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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: Proposed Rule for Affirmatively Furthering Fair Housing  
Docket No. FR-5173-P-01

To Whom it May Concern:

Ballard Spahr is a national law firm, with about 530 attorneys in 14 offices across the country. The firm's attorneys practice in five major departments: Business and Finance, Intellectual Property, Litigation, Public Finance, and Real Estate. In addition, attorneys in the firm participate in more than 40 interdepartmental practice groups. Our Housing Group is one of the largest practice groups, with more than 70 attorneys who represent clients in the acquisition, development, expansion, disposition and operation of nearly every type of housing. Our clients include for-profit and non-profit housing developers and operators, public housing authorities and housing finance agencies.

Ballard Spahr appreciates this opportunity to submit comments to the U.S. Department of Housing and Urban Development (“HUD”) concerning its proposed rule for Affirmatively Furthering Fair Housing (“AFFH”) published in the Federal Register of July 19, 2013 (the “Proposed Rule”). The Fair Housing Act, as amended, (“FHA”) is an important statute and its enforcement has played an important role in identifying and rectifying discriminatory situations. The AFFH standards have not always been clearly defined, so we applaud HUD's efforts to further define the role of AFFH within the FHA. We have some concerns, however, that the approach used in the Proposed Rule may create further confusion as well as administrative, operational and procedural issues related to implementation of AFFH. Further comments are below.

## **1. Public Comment Period**

First, we encourage HUD to significantly extend the period of public comment on this important rule. The Proposed Rule has been under development for a number of years, and a sixty-day public comment period is inadequate for the public and interested parties to comprehend, consider, and respond as completely as possible to HUD's Proposed Rule, which is over 30 pages long. As such,

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we encourage an extension of the public comment period as well as continued dialogue as HUD revises the Proposed Rule in response to public comments received.

## **2. Definition and Interpretation of AFFH**

The implementation and interpretation of what constitutes AFFH has never fully been defined by Congress or HUD, so we support HUD's efforts to create such a definition. The definition included in the Proposed Rule, however, goes well beyond housing or even affirmatively further fair housing with respect to protected classes of persons. Although the concept of integrated housing patterns is certainly consistent with the FHA, the Proposed Rule seemingly expands AFFH to include access to other important neighborhood elements, such as transportation, employment, education, and other community facilities. The Proposed Rule seems to include a non-protected class within the protections of the FHA through a prohibition on racially or ethnically concentrated areas of poverty. By singling out only two protected classes (race and ethnicity) related to poverty concentration, the Proposed Rule also seemingly creates the potential for differential treatment of the other classes protected by the FHA, since the poverty concentrations of those other protected classes are not required to be assessed under the Proposed Rule.

Issues of access to community resources are very important, and often have an impact on neighborhoods, their residents, and quality of life, however they are not covered by the FHA. Similarly, poverty is a protected class under certain state or local laws, but not under the FHA. Many of the public housing agencies and other affordable housing developers that we represent struggle with these very issues, and our clients seek innovative ways to use housing and other resources to bolster community assets and to deconcentrate poverty. Including access to community resources and addressing concentrations of poverty, however, is beyond the scope of the FHA's protections.

We therefore recommend a more narrowly tailored definition of AFFH and the removal of the foregoing from the list of elements to be addressed in the Assessments of Fair Housing ("AFH"). At the same time, we encourage HUD, outside of this Proposed Rule, to continue to work with housing authorities and other interested parties to increase funding for and to make available resources that will increase access of protected classes as well as low-income families to transportation, employment, education and other community facilities.

## **3. Enforcement**

HUD indicates in the Proposed Rule that it does not intend to be prescriptive about AFFH outcomes or fair housing goals developed as a result of an AFH. We very much support the use of an AFFH rule in a procedural and non-prescriptive context. We have concerns, however, about the criteria HUD may use to disapprove AFHs as well as how or whether HUD may seek to monitor progress at AFFH implementation. To the extent HUD seeks to create sanctions or take other enforcement actions in connection with AFFH, HUD should make available for public comment its guidelines for such enforcement, the rights of grantees to appeal, and related matters.

