September 17, 2013

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

RE:             Docket No. FR-5173-P-01., Affirmatively Furthering Fair Housing; Proposed Rule
               [RIN No. 2501-AD33]

To Whom it May Concern:

This letter sets forth the comments of the City of New York on the above-reference proposed rule.¹

The City of New York is the largest municipal developer of affordable housing in the nation. Under Mayor Michael R. Bloomberg’s New Housing Marketplace Plan the City has overseen the creation or preservation of more than 156,000 affordable units of housing in the last ten years. To achieve this, the City has utilized a wide variety of legal and financial powers drawn from federal, state and local sources. The allocation and sale of Low Income Housing Tax Credits have formed the backbone for many affordable housing developments, inclusive of supportive housing. City capital funds have been used to renovate foreclosed housing. Property tax exemptions and zoning bonuses have allowed the City to oversee the creation of thousands of affordable units in neighborhoods that are not racially concentrated areas of poverty. The City is the largest HOME grantee by far, and HOME funds have aided in the creation of more than

¹These comments were prepared by City agencies and entities that, inter alia, provide affordable housing, supportive housing opportunities to the homeless and people with special needs, and assist special constituencies in obtaining equitable housing: the Department of Housing Preservation and Development, Department for the Aging, the Department of Homeless Services, the Department of Health and Mental Hygiene, the Mayor’s Office for People with Disabilities, the Department of City Planning, the Office of Management and Budget, the City Commission on Human Rights, and the New York City Housing Authority.
17,000 units since 2002. Approximately 50% of HPD's HOME allocation creates permanent supportive housing for homeless people with disabilities, much of which is in high opportunity neighborhoods. Please see the accompanying two maps showing New York City’s housing development efforts across the City.

Overall, the City affirms the goal of increased access to high opportunity neighborhoods for historically marginalized populations. We encourage HUD to tackle barriers to opportunity on multiple fronts. However, as is evident from the above data on development of affordable housing in New York, we believe that initiatives utilizing state, local and other federal laws must be considered in assessing whether grantees are complying with AFFH goals. Therefore, to further enhance the Proposed Rule’s utility and its ability to further fair housing opportunity while ensuring that localities not become overburdened with excessive regulations, the City of New York provides the following comments. The City's comments are classified as I) General, followed by II) Public Housing Authority (PHA) related, and III) Proposed Rule-specific.

I) General Comments:

1. As noted, the goals of Affirmatively Furthering Fair Housing can be met using a wide variety of powers granted by federal, state and local law and regulation. As the attached maps demonstrate, the City has used authority derived from all levels of government to develop large amounts of affordable housing in neighborhoods that are not racially concentrated areas of poverty. The Proposed Rule must be rewritten to reflect the fact that compliance with AFFH goals can be met through the use of all powers available to each locality. Such can enable localities and regions to maximize the productivity of each available source of affordable housing without compromising the overarching purpose of AFFH.

2. The Proposed Rule does not anticipate the issues facing localities comprised of majority minority populations, such as New York City, where much of the City’s land area consists of census tracts populated with majorities of households earning less than 80% AMI. Moreover, New Yorkers often live in neighborhoods, and buildings, that are within scant blocks of people with vastly different economic circumstance; buildings with multi-million dollar condominiums exist literally across the street from PHA developments. Even with its poverty pressures, New York City has a demonstrated easy access to quality transportation that is used by minority and non-minority populations across all income levels to take advantage of employment, educational, health care and leisure opportunities. The City’s siting of federally assisted housing by grantees often depends on use of government-owned land. The Proposed Rule should be written to make it clear that even though a locality may use available land in a concentrated area of poverty, where that use makes a project economically feasible -- when use of private land a quarter-mile away would not -- then the more economical use does not violate principles of AFFH.

