHLP recommends translating the executive summaries of documents that it would be too burdensome to translate from start to finish. The letter also recommends that program participants track the languages spoken by people who attend public meetings concerning the AFH. Lastly, the letter urges HUD to require that PHAs conduct an assessment of language needs in addition to consolidated plan jurisdictions.

The letter contains several recommendations with respect to persons with disabilities. First, the letter urges HUD to identify accessibility and *Olmstead* compliance as priorities. Second, the letter points out that there are gaps in available data about persons with disabilities and recommends that HUD work to better develop that data, starting with a focus on accessibility because that might be logistically easier. Third, the letter recommends that program participants be required to describe how they are assisting in the implementation of their states' *Olmstead* plans. Lastly, the letter recommends that each public participation plan include an accessibility plan.

With respect to data, the letter expresses the concern that some of HUD's data is unreliable, particularly with respect to FMRs. The letter recommends that the rule be revised to allow program participants to challenge HUD's data and to require HUD to update its data annually or biannually. NHLP also recommends that HUD provide data about PHA-controlled property that is not public housing such as market rate units or undeveloped land that a PHA might own.

The letter addresses a few more quick points:

- While praising HUD's commitment to regionalism, the letter recommends that HUD include greater incentives to engage in regional collaboration, require the

- consideration of regional issues even in the absence of a regional AFH, and require intergovernmental notice when an AFH raises regional concerns.
- The letter is supportive of coordinating the AFH process with the LIHTC program as well as other federal housing programs such those administered by the USDA.
 - The letter urges HUD to acknowledge its own duty to AFFH in the rule and to require the department to conduct an analysis that identifies obligations, barriers, steps to overcome those barriers, and anticipated outcomes.

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National Housing Trust, LISC, and Enterprise Community Partners

The National Housing Trust, LISC, and Enterprise Community Partners submitted a joint comment letter to HUD that was generally supportive of the Proposed Rule but that requested clarification and minor changes with respect to a few points. First, the letter urges a both/and approach to investment and mobility strategies. The letter expresses concern that, as currently drafted, the Proposed Rule risks sidelining preservation and revitalization in favor of mobility. The letter seeks to define investment-based strategies as not being materially inconsistent with AFFH, even in the absence of a multifaceted revitalization strategy. It is the commenters' view that quality affordable housing alone can improve a neighborhood that is an RCAP. Also to that end, the letter pointed out that HUD's Rental Assistance Demonstration program focuses on revitalization. The letter recommends a focus on gentrification that is largely absent from the Proposed Rule. Second, although the letter expresses support for the idea of integrating fair housing planning with other planning efforts, the commenters observe that the Proposed Rule does not suggest how program participants could or should integrate fair housing planning with, for example, transportation planning. Third, the letter recommends that HUD enhance the rule's public participation by requiring the designation of a coordinating entity that would develop a comprehensive community organizing plan. Fourth, with respect to regionalism, the letter asks that HUD provide more guidance about how a regional AFH would work in practice. Fifth, the letter requests the inclusion of standards and evaluative criteria for AFH approval in the final rule. Sixth, the commenters recommend that HUD crowd-source the data tool for improvement. Lastly, the commenters promote themselves as potential providers of technical assistance to program participants attempting to comply with the duty to AFFH.

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Stewards of Affordable Housing for the Future

Stewards of Affordable Housing for the Future (SAHF) submitted brief comments expressing general support for the Proposed Rule as well as a desire for clarification with respect

to the balance issue. In particular, the letter praises HUD's recognition that the current AI process has been ineffective, the provision of data, and the flexibility of the Proposed Rule. While still acknowledging the importance of desegregation strategies, the letter urges HUD to clarify that preserving and rehabilitating affordable housing is consistent with the duty to AFFH.

