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Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th St. SW, Room 10276
Washington, DC 20410-0001
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Re: Comments on proposed Affirmatively Furthering Fair Housing rule,
Docket No. FR-5173-P-01

These comments are submitted by the Center on Budget and Policy Priorities. The Center is an independent, nonprofit policy institute that conducts research and analysis on a range of federal and state policy issues affecting low- and moderate-income families. The Center's housing work focuses on improving the effectiveness of federal low-income housing programs, and particularly the Section 8 housing voucher program. The following organizations have joined these comments, which focus on the elements of HUD's proposed AFFH rule that may affect the administration of the Housing Choice Voucher (HCV) and public housing (PH) programs: the National Low Income Housing Coalition, the National Housing Law Project, the Sargent Shriver National Center on Poverty Law, National Fair Housing Alliance, and Housing Choice Partners.

We strongly support HUD's proposal to make the new Assessment of Fair Housing (AFH) applicable to all public housing agencies (PHAs) that administer HCVs or public housing (or both), in addition to jurisdictions that receive funds subject to Consolidated Plan requirements (CDBG, HOME, ESG, HOPWA). As recently as 2008 in the Housing and Economic Recovery Act, Congress reaffirmed the importance of the annual certification by PHAs of their compliance with civil rights and fair housing requirements, including the obligation to affirmatively further fair housing.¹ PHAs should be subject to AFH requirements.

The proposed AFH requirement, and the related proposed revisions to the regulations governing PHA Plans, have the potential to make the AFFH certification that is part of the PHA Plan meaningful rather than merely a "check the box" exercise, and to influence PHAs' discretionary policies in the administration of the HCV and PH programs to have better results for families, increase choices of where to live, and reduce isolation of low-income groups protected by the Fair Housing Act. Positive results will be more likely if HUD accepts the changes recommended below. The burden, if any, on PHAs to comply is minimal, given the options HUD provides to PHAs for the preparation of the AFH. (Our recommendations below include several changes that would further minimize PHA burdens.)

¹ See Pub. L. 110-289, section 2702(a), exempted PHAs with 550 or fewer vouchers and public housing units from the requirement to file an annual PHA plan, but retained the obligation to submit an annual civil rights certification. The Quality Housing and Work Responsibility Act of 1998 (QHWRA), established the PHA Plan process, which includes the civil rights certification and PHAs' obligation to carry out their programs in a manner that will affirmatively further fair housing.

A few statistics help underscore why PHA-administered programs are central to any meaningful effort to affirmatively further fair housing in the administration of HUD's programs, as the 1968 Fair Housing Act required.

- More than two-thirds of the households that receive HUD-funded rental assistance are served by PHA-administered programs. About 2.2 million households participate in the Housing Choice Voucher program and 1.1 million households live in public housing. Relatively few households, particularly extremely low-income families, receive rental assistance through programs subject to the Consolidated Plan.
- Concentrated poverty, racial segregation and the federal housing assistance programs are deeply intertwined. Some 660,000 children whose families receive HUD-funded rental assistance live in concentrated poverty neighborhoods, where 40 percent or more of the residents are poor. About 80 percent of these children are assisted by PHA-administered programs.² The vast majority of these children are black or Hispanic, and they live in neighborhoods that are racially or ethnically-concentrated.³ HUD has appropriately noted that these areas that are extremely poor and majority black or Hispanic (or other protected racial or ethnic group) “merit special attention” because of their adverse consequences for residents, such as limited educational and employment opportunities and a range of stressors that have been proven to contribute to poor health, which in turn impose costs on the broader society. (See 78 FR 43714.) Efforts by states and localities to improve the economic and other circumstances in these communities would be hamstrung without the active participation and affirmative efforts of PHAs.
- Only a small (about 20 percent) and declining share of families with housing vouchers live in low-poverty neighborhoods (neighborhoods where fewer than 10 percent of residents have incomes below the poverty line). Vouchers enable families, particularly black and Hispanic families with children, to live in somewhat less poor -- and significantly less violent -- neighborhoods than similar poor families generally, the large majority of whom do not have rental assistance. Yet as currently administered, the HCV program does not deliver on its potential to expand children's access to good schools.⁴
- Vouchers “have reinforced prevailing patterns of racial segregation.”⁵ Based on 2010 data, Alex Schwartz and Kirk McClure found that only 12 percent of black and 10 percent of Hispanic households used their vouchers to live in predominantly white neighborhoods.⁶ This extreme result is unlikely to be the product of families' informed

² The remaining households live in privately-owned properties with project-based subsidies that are administered by the owners.