3. The Proposed Rule contains text which increases citizen participation requirements (e.g., compulsory consultation with FHIP competitive grant recipient organizations during the formulation of the Proposed AFH) without a corresponding increase in grant funds (entitlement or PHA) to undertake this activity. Expecting localities to use other, non-HUD monies (e.g., tax levy funds) to satisfy this requirement would result in an unfunded mandate. If a locality needs to expend CDBG funds for these expanded Fair Housing-related activities, the City recommends that the activities not be subjected to either the
Public Services expenditure cap or the Planning & Administration expenditure cap. Given the importance of this issue, it seems counterintuitive to limit the amount of entitlement funding that grantees can spend addressing it.

4. HUD’s proposed data metrics to analyze fair housing may not be suited to all localities. The City proposes that HUD post commenters’ alternate data metrics as best practices, so that all grantees may access these for their own use. Furthermore, analysis of the *federally-provided* fair housing data expected by HUD will require a high level of expertise that may not be available given limited budgets. Unless HUD provides technical assistance to applicants or additional funds to pay for the analyses, this requirement will be too great a burden in many cases.

5. We echo concerns that if HUD imposes quantifiable fair housing goal(s) in formulation of either the AFH, the Consolidated Plan and/or the PHA Annual Plan, localities are going to be held accountable for goals that may not be met due to external factors beyond their control, including factors such as the housing/business development cycle and the unpredictability of future federal resources (both HUD and non-HUD) available for housing and community-related development (e.g., education, transportation). Furthermore, if HUD finds that one component program in an AFH is not in compliance then the remaining programs should be held harmless.

II) Public Housing Authority (PHA) related:

1. **Faircloth Amendment**
   Section 9(g) (3) of the United States Housing Act of 1937 (the "Faircloth Amendment") limits the New York City Housing Authority’s (NYCHA’s) ability to affect housing patterns by limiting the construction of new public housing units. The Faircloth Amendment states that the Department cannot fund the construction or operation of new public housing units with Capital or Operating Funds if the construction of those units would result in a net increase in the number of units the PHA owned, assisted or operated as of October 1, 1999. Any proposed rule designed to further fair housing through site location must take this limitation into account.

2. **Cost of Compliance**
   Recent reductions in funding (proration and sequester) limit NYCHA’s ability to do the type of sophisticated analysis proposed by the Proposed Rule. HUD vastly underestimates the resources required to achieve compliance. While it is important that NYCHA act affirmatively to further fair housing, compliance would burden it with an unfunded mandate as no funding resource would cover the “marginal compliance cost impact” that HUD acknowledges (78 FR 43725). Given current underfunding, this is not a good time to impose these costs.

3. **Voucher Program as a Vehicle to Affirmatively Further Fair Housing**
   The Proposed Rule at 78 FR 43716 provides that “The Housing Choice Voucher Program can assist in affirmatively furthering fair housing by acting as “[a] significant mechanism “to enable families to access communities offering assets that are often difficult for voucher families to obtain.” The Housing Choice Voucher (“HCV”) program cannot serve this purpose in light of drastic funding cuts to the Section 8 program. To meet the challenge of these funding cuts, NYCHA’s Section 8 waiting list was closed in 2007 and no new incremental vouchers have been issued since mid-2009. Additionally, HUD
released proposed Fair Market Rent (FMR) figures for New York City on August 3, 2013, that reduced the FMR figures from the previous year by a rate of nearly 3 percentage points. While the City submitted a strong objection to the proposed figures, citing the impact these drops will have on owners’ incentives to rent to subsidized prospective tenants, there is no guarantee that prior FMR levels will be restored. And, even assuming a low 2% increase in average rents over the next year, that increase, together with a reduction in FMR, would effectively lower the amount a voucher holder could offer an owner by 5%. Mobility for existing voucher holders will be severely limited. Even assuming funding allows PHAs to resume issuing vouchers to new users, payment standard restrictions preclude Section 8-assisted families from renting apartments in neighborhoods that are not racially concentrated areas of poverty. Thus, unless funding is restored and the payment standards and FMRs are adjusted upwards, the Section 8 HCV program cannot realistically be a vehicle for affirmatively furthering fair housing.

