

September 17, 2013

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

RE: Docket No. FR-5173-P-01, Affirmatively Furthering Fair Housing

To Whom It May Concern:

The High-cost Cities Housing Forum (HCHF) and our partners appreciate the opportunity to submit comments on the Affirmatively Furthering Fair Housing (AFFH) proposed rule. We commend HUD for seeking input and taking these steps to update and strengthen fair housing regulations.

HCHF is a peer-to-peer group of housing directors and commissioners for the large cities of Boston, Chicago, Los Angeles, New York City, San Francisco, and Seattle. The forum serves as a venue for these commissioners to discuss policy, offer program ideas and exchange best practices. Our cities share many unifying characteristics, including expensive real estate, robust population and economic growth, and a housing stock characterized by more multifamily than single family housing.

We appreciate the conversation that Deputy Secretary Maurice Jones, the Office of Policy Development and Research (PD&R) and the Office of Fair Housing and Equal Opportunity (FHEO) had with HCHF upon the release of the proposed rule to respond to questions and concerns on July 30, 2013. HCHF requested another call with HUD to include the Office of Community Planning and Development (CPD) to ensure that CPD has an equal role with FHEO in approving the AFFHs. A second conversation took place on September 9, 2013 which included Deputy Secretary Maurice Jones, Patrick Pontius, staff from CPD, FHEO, and the Office of Public and Indian Housing (PIH). The conversation included a discussion about HUD's coordinated efforts between the relevant offices as well as the review and approval authorities. We are grateful for FHEO's commitment to coordinate technical assistance efforts with CPD and look forward to a rule with explicit language on CPD's formal integration into the process. Members of HCHF also participated and presented on PolicyLink's Affirmatively Furthering Fair Housing webinar held on August 21, 2013. The importance of a balanced AFFH rule was expressed in both the webinar and on phone calls.

Due to the significance and far-reaching implications of this rule, HCHF has joined with other cities on this letter to voice our concerns and recommendations for improvement. These signatories include the cities of Baltimore, Denver, Houston, New Orleans, and San Jose. Together, we represent nearly 22 million people and over 2,300 square miles. Our annual Consolidated Plan funds total more than \$650 million, or 14.3 percent of all HUD block grant funds for housing and community development. Nine of these eleven cities—Baltimore, Boston, Chicago, Houston, Los Angeles, New Orleans, New York, San Francisco, and San Jose—are majority minority.

The cities represented on this letter and many others across the country have a balanced policy approach to fair housing that acknowledges the importance of investing in both high and low income areas. The proposed AFFH rule is missing this balance and does not allow room for local equity strategies.

We strongly support HUD's objective to reform and advance the important goal of ensuring access to decent, affordable housing in thriving communities for all people. However, we have substantial issues with the rule as currently written, and strongly recommend that HUD take these and other comments into consideration, release a second proposed rule and allow for a second round of comments before finalizing the rule. Our primary recommendations are outlined below, and we welcome the opportunity to discuss these further with HUD.

- 1. Explicitly acknowledge that efforts to reinvest in and revitalize areas of concentrated poverty *and* efforts to promote mobility and access to housing and resources in high opportunity neighborhoods are equally endorsed strategies by HUD, as both strategies affirmatively further fair housing.**

Our cities are firmly committed to equity and fair housing, and we fully embrace both reinvestment and mobility strategies. In our experience as leading practitioners in the field of housing and community development, we have seen first-hand that both strategies must be employed. Unfortunately, the language in the initial proposed rule favors mobility and does not appear to support reinvestment and preservation as robustly. We greatly appreciate the assurances we have gotten from HUD throughout the comment period regarding their commitment to both approaches, but we need clearly stated language in the second proposed rule.

Our cities and others across the country have made concerted efforts in recent years to invest public funds in communities that have experienced disinvestment and neglect. These areas often

include minority racial concentrations and have disproportionately high poverty rates. Targeted investments are a critical tool to improve housing options and quality of life for the low- and moderate-income households in these communities.

We ask that the rule acknowledge that investments in low-income communities are consistent with both HUD program goals as well as fair housing goals. The initial proposed rule's intense emphasis on promoting integration and ending patterns of segregation could overtake other worthwhile programs to further that purpose. The initial rule seems to imply that the makeup of certain communities indicates distress. Racial and ethnic concentrations should not necessarily be indicators of dysfunction. Low-income neighborhoods can be thriving hubs for commerce, recreation, and families. Areas of minority concentration can be strong, successful, and ethnically identified communities. In cities that are majority minority, like Los Angeles, New York, or New Orleans, this is particularly true. However, even in Seattle—which is not majority minority—the city works to support the highly functional and ethnically diverse neighborhoods that have developed in the city as receiving sites for immigrant and refugee communities. These neighborhoods provide critical economic mobility opportunities for these communities transitioning into U.S. society and bolster the regional economy. Many of our cities also work to prevent displacement due to gentrification, and to ensure that families that do relocate are provided ample support as they settle into new routines. These activities should be affirmed in the rule.