³ Center on Budget and Policy Priorities analysis of 2010 HUD microdata and 2005-2009 American Community Survey data.

⁴ Barbara Sard, “Concentrated Poverty is a Children's Issue,” *Poverty & Race*, September/October 2013, <http://prac.org/newsletters/sepoct2013.pdf>; Ingrid Gould Ellen and Keren Mertens Horn, “Do Federally Assisted Households Have Access to High Performing Public Schools?” PRRAC, November 2012, www.prrac.org/pdf/PRRACHousingLocation&Schools.pdf.

⁵ Alex F. Schwartz and Kirk McClure, “The Impact of Race and Ethnicity on Entry to High-Opportunity Neighborhoods Among Housing Choice Voucher Recipients,” Presented at the Annual Meeting of the Urban Affairs Association, San Francisco CA, April 4, 2013, pp. 12-13.

⁶ *Id.*, p. 10.

choices.⁷ The HCV program has significant potential to further fair housing objectives, but only if PHAs are encouraged and required to act affirmatively to achieve this result. To date, HUD's policies have been ineffective at making the existing PHA obligation meaningful. With modest improvements, the proposed rule would likely be significantly more effective at enhancing PHAs' compliance with their AFFH obligation.

Related to the importance of improving the extent to which the HCV program enhances housing choice and promotes deconcentration, **it is vital that HUD make clear in the final rule that the purpose of the affirmatively furthering fair housing requirement is *both* to enhance neighborhood assets in racially or ethnically concentrated areas *and* to promote greater mobility.** In the preamble (at 78 Fed. Reg. at 43716) and §5.150 of the proposed rule, HUD appears to treat the residential integration goal and the community improvement goal as equally acceptable alternatives for a state or local government to pursue:

A program participant's strategies and actions may include strategically enhancing neighborhood assets (e.g., through targeted investment in neighborhood revitalization *or* stabilization) or promoting greater mobility and access to areas offering vital assets such as quality schools, employment, and transportation, consistent with fair housing goals. (emphasis added).

This language should be changed from "or" to "and" in the final rule. To treat these two goals as alternatives would be a distorted reading of the Fair Housing Act. For similar reasons, PHAs that administer both public housing and HCV programs should not be permitted to establish AFFH goals related only to their public housing programs, as discussed in more detail below.

Some commenters have expressed a concern that PHAs should not be required to pursue mobility strategies even if the AFH finds that a voucher mobility strategy would advance fair housing goals, because such strategies would necessarily force the PHAs to serve fewer families. HUD should reject this argument, because increased use of vouchers in non-concentrated opportunity areas will not necessarily require trade-offs in the number of families served. If the same payment standard applies throughout a metropolitan area, which is often the case under HUD's current metropolitan Fair Market Rent policy, the subsidy a PHA provides will remain essentially the same. If the PHA chooses to raise the payment standard in opportunity areas to make it more feasible for families to rent units, it could offset the higher cost by reducing the payment standard in lower rent areas. Research on the first year of implementation of Small Area Fair Market Rents (SAFMRs) in the Dallas metro area found that the policy enabled voucher holders to live in higher quality neighborhoods without causing per-voucher costs to be higher than they would otherwise have been. HUD data indicate that since SAFMR implementation the average per-voucher cost at Dallas area PHAs *fell* while average costs at other Texas PHAs, and nationally,

