

February 17, 2015

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Office of Legislation and Regulations  
Office of General Counsel  
Department of Housing and Urban Development  
451 7<sup>th</sup> Street, SW, Room 10276  
Washington, DC 20410-0500

**RE: Proposed Rule, “Affirmatively Furthering Fair Housing,” Re-Opening Public Comment Period on Subject of Later First AFH Submission Date for Certain Entities, 80 Fed. Reg. 2062**

Dear Ms. Acevedo:

These comments are submitted on behalf of the Lawyers’ Committee for Civil Rights Under Law and the undersigned civil rights, fair housing, and other non-profit policy organizations. Many of the undersigned organizations previously submitted comments, both jointly and individually, on the Department of Housing and Urban Development’s (HUD) proposed Affirmatively Furthering Fair Housing regulation, 78 Fed. Reg. 43709, and the Affirmatively Furthering Fair Housing Assessment Tool, 79 Fed. Reg. 57949. We continue to strongly support HUD’s efforts to clarify the responsibilities and increase the accountability of state and local grantees to comply with the “affirmatively furthering fair housing” (AFFH) mandate of the Fair Housing Act. HUD’s January 16, 2015 notice re-opening public comment on the Proposed Rule solicited input on proposals to (1) delay submission of initial Assessments of Fair Housing (AFHs) for states and insular areas, (2) delay submission of initial AFHs for qualified public housing authorities (PHAs), and (3) delay submission of initial AFHs for entitlement jurisdictions that receive grants that are 0.0125% of the total formula allocation.

HUD should move quickly to finalize and implement the Proposed Rule and should only permit delays in very limited and clearly articulated circumstances. With respect to the details of the January 16 notice, it is difficult to comment on the advisability of deferring the submission of certain jurisdictions’ AFHs without knowing the duration of the proposed delays. The department’s goal of ensuring that jurisdictions have the capacity to engage in sound fair housing planning would be better achieved through the alternative strategies of promoting collaborative AFH submissions and offering targeted technical assistance. Specifically, we recommend that:

1. HUD should consider granting reasonable, limited delays only where they are tied to specific gaps in capacity and the delay would improve the grantee’s eventual AFH submission. In most instances, HUD could better encourage high-quality AFHs by fostering collaboration among program participants and providing targeted technical assistance.
2. The different types of jurisdictions identified in the notice raise different concerns and should be treated as follows:

- a. Delayed submission is inappropriate for states because of their high capacity, their broad influence, and the relatively small number of states that would have to submit AFHs in the near future in light of the Consolidated Plan submission schedule. In order to facilitate state preparation of AFHs, HUD should act promptly to release and subsequently finalize an appropriate assessment tool for states. Only by having states go forward and prepare AFHs will HUD enable states going through the process in future years to learn from and apply lessons learned.
  - b. HUD's reliance on the criteria for qualified PHAs to assess the capacity levels of PHAs is reasonable, but collaboration between qualified PHAs and entitlement jurisdictions or states is a more efficient and effective strategy for overcoming capacity constraints among small PHAs.
  - c. Likewise, HUD's formula for differentiating low capacity entitlement jurisdictions from higher capacity ones is reasonable, but collaboration on regional AFHs is a better strategy for addressing gaps in capacity.
3. To the extent that HUD allows for delayed submissions, the department must make the duration and scope of those delays much clearer.
  4. In order to ensure the long term success of the Proposed Rule, it is absolutely critical that a cohort of large entitlement jurisdictions conduct their initial AFHs this year and that HUD begin process of reviewing those submissions.

#### **I. States and Insular Areas:**

Delaying the submission of initial AFHs is particularly inappropriate for states and insular areas for three primary reasons. First, states are among the very highest capacity grantees. The state housing and community development departments and housing finance agencies that will serve as lead agencies for the preparation of AFHs generally have more staff and more highly qualified staff than entitlement jurisdictions. They are also more likely to have access to helpful resources like geographic information systems (GIS) mapping software.

Second, the role that states play in the expenditure of federal housing and community development funds is outsized in comparison to that of municipalities. In 40 out of 50 states, the state, rather than any entitlement jurisdiction, is the largest grantee of formula funds. The geographic reach of those expenditures is expansive, dominating housing and community development activities in rural areas, playing a significant role on the exurban fringes of metropolitan areas, and often overlapping with entitlement jurisdictions, many of which only administer one or two of the four key formula-funded programs. Additionally, state housing agencies frequently administer the largest allocations of Housing Choice Vouchers (HCVs) of any PHA in their states. For the purposes of the Proposed Rule, these agencies are PHAs rather than states. Since nearly all of these agencies are too large to be qualified PHAs, allowing delays for state housing agencies that administer CDBG and HOME funds would increase the likelihood that states and state PHAs would not conduct their AFHs on the same schedule, an outcome that would decrease the quality of the assessments.

In addition to those HUD-funded programs, state housing finance agencies administer the Low-Income Housing Tax Credit (LIHTC) program, which produces, by far, the greatest number of new units of affordable housing of any housing program. If HUD relies solely on the fair housing planning activities of large entitlement jurisdictions and large PHAs to meet the department's own obligation to affirmatively further fair housing for any appreciable amount of time, the existence of gaping holes in HUD's awareness of what is occurring at the state level will undermine HUD's compliance with the duty to AFFH.