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Housing Partnership Network

The Housing Partnership Network (HPN) submitted comments expressing general support for the Proposed Rule. The letter praises the rule's clarification of what is expected of program participants and the provision of data to better inform program participants' analysis. The letter criticizes the seemingly binary approach of the Proposed Rule to mobility and investment-based strategies. Instead, HPN urges that the rule be revised to encourage both types of strategies as means of AFFH. The letter points out that revitalization strategies are only mentioned once in the Proposed Rule whereas reference to mobility strategies abound. The letter argues that this imbalance implicitly privileges mobility over investment. To clarify the situation, the letter recommends that the final rule explicitly state that AFFH may involve the investment of resources in RCAPs. With respect to RCAPs, the letter refers only to the preservation and improvement of housing in those areas, and not to new development. The letter recommends that HUD reference existing place-based strategies, particularly the Choice Neighborhoods Initiative, in that provision. With respect to regional collaboration, the letter argues that little collaboration will result in the absence of meaningful incentives. The letter suggests that HUD award bonus points in the application processes for competitive grant programs like Sustainable Communities or Choice Neighborhoods in order to provide such an incentive. The letter suggest that HUD could even attempt to convince other federal agencies, such as DOT, to provide bonus points for regional AFH collaboration in their competitive grant processes. With respect to HUD review of AFHs, the letter suggests that 60 days is insufficient and expresses concern that delays in the review process could impede the flow of money to communities. To that end, the letter recommends a staggered review process to keep HUD's workload reasonable at all times. Regarding the scope of the duty, the letter urge HUD to clarify that the duty applies to all of a grantees activities that affect housing, not just those involving HUD funds. Lastly, the letter urges HUD to state its willingness to withhold funds from non-compliant program participants.

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National Housing Trust

In addition to submitting joint comments with Enterprise and LISC, the National Housing Trust also submitted a comment letter of its own. The letter expresses general support for the

Proposed Rule and highlights the need to overcome historical patterns of segregation, coordinate public investment, and ensure access to community assets. At the same time, the letter expresses concern about the implications of the rule for preservation and revitalization efforts. The letter urges HUD to adopt a both/and approach to the question of investment and mobility-based strategies for AFFH. The letter directly asks HUD whether the investment of federal funds in an RCAP is a violation of the Proposed Rule when (1) low-income minority residents have chosen to remain in the community and (2) there is no comprehensive community revitalization plan. The letter claims that incorporating housing investments into multifaceted revitalization strategies is not always feasible and that investment in housing, by itself, improves neighborhoods. To a similar end, the letter encourages HUD to make clear that the revitalization of existing affordable housing is not “materially inconsistent” with AFFH.

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National Council of State Housing Agencies

The comment letter submitted by the National Council of State Housing Agencies (NCSHA) praised a few of HUD’s stated goals for the Proposed Rule but was uniformly critical with respect to the specifics that it discussed. NCSHA did not take a stance on whether HUD should abandon the rulemaking process, issue a second proposed rule, or finalize the current Proposed Rule with revisions based on the public comments. NCSHA praised HUD’s intent to improve compliance with the duty to AFFH and to reduce the risk of litigation. Priorities for the final rule include an acknowledgment that the duty affects states different, flexibility in implementation, and a minimal burden of implementation.

NCSHA expressed a need for clarity on several subjects. First, the letter pointed out that it was not clear which office within HUD would be responsible for reviewing AFH submissions. The letter did not come right out and say that CPD should be in charge but did suggest that experienced staff with strong program knowledge review the documents. Second, NCSHA expressed confusion as to whether the rule is intended to apply to voucher-only PHAs. The reference to PHAs’ development-related activities brought about this confusion. The letter suggested that the rule should not apply to voucher-only PHAs because of the fiscal constraints under which they are currently operating. As an example, the letter stated that innovations such as setting higher payment standards in expensive suburban areas are no longer feasible. If the Proposed Rule will apply to voucher-only PHAs, the letter asked that HUD provide examples of what steps such an entity could take to AFFH. Third, the letter sought clarity on the balance issue. NCSHA asked HUD to specify that investments in RCAPs that have the purpose of preserving or rehabilitating affordable housing or revitalizing the community are consistent with

the duty to AFFH. The letter took a somewhat different tack from most organizations with respect to the balance issue. It effectively suggested an and/or approach.

NCSHA also attacked some of the underlying premises of the Proposed Rule. First, the letter expressed concern that the practice of identifying communities as RCAPs or ECAPs could exacerbate NIMBYism (there was no elaboration as to how it would do so) and complicate attempts to provide housing choice to members of protected classes. As an example, the letter pointed out that adding just a few assisted units to a non-concentrated area could flip a census tract and make it an RCAP or ECAP. The letter also suggested that the RCAP and ECAP labels were often inappropriate in rural areas, particularly those in Indian Country and those with large farmworker populations. The letter recommended that the Proposed Rule exempt activities on reservations and tribal lands. Second, NCSHA questioned the use of poverty in the analysis of fair housing issues. The letter observed that HUD seemed to be treating low-income persons as a protected class. In NCSHA's view, HUD exceeded its statutory authority in adopting this focus. The letter recognized that there are often correlations between protected class status and income but urged HUD to wait until the resolution of the *Mt. Holly* case before finalizing the rule. The letter also criticized HUD's focus on access to amenities as being beyond the scope of the department's statutory authority. Third, the letter argued that states should not be held accountable for the actions of entities to which they pass through funds because states lack both the resources to monitor those entities and the authority to control their conduct. As an example, the letter stated that state housing finance agencies have no power to control local zoning. Fourth, the letter expressed concern that placing requirements on entities involved in other planning and development activities, including transportation and LIHTC, would exceed HUD's authority. NCSHA claimed that the current LIHTC planning process provides greater opportunities for public engagement because it is annual rather than every five years. Lastly, the letter criticized the data tool both for containing errors and for not working well on a statewide level.