⁷ Research suggests that black individuals generally are reluctant to be pioneers in all-white neighborhoods, but view mixed neighborhoods, including those that are majority white, favorably. See, e.g., Maria Krysan, Mick P. Couper, Reynolds Farley, and Tyrone Forman, "Does Race Matter in Neighborhood Preferences? Results from a Video Experiment." *American Journal of Sociology* 115 (2): 527–59, 2009. Some poor black families voluntarily use vouchers to move to and stay in predominantly white, low-poverty areas. Stefanie DeLuca & Peter Rosenblatt, "Walking Away from *The Wire*: Residential Mobility and Opportunity in Baltimore" (Johns Hopkins University, Working Paper, 2010).

increased.⁸ Moreover, even if increased moves to opportunity areas resulted in a net increase in subsidy costs for a particular PHA, the agency may have reserve funds it could draw to meet the increase, rather than reducing the number of vouchers in use. Under the voucher renewal funding formula in use in recent years, renewal funding would increase to cover the PHA's increased costs.

§903.2 – Proposed changes to PHAs' fair housing obligations with regard to “development-related activities” and public housing admissions

This part of the proposed rule would add a new paragraph (a)(3) concerning a PHA's obligations with regard to “development-related activities” and revise paragraph (d)(2) to make the AFFH obligation mandatory (“must”) rather than hortatory (“should”), and to spell out admissions-related obligations with more specificity. Given the evolution of public housing through mixed finance redevelopment and section 8 conversions under the Rental Assistance Demonstration (RAD), we support adding paragraph (a)(3) as an important update to implement the deconcentration goal of section 16(a)(3)(B) of the USHA, 42 USC §1437n. However, **the definition of the key term “development-related activities” should be amplified** to include activities with regard to properties that formerly were public housing or that replaced public housing, are no longer owned by the PHA, and have PHA-administered project-based vouchers in the rehabilitated or replacement properties. This could be done in the body of proposed §903.2(a)(3), or the definition of “development-related activities” could be set forth in a separate provision.

Revised §903.2(d)(2) also makes a number of positive changes that we support, including specifying that affirmative steps may include “narrowly tailored site-based waiting lists” and other steps that “lead to desegregation,” and adding a reference to admissions preferences that assist in deinstitutionalizing individuals with disabilities. (On the last issue, it is not clear why HUD thinks that *residency* preferences would achieve this goal. We recommend that HUD revise this clause to substitute “admissions” for “residency.”) To further strengthen §903.2(d)(2), we recommend that HUD add to the rule illustrations of how PHAs could use their HCV policies to deconcentrate public housing, including:

- establishing an HCV waiting list preference for public housing tenants in the racial majority of a development that is deemed “concentrated” and is in a Racially/Ethnically Concentrated Area of Poverty and providing assistance to such families to help them move to non-concentrated areas; and
- adopting a choice/mobility policy for a racially/ethnically-concentrated public housing development converted under RAD that is effective in achieving racial deconcentration.

§903.7(o) – Meaning of a PHA's certification that it affirmatively furthers fair housing

The proposed changes in §903.7(o) would revise what a PHA must do to be found in compliance with the requirement that a PHA certify its compliance with civil rights and AFFH requirements as part of the annual PHA Plan. **The obligation to take “meaningful” actions in revised (o)(1) is**

⁸ Robert Collinson and Peter Ganong, “Incidence and Price Discrimination: Evidence from Housing Vouchers”, April 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2255799. CBPP's analysis of HUD's Voucher Management System data found that from the fourth quarter of 2010 to the first quarter of 2013, the average per-unit cost (PUC) at Dallas area voucher programs fell by 4.9 percent. During the same period it rose by 1.9 percent at non-MTW agencies nationally and 1.8 percent at non-MTWs in Texas.

too vague and implementation requirements are too weak.⁹ To overcome this vagueness, and to tie the assessment of compliance more to results, we recommend that the rule state that an action or set of actions qualifies as “meaningful” only if the PHA explains in its PHA Plan the measurable results it expects to see within a specified timeframe, explains how the anticipated results would further the goals identified in the applicable AFH, and then reports and assesses the actual results in a subsequent Plan. HUD also should require PHAs to modify their actions if the results fall short of expectations. These changes would advance the overall purpose of the rule, as stated in §5.150, to provide “a stronger accountability system governing fair housing planning, strategies, *and actions.*” (emphasis added) They also are consistent with language in proposed §903.2(d)(3) and §903.7(o)(3)(vii) that emphasize that compliance with the AFFH obligation depends on the implementation of the plan and the *results* of actions.¹⁰