4. Limitations on the Ability of PHAs to Affect Housing Patterns
   Limited Section 8 funding, including the administrative cap on the number of units assisted, plus anticipated funding decreases and the expected second sequester, combined with Faircloth limitations on public housing units, all decrease a PHA’s ability to affect housing patterns because a PHA has limited ability to provide funding for units in mixed-income developments.

5. Suggested Tenant Selection and Assignment Policy Modifications
   Proposed 24 CFR §903.2, at 78 FR 43742, encourages modifications to tenant selection and assignment policies, and other policies “to reduce racial and national origin concentrations.” Any tenant selection or assignment policies a PHA may implement which are based on race or national origin would likely violate City, State and Federal fair housing laws. Such policies could expose PHAs to litigation and liability with respect to any individuals or groups which do not receive the apartment or development of their choice due to their race or national origin.

6. Exemption or Safe Harbor for PHAs Accorded SEMAP Bonus or Acceptable Annual Plan De-Concentration Statements
   Existing regulations for the Section Eight Management Assessment Program (“SEMAP”) afford a de-concentration bonus to housing authorities demonstrating, among other things, that half or more of the families with children that are assisted reside in low-poverty census tracts, or that there has been an increase in the number of assisted families with children that move to low-poverty census tracts (24 CFR §984.5(h)). These incentives have not been incorporated into or discussed in the Proposed Rule, which should be reviewed and rewritten to avoid unnecessarily duplicative regulation.

7. In addition, the Proposed Rule is duplicative of the requirement that PHAs’ Annual Plans must include a statement of their de-concentration and other policies governing eligibility, selection, and admissions, including the ways in which their admissions policies will de-concentrate lower-income families (42 U.S.C. § 1437c-1(3)(B); 24 CFR §903.2(a), 903.7(b)). If a PHA adopts site-based waiting lists, it must review its site-based policy to ensure that it is taking the steps necessary to affirmatively further fair housing (24 CFR §903.7(b)(2)(v)(D)). If the Proposed Rule is issued without any reference to or coordination with the SEMAP de-concentration incentive or with the Annual Plan’s fair housing requirements, it should, at the very least, contain an
exemption for PHAs that demonstrate that they have de-concentrated poverty and for PHAs whose annual plans demonstrate that they are affirmatively furthering fair housing. In lieu of an exemption, HUD should adopt safe harbor provisions under which a PHA receiving the SEMAP bonus, meeting annual plan fair housing requirements, or otherwise demonstrating that it is affirmatively furthering fair housing may be deemed to have satisfied the proposed rule’s requirements.

III) Proposed Rule-specific:

The City's section-specific comments follow the topic headings of the Proposed Rule, as follows:

1. HUD PRESENTED COMMENTATORS WITH 17 QUESTIONS FOR CONSIDERATION. NEW YORK CITY OPTS TO RESPOND TO THE FOLLOWING TWO:

A) Regarding Question 1, Improvements to geo-code data: HUD should enhance its Geospatial Tool for the proposed Assessment of Fair Housing (AFH) Statement by making the respective data layers exportable to either a spreadsheet or database software application such as MS Excel. This will provide the localities the ability to statistically analyze the data for various purposes such as the formulation of their Proposed AFH or the delineation of potential areas for possible fair housing-related activities (e.g., analysis areas for targeted investment).

B) Regarding Question 7, which states: “…the proposed rule acknowledges that the 5-year planning cycles and program/fiscal years for PHAs and consolidated plan program participants might differ...” The City of New York urges HUD to reduce the redundancy between the contents of the AFH and the Consolidated Plan by fully incorporating the AFH into the Consolidated Plan. To fully integrate all planning processes, the AFH must be part of the Consolidated Plan process to more directly and effectively incorporate fair housing planning into the comprehensive housing and community development planning that grantees undertake through the Consolidated Plan. Aligning the two processes will streamline the process and ensure that analysis of need and strategies are discussed in sync. In addition, the incorporation of the two plans will save time and resources. The combined AFH and Consolidated Plan should be reviewed by staff from CPD, PIH, and other HUD offices whose programs are under scrutiny in the review process.