The letter urged that HUD allow greater flexibility with respect to a number of features of implementation. Concerning public participation, the letter criticized detailed newspaper publication requirements, arguing that such outreach is an inefficient way of obtaining the public's input. Instead, the letter suggested that HUD allow program participants to primarily publicize their AFHs on their websites and recommended that HUD create a section on its own website with a searchable database of AFH documents nationwide. As regards compliance determinations, the letter pled for HUD to be flexible in applying the materially inconsistent standard in light of the lack of clarity as to what it means to AFFH. The letter also asked for guidance about the potential consequences of a HUD determination that a program participant has failed to AFFH. With respect to the content of the AFH, the letter expressed confusion as to whether the requirement to identify patterns of integration and segregation only applies in the

case of regional AFHs or whether it applies to all submissions. The letter urged that it only apply to regional AFHs. In the case of regional AFHs, the letter suggested that the region be defined to solely include the jurisdictions of the collaborating program participants. In the event that HUD decides that the requirement applies to all program participants, the letter asked that HUD clarify the scope of the region or regions that states should analyze. The question is whether the region contains surrounding states or simply the regions within the state. With respect to disparities in access to community assets, the letter expressed confusion over whether the quality of the asset was a factor in that analysis and argued that it should not be. Thus, in NCSHA's view, a school – rather than a good school – is a community asset.

In a few places, the letter asked HUD to reduce the burden placed on program participants. First, the letter claimed that the analysis required to identify fair housing determinants is too difficult. Instead, the letter suggested that such time would be better spent devising strategies to address fair housing issues. Second, the letter urged flexibility with respect to state collaboration with PHAs on AFHs. The letter argued that states should be able to set a deadline for PHAs to declare their intent to collaborate. Additionally, the letter asked that HUD clarify that collaboration does not transfer responsibility for the attainment of one collaborating entity's goals to the other entities. In the event that a collaborating entity dissents, the letter argued that the entity that is responsible for ultimately submitting the AFH should have the final say to resolve the disagreement. With respect to collaboration with entitlement jurisdictions, the letter argued that such collaboration must be purely voluntary, and, in the absence of such collaboration, state AFHs need only address non-entitlement areas within state boundaries. Lastly, the letter contained several quick points including: (1) that any performance benchmarks should be guideposts rather than mandates, (2) that HUD should waive the AFH requirement for any program participant that recently completed a comprehensive AI, and (3) that program participants should have maximum flexibility when operating in the disaster recovery context.

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National Low Income Housing Coalition

The National Low Income Housing Coalition (NLIHC) submitted a letter in support of the Proposed Rule. The letter praises the lengths to which HUD went in soliciting input prior to publishing the Proposed Rule, the clearer requirements of the AFH as opposed to the AI, and the emphasis on public participation in the Proposed Rule. The letter's suggested improvements focus on the balance between mobility and investment-based strategies, public participation, compliance standards and enforcement, and regionalism.

The letter urges a both/and approach to mobility and investment-based strategies. The letter recommends that HUD clarify that strategically enhancing segregated neighborhoods

featuring highly concentrated poverty is consistent with the duty to AFFH and suggests several places throughout the regulation for such clarifying provisions. NLIHC argues that this even the case when the investment is not made in tandem with the use of non-housing community development funds if the investment is either the preservation of housing, the majority of whose residents wish to remain, or a project spearheaded by a community-based development organization. The letter recommends adding a clause to the definition of “fair housing choice” that would indicate that the concept includes the choice to remain in one’s residence, even if located in an RCAP.