Proposed (o)(2) adds the specification that the certification applies to any plan that is incorporated in a PHA’s annual or 5-year plan under other regulations. While this should have been implicit, it is helpful to have it be explicit. **We recommend that HUD state specifically that the AFFH certification applies to a PHA’s HCV administrative plan**, which includes numerous policies that are key to the AFFH obligation, such as payment standards, occupancy standards, policies on housing search time, and how the PHA plans to expand housing choices.

The revision of the standards in §903.7(o)(3) for a PHA to be in compliance with the certification requirement has several positive changes. E.g.,

- (3)(ii) would require the identification of “any fair housing issues and determinants” in *all* of the PHA’s programs (thereby including the HCV program which is not otherwise separately addressed).
- (3)(iv) would eliminate the word “local,” thereby clarifying that if the state or a regional planning entity has initiatives to affirmatively further fair housing that require the PHA’s involvement, the PHA’s cooperation is part of the compliance determination. To advance this goal, HUD should change the word “jurisdiction’s” to “jurisdictions” so that it is clear that the obligation may apply to multiple jurisdictions, depending upon the circumstances.)
- New (v) and (vi) are the vehicle to enforce the requirements elsewhere that a PHA operate programs consistently with applicable Con Plans, civil rights related orders or agreements, and requirements to contribute or consult in the formulation of another jurisdiction’s AFH.
- Revised (vii), formerly (v), includes a new requirement to maintain records of results.

Doing the Assessment of Fair Housing, proposed 903.15

Importantly, the proposed rule allows PHAs some flexibility about whether to do the AFH itself or to collaborate with a Con Plan jurisdiction (which may be a state). Proposed §903.15 gives PHAs three options: 1) to participate with one or more sub-state Con Plan jurisdictions in a joint AFH; 2) prepare its own AFH; or 3) be subject to a state AFH, with or without active participation in its preparation. AFHs by Con Plan jurisdictions – with or without PHA partners but with PHA participation -- are required every 5 years (with some required interim amendments if there are

⁹ The same defect applies to the parallel language in other portions of the proposed rule, e.g., §91.225(a)(1).

¹⁰ §903.7(o)(1) is missing the word “it” in the second sentence: “...of 24 CFR 5.154, that *it* will....”

significant changes in relevant circumstances). If a PHA submits its own AFH, it must update it annually. We have the following recommendations to improve this basic framework of PHA options.

- **Option 1.** HUD should modify the standards in §903.15(a)(1) for Option 1, which allows a PHA to participate in the AFH of “its” local jurisdiction rather than submit its own AFH. The following changes are important to help ensure that PHAs and localities consider the use of all of the available housing resources in an area to affirmatively further fair housing, and to reduce burdens for PHAs.
 - The determination of which local jurisdiction a PHA can collaborate with in developing an AFH should not be determined only with regard to where the majority of “hard units” is located, as HUD has proposed. **PHAs choosing Option 1 should have the discretion to decide which Con Plan jurisdiction to collaborate with, so long as the PHA has *some* “hard units” or vouchers in the same geographical area as the chosen jurisdiction, and the joint AFH covers all of the PHA’s units and vouchers.** A focus only on hard units will tend to narrow the focus of the assessment and could lead to PHAs and localities overlooking how changes in policies that affect where families use HCVs to rent homes could help overcome barriers to fair housing choice and promote desegregation and deconcentration. HUD’s proposal on the share of hard units that must overlap with the chosen jurisdiction is unclear, but this issue would cease to matter if HUD adopts this recommendation.
 - Moreover, it isn’t clear whether “hard units” means only public housing units, or whether the term also covers PHA-owned units that have project-based vouchers (PBVs) or PBRA (important after RAD conversions), or other PBV units in properties that the PHA does not own. **HUD should define “hard units” to include all PHA-owned units that have HUD-funded rental assistance, and all units, regardless of ownership, that have PHA-administered PBVs.**
 - Proposed §903.15(a)(1) assumes that there is always a single jurisdiction that “governs the PHA’s operation” for HCV-only agencies. But that is not true for many agencies, either because they are independent or because their service area includes more than one Con Plan jurisdiction. **The rule should be clarified to allow any HCV-only PHA that administers vouchers in the area of a sub-state Con Plan jurisdiction to participate in that locality’s AFH.** (Statewide HCV-only PHAs would presumably be covered by Option 3 if they do not select Option 2. HUD should clarify this issue in the final rule.)
 - Related to Option 1, it is important to **modify proposed §5.154(e)(1)**, which addresses what happens when a PHA and a Con Plan jurisdiction do a joint AFH pursuant to §903.15(a)(1) and disagree over some specific elements. In addition, HUD should reference §5.154(e)(1) in the parenthetical at the end of §903.15(a)(1).