If HUD does contemplate enforcement related to AFFH, we recommend that HUD considers instituting a “safe harbor” or similar that clearly delineates realistic actions that may be taken for a grantee to be presumed in compliance with AFFH. This safe harbor could be analogous to the design standards of the FHA and Section 504 of the Rehabilitation Act; grantees know that if units meet applicable standards, they comply. Although the Proposed Rule’s 24 CFR § 5.162(a)(2) indicates that HUD’s approval of an AFH does not in any way constitute a determination that a grantee is compliance with its AFFH obligations or other civil rights requirements, to the extent that HUD plans to take enforcement actions, grantees should be able to rely in some manner on the HUD approval. Our suggestion for a reasonable safe harbor is that, if a grantee submits an AFH, and if HUD approves the AFH, then the grantee should be considered in compliance with the AFH requirements. If the grantee then proceeds to use reasonable efforts to implement its findings under the AFH, and to address fair housing choice issues in accordance with the AFH and consolidated or PHA plan, as applicable, there should be a presumption of compliance with the AFFH requirements.

Related to the above, the Proposed Rule’s 24 CFR § 903.2 contemplates that HUD may challenge housing authority’s certification that it is compliant with its AFFH obligation, and the Proposed Rule places the burden on the housing authority to document its AFFH compliance. This burden shifting is unfair. HUD should be required to set forth a clear and documented basis for its challenge. If the housing authority is using reasonable efforts to implement the steps it has indicated in its PHA Plan that it will take to AFFH, or can provide a justification for being unable to fully implement the AFFH steps, the PHA should be considered compliant.

We are also concerned by the breadth of the Proposed Rule’s 24 CFR § 903.7 for determining a housing authority’s compliance with AFFH. The compliance determination is partly dependent on external factors outside of the housing authority’s control – namely the jurisdictions in which the housing authority is located and available resources. Housing authorities in most cases may have input into their jurisdiction’s AFH, but will not fully control the content of the AFH or the actions of the jurisdictions. To document compliance with AFFH under this section of the Proposed Rule, a housing authority would have to implement “any” jurisdiction initiative that required its involvement, without regard to whether the initiative is also consistent with the housing authority’s resident needs or available resources. The compliance at § 903.7 also depends on a housing authority identifying “any” fair housing issue within its programs. Although housing authorities can certainly use their “best efforts” to identify fair housing issues, it is impossible to prove that they have identified each and every issue.

Finally, related to AFH submissions generally, the Proposed Rule requires a housing authority that submits its own AFH to submit it annually. In contrast, cities and states need only submit their AFH once every 5 years or upon a material change in circumstances. Housing authorities should not be required to devote annually the extensive resources required to create an AFH simply because they choose to submit their own AFH. As such, the final rule should reflect a consistent 5-year requirement for all AFH submissions.

#### **4. Data Provision**

Under the Proposed Rule, HUD indicates that it will make comprehensive fair housing data available to all grantees drafting an AFH. This data provision is intended to reduce the cost burdens of preparing and submitting the AFH to HUD. Although we fully support HUD's efforts to make fair housing data available, the value of the data will depend entirely on how recently the data was collected as well as the quality of the measures and indices used in HUD's data. We therefore urge HUD to ensure the timeliness and high-quality of the data so that it can truly be useful for the drafting of an AFH.

The Proposed Rule also notes that grantees may supplement HUD's data with their own data, and we recommend that the final AFFH rule explicitly allows for deference to each entity's choices of data used to support the AFH. Particularly in situations in which a grantee has more recently collected data, even if that data contradicts HUD's, deference should be given to the grantee's data so that HUD is not substituting its judgment for the grantees.

## **5. Diminished Resources**

HUD and all of its grantees are currently operating in an environment of diminished funding. As much as we would like increased funding, it is unlikely that federal funding for housing programs will increase significantly, if at all, in the next several years. The Proposed Rule places a significant, increased burden on HUD, not only to create, implement, and maintain the fair housing data tool, but also to review and approve each and every AFH in the country. The creation of AFHs also places an increased responsibility on HUD grantees to create a more comprehensive AFH than required in the Analysis of Impediments currently developed by many grantees. While we do not question the value of an AFH in principle or the value of submitting an AFH to HUD for review, it is also important to be realistic about the available resources to HUD and to grantees and to make decisions about how best to maximize and target those resources. We therefore urge HUD to keep the foregoing in mind as it drafts the final rule. HUD should ensure that the final AFFH rule more explicitly recognizes that the actions a grantee may take are based on available resources. The availability of resources should also generally be taken into account as HUD envisions its and its grantees' responsibilities under the AFFH final rule.

We appreciate your consideration of the above comments.

Sincerely,



Sharon Wilson Géno

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