If the above approach is not agreeable to HUD, the City of New York strongly requests that HUD initiate and finalize its review of a locality’s AFH one year before the Consolidated Plan period begins; that is, a one-year lag.

2. PART 5 - GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

Affirmatively Furthering Fair Housing

§ 5.152 Definitions.

The definition for Disproportionate Housing Needs explicitly states the criteria/threshold for what constitutes a disproportionate housing category need for low-/moderate-/middle-income families, respectively (“At least ten percent higher than the percentage of persons in a category as a whole”). However, the respective definitions for Integration; Racially
or ethnically concentrated area of poverty (RCAP or ECAP); and, Segregation do not state their criteria/threshold for the term (high, significant) “concentration”.

For example:

Integration means, based on the most recent decennial Census and other data sources as determined by HUD to be statistically valid, that particular geographic areas within a jurisdiction do not contain high concentrations [emphasis added] of persons of a particular race, color, religion, sex, familial status, national origin, or handicap when compared to the jurisdiction or Metropolitan Statistical Area as a whole.

Therefore, the City recommends the above mentioned definitions be revised to incorporate the specific description of what the term “concentration” means for clarity.

3. PART 5 - GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS
Affirmatively Furthering Fair Housing
§5.154 Assessment of Fair Housing (AFH).

The Proposed Rule at §5.154 (d)(4) (Content, Identification of fair housing priorities and general goals) does not specify how HUD will determine whether a locality’s AFH is acceptable or how it will evaluate the locality’s success in achieving its goals once the AFH is approved. As previously stated, in defining success HUD must consider all applicable federal programs (not merely those specified in the draft Rule) as well as local initiatives taken under state and local laws and using state and local funding.

4. PART 5 - GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS
Affirmatively Furthering Fair Housing
§5.156 Regional assessments and fair housing planning.

We believe there is a contradiction between proposed regulations concerning consultation with surrounding localities which needs to be reconciled.

The proposed regulation §5.156(a) (Regional assessments and fair housing planning, General) indicates that consultation with adjacent units of general local government, while encouraged, is not mandatory. (Two or more program participants (regionally collaborating program participants) may, and are encouraged to, collaborate to conduct and submit a single regional AFH to evaluate fair housing issues and determinants from a regional perspective (Regional AFH).)

However, proposed regulations in CFR Part 91 regarding the formulation a locality’s Consolidated Plan require consultation with adjacent localities. Regulation §91.100(a)(5) (Consultation; local governments., General) states: The jurisdiction also shall consult with adjacent units of general local government, including local government agencies with metropolitan-wide planning and transportation responsibilities, particularly for problems and solutions that go beyond a single jurisdiction.

To require a central city in a metropolitan area, such as New York City, to consult with adjacent local governments, and by implication, request that such localities use their limited entitlement grant funds to assist the central city to meet its fair housing goals, may not be practical or financially feasible.
Recommendation: The City of New York recommends that §91.100(a)(5) be amended to be consistent with the proposed regulation §5.156(a). The amended regulation should read as follows:

*The jurisdiction may also consult with adjacent units of general local government, including local government agencies with metropolitan-wide planning and transportation responsibilities, particularly for problems and solutions that go beyond a single jurisdiction.*

5. PART 5 - GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

Affirmatively Furthering Fair Housing

5.160 AFH submission requirements

The proposed regulations provide the requirements for submission of the AFH to HUD in terms of submission deadline and frequency.

Proposed regulation §5.160(a)(1) and (a)(2) (General) state the submission deadline for initial AFH and subsequent AFH Statements, respectively.