- First, we recommend that HUD require a PHA that disagrees with any aspect of the jurisdiction’s AFH to propose an alternative strategy or priority, and explain why the alternative is better designed to achieve the joint goal(s).
 - Second, HUD should clarify the proposed language of §5.154(e)(1) in several respects. It is not clear what “differentiated sections” means, and what the consequences are of HUD’s decisions on which provisions are approved in the case of a disagreement. If HUD approves the jurisdiction’s AFH despite the PHA’s dissent on some portion, the PHA should be bound by the approved provisions from which it had dissented. And conversely, if HUD agrees with the PHA’s alternative, the jurisdiction should be bound by it. Because of the potential consequences for jurisdictions in such a case, HUD should make clear that jurisdictions can include in their submission to HUD their response to a PHA’s disagreements.
- **Option 2** permits PHAs to do their own AFH. It makes sense for PHAs to have this option, as many PHAs are outside of any Con Plan jurisdiction except the state, and others may prefer to act independently for what could be good reasons. PHAs choosing this option would still be required, by revised §903.7(o)(3), to contribute or consult in the formulation of the separate AFHs of jurisdictions that overlap with the PHA, and to implement initiatives that require their involvement. We recommend two changes in the policies that apply to PHAs choosing Option 2:
 - In §903.15(a)(2), HUD has proposed to tie the geographic scope and proposed actions in the AFH to the PHA’s current operations. This would have the effect of allowing a PHA that has made no effort to expand where voucher holders live to ignore in the future the lack of mobility or portability outside the PHA’s typical service area. **At least for PHAs that administer HCVs in metro areas, we recommend that the PHA be required to consider the whole metro area as its scope for analysis and action.**
 - Proposed §903.15(c) would require PHAs doing their own AFH to update their AFH annually. We think this requirement is unnecessarily burdensome. All other PHAs, like all Con Plan jurisdictions, would be required to update their AFHs every five years, or if significant changes occur (pursuant to §5.164). **Option 2 PHAs should be subject to the same 5-year AFH requirement as all other entities required to submit an AFH.** They would then revise and update their 5-year PHA Plans based on the most recent AFH, which would sensibly tie together the broad goals of both documents and better integrate fair housing planning into a PHA’s overall longer range plan.¹¹ They also would submit an annual civil rights certification under §903.7(o), which should include a report of results of the

¹¹ These PHAs would then also be subject to §5.164, concerning when the AFH must be revised short of the 5-year point.

implementation of the PHA's strategies to advance the goals of the AFH, as recommended above.¹²