The letter contains several recommendations with respect to the Proposed Rule’s public participation requirements. With respect to PHAs, the letter recommends that the rule specifically refer to existing regulations on the subject of Resident Advisory Boards and public participation in the PHA Plan process. The letter recommends that HUD revise the Proposed Rule’s recordkeeping requirements to provide that records be available to the public, not just to the department. The letter argues that consultation with a Fair Housing Advisory Council should not be a substitute for consultation with the various types of fair housing organizations listed in the Proposed Rule. Continued consultation with other stakeholder groups is particularly essential if the membership of the Advisory Council is handpicked by the program participant. The letter urges revision of the publication provision to require posting on program participants’ websites in addition to traditional means of providing notice. The letter recommends including a similar provision to that present in the Consolidated Plan section of the Proposed Rule on accessibility for LEP community members in the section of the rule dealing with PHAs. The letter recommends lengthening the period that the public has to review AFHs to 60 days, requiring a 30 day gap between publication of the proposed AFH and the public hearing, and requiring that the hearing take place at least a week or two before the program participant submits the document to HUD. Lastly, the letter recommends that HUD require program participants to hold public hearings on their performance reports.

The letter also contains several recommendations with respect to compliance and enforcement. First, the letter recommends honing the AFH to require program participants to identify more than just one goal, to provide that the failure to include issues and determinants that stakeholders raised in the public participation process is automatic grounds for rejection of the AFH, and to require program participants to set benchmarks for each goal. In setting benchmarks, program participants would draw up a list of actions, set a timetable for each action, and designate the responsible entity for carrying out each action. The letter encourages HUD to clarify the definition of a substantially incomplete AFH. In particular, the letter expresses concern that HUD will fail to reject AFHs for which program participants complied with the letter but not the spirit of public participation requirements. To that end, the letter recommends that stakeholders be allowed to challenge whether the level of consultation was sufficient.

Second, the letter recommends giving stakeholders the ability to formally challenge AFH submissions while they are under HUD review, to appeal a field office approval of an AFH to HUD headquarters, and to challenge a later civil rights certification based on a faulty AFH or an AFH that has not been implemented. The letter argues that FHEO should have full authority over the AFH and AFFH processes and that AFH submissions should be staggered over the course of 2015 in order to avoid straining FHEO's capacity. If the rule is not finalized in time for 2015, the letter urges HUD not to wait until 2020 to implement the new process. Third, the letter makes a few recommendations with respect to performance reporting. The letter recommends that annual performance reporting – for all types of program participants – include descriptions of actions carried out to address goals, the results of those actions, the issues that the actions affected and the nature of the effect, and strategies for correcting actions that proved unsuccessful.

The letter has a few recommendations with respect to regional collaboration. First, the letter recommends creating another regional AFH option whereby two or more PHAs in the same region could collaborate with each other. Second, the letter criticizes using the location of hard units as the determinant of which consolidated plan jurisdictions PHAs can join with in conducting an AFH. Instead, the letter recommends allowing a PHA to partner with any entitlement jurisdiction in which some of its units are located or vouchers are used so long as the AFH itself addresses all of the PHA's units and vouchers. Lastly, with respect to PHAs located in metropolitan regions that choose to conduct their own AFHs, the letter urges HUD to clarify that those PHAs still must consider their entire metropolitan region in relation to the HCV program.

The letter contains a few other points, a few of them in response to HUD questions, which are summarized below:

- The letter recommends that HUD clarify the scope of the obligation to AFFH to make it explicit that the duty attaches to program participants' laws, policies, and practices.
- The letter asks HUD to clarify PHAs' obligation to conduct annual updates. The letter supposes that the purpose of the update is to identify any significant changes that warrant adjustments rather than to conduct a whole new AFH.
- The letter recommends integrating the process of revising an AFH after a disaster with the process of devising a CDBG-DR Action Plan.
- The letter asks HUD to explain the interplay between the Proposed Rule and the administration's announced plan to do away with PHA Annual Plans. Relatedly, the letter recommends that HUD make explicit that the AFH requirement applies to MTW PHAs that are not subject to PHA Plan requirements.
- The letter recommends coordinating AFH planning with the LIHTC QAP process as well as planning related to federal transportation programs.

- The letter recommends that grantees analyze disproportionate housing needs in both their consolidated plans and their AFHs.
- Lastly, the letter recommends allowing program participants flexibility in the use of data, particularly in rural areas where Census tracts may not provide the most useful scale for assessing fair housing issues. The letter asks HUD to release a more advanced version of the geospatial tool for public comment before finalizing the tool.

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