(1) “…each program participant ... shall submit an initial AFH to HUD at least 270 calendar days before the start of the program participant’s program year,”

and

(2) “…After acceptance of its initial AFH, each program participant ... shall submit subsequent AFHs to HUD at least 195 calendar days before the start of the jurisdiction’s program year.”

However, the two above mentioned propose regulations as written contradict the proposed regulation at §5.160(c) (Frequency of submission): (“Each consolidated plan program participant must submit an AFH at least once every 5 years, or as such time agreed upon by HUD and the program participant in order to coordinate the AFH submission with time frames used for consolidated plans, ...”)

Consolidated Plan regulations require entitlement grantees are to submit their Consolidated Plan One-Year Action Plans annually forty-five (45) days prior to the start of jurisdiction’s program year. Therefore, it is unclear whether HUD expects the localities to submit an AFH on an annual or five year basis.

In addition, proposed regulations at §5.160(a)(1)which requires submission of the initial AFH Statement 270 calendar days prior to the start of a jurisdiction’s program year would result in New York City and other localities having to formulate and submit their initial AFH during their Consolidated Plan Annual Performance and Evaluation Report (CAPER) formulation and submission process for the prior program year’s Consolidated Plan. Attempting to formulate and submit both federally-required reports within the same time frame would create an excessive administrative burden.

Therefore, the City of New York has several recommendations regarding the proposed regulations:
1) Modify proposed regulations §5.160(a)(1) and (a)(2) to provide clarification and be consistent with proposed regulation §5.160(c) regarding frequency of submission; and,

2) Modify proposed regulation §5.160(a)(1) to change the submission deadline to relieve the administrative burden to be closer the Consolidated Planning cycle (for example, 180-210 calendar days before).

The amended regulation §5.160(a)(1) may be modified to read as follows:
“...each program participant ... shall submit an initial AFH to HUD at least (180-210) calendar days before the start of their 3- or 5-year consolidated planning process,...”).

In addition, the amended regulation §5.160(a)(2) may be modified to read as follows:
“After acceptance of its initial AFH, each program participant ... shall submit subsequent AFHs to HUD at least 195 calendar days before the start of their 3- or 5-year consolidated planning process.”

6. PART 5 - GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

Affirmatively Furthering Fair Housing
§5.164 Revising the AFH.

The proposed regulation at §5.164(a)(1)(i) (General—Minimum criteria for revising the AFH) reads: (“The AFH must be revised under the following circumstances: Whenever a significant material change in circumstances occurs that calls into question the continued validity of the AFH, such as..., significant demographic changes, significant policy changes (such as significant changes related to zoning, housing plans or policies, or development plans or policies),...”). The rule does not provide criteria or define what constitutes a “significant” demographic change, and/or a “significant” policy change. The City submits that this is too vague to be clearly and consistently applied by localities on a national basis.

Moreover, there is a concern whether the Proposed Rule will give HUD oversight power over a locality’s (internal) functions, particularly the potential for scrutinizing local zoning changes on fair housing grounds with no clear review criteria.

Before concluding, the City raises a final question concerning the Proposed Rule: We understand that HUD has announced that it anticipates issuance of a Final Rule, after the review and consideration of submitted comments, in 2014, with the first initial five-year AFH plans submitted in 2015. We ask HUD to issue further assurance that this will be the case, as uncertainty over scheduling of the AFH could interfere with the City’s Consolidated Plan Five-Year Strategic Plan formulation cycle, the next of which is scheduled to begin on January 1, 2015? Otherwise, it is not clear whether the City would have to amend its Five-Year Strategic Plan, or whether it could wait to institute this for the 2020 Five-Year Strategic Plan.

The City of New York appreciates the opportunity HUD has offered to receive stakeholders' views on this important policy initiative. If you have any questions or concerns, please do not hesitate to contact HPD Associate Commissioner Christopher Gonzalez, email gonzac@hpd.nyc.gov.
Sincerely,

[Signature]

RuthAnne Visnauskas

Enc.