- **Option 3** would allow PHAs “covered by state agencies” to be bound by the state AFH whether or not they participate in its preparation. It is not clear which agencies HUD intends this description to apply to. Perhaps HUD meant the majority of the nearly 4,000 PHAs that primarily serve areas outside of the sub-state CDBG entitlement jurisdictions. If HUD retains a policy of limited eligibility for Option 3, the final rule should clarify which PHAs are eligible to choose this option. But this option is likely to be attractive even to some PHAs that overlap with a sub-state entitlement jurisdiction and are not interested in spending the staff time that Options 1 or 2 would require. **We recommend that any PHA (except one that administers only public housing that is located primarily or wholly within a sub-state jurisdiction that submits an AFH) be able to opt to be covered by the state AFH, unless there is a regional AFH that covers its service area.**¹³ These PHAs will have to submit the civil rights certification like others, and they should be required to explain how they will address fair housing issues and determinants in their own programs, even if the state AFH does not include any goals or strategies directly applicable to the PHA. We submit this recommendation out of concern that the AFHs of many local jurisdictions may not have appropriate regional focus to cover PHAs that serve suburban cities or towns too small to be entitlement jurisdictions. There are more than 1,000 such suburban PHAs.
 - The proposed rule states that PHAs choosing option 3 “must demonstrate that their development related activities affirmatively further fair housing....” This language implies that these PHAs have no obligation to demonstrate that how they administer their HCV programs, which many have, meets the AFFH obligation. **HUD should revise the final sentence of §903.15(a)(3) to include the administration of HCV programs.**

The proposed rule, in §903.15(a), would require PHAs to notify HUD 60 days before their PHA Plan AFFH certification is due to HUD of which option they are following. **We recommend that HUD delete this notification requirement, as it serves no apparent purpose.** If there is a worthwhile purpose, it is unlikely to be served by a notice to HUD 60 days before the PHA has to submit a Plan dependent upon the AFH. Moreover, this time frame seems inconsistent with the requirement in §5.160 that an initial AFH be submitted to HUD at least 270 days before the start of the program year.¹⁴ If HUD believes that it is important to make sure each PHA has thought about which option it will follow, HUD could require PHAs to include in the Annual PHA Plan submitted after the effective date of the rule its decision about which option it intends to choose for the AFH,

¹² If HUD's rationale for the annual AFH requirement for these PHAs is that they are required by statute to submit annual PHA Plans, then all PHAs subject to the annual plan requirement would also be required to submit annual AFHs, and Options 1 and 3 would be in conflict with the PHA Plan requirements of the U.S. Housing Act. We do not think this reading of the USHA is required.

¹³ PHAs subject to 903.15(d) would also not be able to select Option 3.

¹⁴ “Program year” may be an unclear concept for PHAs, since the program year for PH and HCV is the calendar year but PHA Plans are submitted based on PHAs' fiscal years.

which would allow public and resident input into the decision. In that case, the initial AFH should not be due until at least a year later (and based on the recommendations above, should be aligned with the 5-year PHA Plan for Option 2 PHAs, or the timeframe applicable to the local or state jurisdiction under Options 1 and 3).

In addition, we recommend that in the final rule HUD should modify §903.6, which addresses the information a PHA must provide in the 5-year Plan, to clarify that the 5-year Plan should align with the applicable AFH. This change is necessary to achieve the goal HUD states throughout the proposed rule to integrate the AFH into already-required planning processes. To this end, **HUD should include in §903.6 a provision that requires PHAs to incorporate in their next 5-year Plan after the preparation of the AFH goals and objectives consistent with the AFH, and adopt quantifiable measures for achievement over the 5-year period.** (§903.6(a)(2) already requires “quantifiable goals and objectives for serving [the] needs [identified in the Annual Plan] wherever possible.”) This recommendation is consistent with proposed §903.15(e), which would require PHAs to modify their 5-year PHA Plans if a significant change in the applicable AFH “necessitates a PHA Plan amendment.”

Regional issues

HUD invites comments on how to incentivize regional collaboration. HUD could provide an Option 4, similar to Option 3, that would allow any PHA that primarily serves an area covered by a regional AFH to be bound by the regional AFH, whether or not it participates in its preparation. As noted above in the discussion of Option 3, we recommend that HUD not permit PHAs to choose to be covered by a state AFH if there is a relevant regional AFH available. But an Option 4 concerning Regional AFHs would go further to incentivize regional collaboration, as well as make this option more visible to PHAs. At the least, HUD should incorporate in §903.15, in a new Option 4 or otherwise, the option for two or more PHAs to join together to submit a regional AFH, with or without Con Plan jurisdictions. Proposed 24 CFR §5.156, on regional AFHs, appears to contemplate this possibility, but without reference in the PHA-focused section of the rule PHAs may not be aware of it.