Third, if the Proposed Rule is finalized this spring, only two states will have Consolidated Plan program years with start dates that will trigger AFH submission requirements during the first year and a half of the Proposed Rule's operation. If there are capacity constraints with respect to the two states at issue, targeted technical assistance should easily surmount those difficulties, and going through that process will result in the development of lessons learned that will be crucial for states conducting AFHs in future years.

HUD clearly must publish a version of its Assessment Tool that is tailored to the needs of states prior to requiring states to complete AFHs. Rather than considering delays that are not tied to the very specific need to finalize that template, HUD should work expeditiously to publish the template and begin the process of incorporating stakeholder feedback.

## **II. Qualified PHAs:**

Unlike states, qualified PHAs, which are, by definition, small, have very real capacity constraints that may limit their ability to conduct high-quality AFHs. Additionally, unlike both states and entitlement jurisdictions of all sizes, qualified PHAs have not historically been subject to the requirement to conduct an analysis of impediments to fair housing choice. Thus, although PHAs have been under an obligation to affirmatively further fair housing since 1968, the Proposed Rule rightly imposes a new procedural requirement on PHAs. That means that, under the Proposed Rule, PHAs will be engaging in activity – fair housing planning – in which many of them did not previously engage. Delaying submission of qualified PHAs' initial AFH submissions is not a prudent course of action because there is no evidence that postponing submission would increase the capacity of PHAs to create effective plans.

A much better approach to the issue of PHA fair housing planning capacity would be to encourage qualified PHAs to collaborate with overlapping entitlement jurisdictions, if any, or the state on AFH submissions. Indeed, allowing qualified PHAs to delay their initial AFH submissions may have the unintended consequence of deterring that type of collaboration. Regardless of whether HUD allows some qualified PHAs to delay their submissions, the department should limit delays to qualified PHAs that are outside of metropolitan areas in order to limit that risk.

In addition to avoiding needless delays, this approach offers two tremendous benefits. First, the total cost of preparing a joint AFH is likely to be lower than the cost of preparing two separate AFHs. Thus, jurisdictions that collaborate on joint AFHs will have more funds available to spend on programmatic activities like developing or rehabilitating subsidized housing, providing tenant-based rental assistance, and sustaining parks and community centers. Second, effective fair housing planning requires jurisdictions to look at policies and practices that affect

housing choice holistically. For example, issues relating to public housing and the Housing Choice Voucher (HCV) Program cannot be meaningfully separated from how a jurisdiction provides mass transit services or restricts or promotes the development of market affordable housing relied upon by HCV holders.

HUD's Proposed Rule goes some length toward encouraging this type of collaboration, which will obviate any apparent need for delay. Section 903.15(a)(1) of the Proposed Rule contemplates PHAs collaborating with overlapping local governments on AFHs, and Section 903.15(a)(3) permits "PHAs that are covered by state agencies" to participate in state AFHs. HUD should build on this base by clarifying that the category of "PHAs that are covered by state agencies" includes all PHAs whose geographical territory does not overlap with that of an entitlement jurisdiction. Doing so is the most effective means HUD has at its disposal to address PHA capacity constraints. Of course, while we believe such collaboration has the potential to provide a great benefit to resource-constrained funding recipients, we also reiterate the importance of ensuring that PHAs are also meeting their individual AFFH obligations.

### **III. Small Entitlement Jurisdictions:**

HUD's notice proposes delayed initial AFH submission for small entitlement jurisdictions that receive no more than 0.0125% of the annual formula allocation. If small entitlement jurisdictions' initial submissions are going to be delayed, the cut-off of 0.0125% of the total formula allocation would be a reasonable threshold for determining whether or not an entitlement jurisdiction is small enough to have its capacity constraints accommodated. However, as with states and qualified PHAs, there is no clear justification for the position that delayed submission deadlines are likely to be of meaningful assistance to jurisdictions attempting to engage in effective fair housing planning despite the existence of capacity constraints. Deferments would only assist jurisdictions if additional financial resources were likely to be made available in future years, but there is no prospect of such funding emerging.

Instead, a combination of collaboration between entitlement jurisdictions on regional AFHs, as provided in Section 5.156 of the Proposed Rule, and targeted technical assistance from HUD is the best strategy for overcoming the capacity constraints of small entitlement jurisdictions. In addition to increased efficiency, regional AFHs also offer the benefit of enabling jurisdictions to identify, discuss, and analyze the cross-jurisdictional effects of housing, transportation, and education policies. This regional lens is critical to a robust understanding of fair housing choice and occupancy patterns.

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In strengthening and modernizing its approach to AFFH oversight, HUD must create a structure that facilitates effective fair housing planning and ensures a culture of accountability around both the planning process and grantees' programmatic activities. On rare occasions, actions that dilute jurisdictions' obligations under the regulations may be justified insofar as they further those overarching goals. If allowing a jurisdiction to submit its AFH 30 days late is likely to result in a much higher quality AFH, then allowing such a delay is not problematic. HUD can offer this degree of flexibility through a regulatory waiver process under which the department applies clear standards in reviewing jurisdictional requests.

However, widespread delays in implementation that are not tied to specific gaps in capacity that such delays would help overcome are ill-advised. Instead, HUD should (1) act quickly to publish Assessment Tools for states, PHAs, and regional AFHs; (2) encourage small grantees to collaborate with larger grantees on joint AFHs and clarify the circumstances under which such partnerships are allowed; and (3) provide targeted technical assistance to overcome remaining capacity constraints. By taking these steps, HUD will strengthen its own compliance with the duty to AFFH and help ensure that communities of opportunity are accessible to all.

Respectfully submitted,

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