Separate from the AFFH rule, HUD could reward jurisdictions and PHAs that are part of regional AFHs with additional points under relevant competitions for new funds, and seek to have its partners in the Sustainable Communities initiative – DOT and EPA – provide similar incentives.

Small PHAs

HUD invites comments on whether small PHAs should be subject to different AFH requirements. The response to this is a simple “no” if HUD accepts the above recommendations, which would likely allow any small PHA to opt to be covered by the state AFH and not do any additional work. Some 640 small PHAs – those with 550 or fewer vouchers and no public housing – are already exempt even from the annual civil rights certification under the 2008 amendment to the PHA Plan requirements.¹⁵ It is particularly important not to further reduce fair housing-related obligations for these agencies, as well as the 300 or so small PHAs that administer public housing as well as vouchers and are in metropolitan areas. The HUD-funded resources controlled by small

¹⁵ An annual civil rights certification is required only regarding a qualified PHA’s public housing program.

PHAs in metropolitan areas, and their willingness to cooperate in portability arrangements, may be critical to the ability of PHAs and jurisdictions with severe fair housing challenges to make progress in affirmatively furthering fair housing. Rather than relieve these small agencies of fair housing responsibilities (which HUD may lack the legal authority to do), HUD should encourage them to collaborate with others in regional or state plans to reduce administrative burdens.

Enforcement

The PHA portion of the rule is weak on the consequences of non-compliance with the AFH requirement or the civil rights certification. The proposed rule is silent on the consequences for PHAs if HUD does not fully approve an AFH submitted under one of the permissible options after opportunity for revision and resubmission. Proposed §5.162(a)(2) implies that an approved AFH is a precondition to receipt of HUD program funding, but the language is ambiguous. Without a clear set of sanctions that PHAs can reasonably expect HUD to apply, some PHAs may ignore the requirements of the rule. Moreover, it is critical that subsidy payments to landlords under the HCV program not be withheld due to a PHA's noncompliance, or innocent families could be harmed. For the rule to be effective, it must include a statement of possible sanctions. These could be incorporated in the general part of the AFH rule in Part 5, and/or by revising §903.23 (on disapproval of the PHA Plan) and §903.25, which addresses the consequences of PHA non-compliance with its Plan. Unfortunately, §903.23 is silent on the consequences of HUD disapproval of the Plan, and in §903.25 HUD simply grants itself authority to "take whatever action it deems necessary and appropriate."

PIH Notice 2008-41, the most recent HUD issuance concerning PHA Plan requirements, states in paragraph 4 that HUD will not provide Capital Funds to PHAs without an approved Plan, but obviously this is of no consequence for PHAs that administer only an HCV program. Moreover, Public Housing Capital Funds are a small portion of overall funds for most PHAs. The PIH notice also states "If a PHA fails to *submit* a PHA Plan in a timely manner, HUD may impose sanctions including but not limited to the withholding or future reductions in Capital Fund program, Operating Fund, or Section 8 administrative fees." (emphasis added) This sub-regulatory statement is of no effect if the PHA submits a Plan that fails to comply with the AFH or improperly certifies that it is in compliance with civil rights and AFFH obligations.

In addition to incorporating in regulations its authority to withhold public housing funds or Section 8 administrative fees, we recommend that HUD add a range of non-financial PHA-specific sanctions that have the potential to encourage compliance with less likelihood of harming low-income families than the withholding of funds. For example, HUD could condition approval of waivers of program rules (unless the waivers are relevant to fulfilling fair housing obligations) and eligibility for discretionary program funds (e.g., Choice Neighborhood grants, ROSS grants) or other discretionary HUD actions, such as approval of a public housing conversion under RAD or the demolition or disposition of a public housing property, on a PHA's having an approved AFH and PHA Plan, including the annual AFFH certification. In addition, such PHAs should be ineligible for participation in any expansion of the Moving to Work demonstration or its successor. Compliance with AFH and AFFH requirements also could be rewarded through

points in competitive NOFAs and under PHAS and SEMAP (HUD's performance measures for the public housing and HCV programs, respectively).

Also critical to enforcement is an effective mechanism for residents and the public to file complaints with HUD about why it should disapprove an AFH or PHA Plan or find the PHA in non-compliance with its Plan. §903.25 recognizes the importance of such complaints, but to our knowledge HUD has never provided guidance for how such complaints can be submitted to ensure that the appropriate staff at HUD receive them. The final rule should make clear that complaints may be submitted to HUD on both sets of issues, and HUD should issue timely guidance concerning complaint procedures after discussion with representatives of residents, advocates and PHAs.

Inclusion of PHA data in national data provided by HUD

Question 1 asks “To what extent, if at all, should local data, for example ...PHA-related information, be required to supplement this nationally uniform local and regional data?” It's not clear what HUD means by “PHA-related information.” Proposed §5.154(c) states that HUD will provide all program participants (i.e., Con Plan jurisdictions, states and PHAs) with “PHA site locational data..., the distribution of housing choice vouchers, and occupancy data.” Making these data available to program participants *and the public* is critically important, for the reasons laid out in the introduction to these comments. If HUD has other relevant data on the location of public housing and HCVs, by demographic categories, including providing data on the share of resources located in Racially/Ethnicity Areas of Concentrated Poverty, by race/ethnicity and family type, that also would be important. In addition, HUD should include in the national data statistics on rental units with rents within 10 percent of the Small Area FMR by Con Plan jurisdiction, metro area and county (or just by zip code within metro areas, if the aggregation can easily be done by Con Plan jurisdictions and PHAs). These data are easily available to HUD and will make it much easier for PHAs and the public to visualize the possibilities of increasing the use of HCVs in neighborhoods with better access to key assets and opportunities.

Beyond “data” per se, there are key *policies* that are relevant to the AFH, such as PHAs' payment standards and admissions policies. In the short run, it may be more feasible for PHAs to provide information on these policies to the relevant jurisdictions since HUD does not collect them. It should, however, be a longer-run goal for HUD to require PHAs to postall such information on publicly-accessible internet sites, which also would eliminate the need for additional work related to providing information about these policies as part of the AFH.

Comparable AFH and fair housing requirements to those applicable to PHA Plans must apply to MTW Plans

The proposed rule properly focuses on integrating the fair housing planning process with the PHA plan process. But the rule overlooks the fact that 39 PHAs, serving about 12 percent of all PHA-assisted households, are not subject to any PHA Plan requirements because they participate in the Moving to Work demonstration. Under the MTW statute, HUD has no legal authority to waive the applicability of fair housing laws. To fix this apparent oversight, HUD should include a provision in the final rule clarifying that MTW agencies have the same three options as other PHAs

with regard to how to prepare an AFH, and also must include in their annual MTW plans the strategies they will follow to implement the goals of the AFH. MTW agencies should include information on their progress on quantifiable and other goals in their annual reports.

Technical issues

- Proposed §5.154(b)(2) specifies that PHAs “receiving assistance under sections 8 [HCV] and 9” [PH operating and capital] must submit fair housing assessments. Other text in the proposed rule makes it clear that HUD intends, as it should, to cover PHAs that receive *either or both* types of funding. We recommend changing the “and” to “and/or” (or revising the phrase to say “receiving assistance under sections 8 [HCV] or 9, *or both*”).
- §90.100(c) should be titled “public housing *agencies*” not “public housing,” as it clearly covers the programs of the agencies, and is not restricted to public housing.
- Proposed §91.110 omits references to the HCV program in several places without any apparent reason. We assume this was a mistake. HUD should:
 - Insert “or the Housing Choice Voucher program” at the end of the first parenthetical in (a);
 - Insert “or the Housing Choice Voucher program” after the first reference to “public housing” in (a)(1);
 - Change “PHA’s program” to “PHA’s programs” in (a)(1) near the bottom of 78 FR 43736.

Respectfully submitted,

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National Low Income Housing Coalition

The National Housing Law Project

The Sargent Shriver National Center on Poverty Law

National Fair Housing Alliance

Housing Choice Partners