2. Address local and regional capacity concerns and provide the necessary supports to jurisdictions in transitioning and implementing this new system.

The initial proposed rule presents numerous new tasks and requirements, which will take considerable staff time and energy. The overall logistics of the AFH will clearly be substantial, particularly if we attempt to submit regional plans; however, it is difficult to estimate resources that will be required without greater specificity in the rule. We request the next draft rule provide additional detail on timelines, record keeping, and community engagement requirements. In crafting these details, HUD should consider that the laudable AFFH goal of overcoming historic patterns of segregation and disinvestment has already been undermined by a crushing reduction of federal resources. There are no additional funds associated with implementing the AFH system, and we are concerned that the AFH will create an enormous burden placed on cities in return for receiving HUD funds.

The proposed regulation appears to suggest that the Assessment of Fair Housing (AFH) will significantly shape the Consolidated Plan and all the activities within it. We are concerned about the logistics and capacity requirements associated with this intersection. For instance, the Fair

Housing Advisory Councils and citizen participation plan appear to be duplicative, and we are concerned about local citizens becoming weary of multiple requests for input and response to community plans. Additionally, the initial proposed rule seeks a 270-day advance submittal of the AFH to HUD before jurisdictions can incorporate fair housing strategies in the Consolidated Plan. There are numerous challenges associated with this timeline. We urge 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 Con Plan should be reviewed by staff from CPD, PIH, and other HUD offices whose programs are under scrutiny in the review process.

Finally, HUD funding alone is insufficient to address market and political forces that lead to inequitable communities, like gentrification or NIMBY-ism. As HUD considers technical assistance needs regarding the implementation of this rule, we recommend that HUD work to increase capacity at the local level for implementing sophisticated strategies that involve concepts such as value capture (which allows cities to recover some of the value that public infrastructure or private development generates for landowners), JPAs, zoning and planning tools, regional partnerships, and other best practices. These are just a few examples, and we are confident there are many more across the country that would be useful for HUD to learn about, become leaders in, and assist localities in adopting these cutting edge practices.

The delivery of fair housing through community development requires that HUD TA is provided by those that possess both fair housing expertise and *actual experience* in the delivery of housing and community development in neighborhoods. In conversations with HUD officials regarding the initial proposed rule, we have heard that FHEO plans to coordinate review and technical assistance efforts with CPD, PIH, and other divisions. We greatly appreciate this commitment and hope to see written documentation of this intended collaboration in the second proposed rule.

3. Clarify the anticipated evaluation, monitoring, and enforcement process.

Interdepartmental Review

In the initial proposed rule, there are numerous instances that refer to HUD generally or the Secretary, and we request that the second proposed rule identify which office is actually being referenced or will have authority or discretion. We understand that many parts of the process are

expected to be collaborative, but we still request clarification on specifically which offices will be involved in the work and to what degree.

Different offices within HUD have expertise about the programs they administer and monitor. Given the direct impact of the AFH on the Consolidated Plan and the Public Housing funds, CPD and PIH should have at least equal authority with FHEO to review and approve each AFH.

Evaluation Criteria

HUD needs to clearly outline the measures it will use to evaluate an AFH. We also ask for clarification as to how HUD will monitor and evaluate the implementation of the plan after the AFH has been accepted.

Under the initial proposed rule, we are concerned that certain development constraints—related to the availability or costs of land, for example—will set some localities up to fail. We recognize that HUD is not intentionally setting up this situation, but the rule must be modified to recognize that grantees must not be held accountable for insurmountable barriers. Current economic problems already pose challenges for jurisdictions to meet the needs of low-income, unemployed, homeless, and other at-risk populations, and the threat of losing any resources from HUD sanctions or funding delays is distressing.

The evaluation criteria should also take into consideration the goals and limitations of federal, state and local initiatives that contribute to the achievement of HUD's stated goals. For instance, it is often infeasible to use Low-Income Housing Tax Credits in mixed-income developments or upper-income neighborhoods. We ask that the AFFH rule specify that HUD will hold local grantees harmless for adhering to rules and guidelines of HUD programs and other critical affordable housing and community development programs.

At a minimum, the rule should state that:

- HUD will produce an initial draft of any evaluation tools and checklists and allow for public input before finalizing AFH evaluation tools.
- In reviewing the AFH, HUD will provide at least two written correspondences to the jurisdiction if any issues arise—an initial response to gather information followed by a formal response, if necessary.
- HUD's initial response to an AFH will be in the spirit of inquiry rather than judgment. This initial response will allow jurisdictions to justify their AFH data and recommendations.
- The AFH and implementation of the AFH will be reviewed holistically. A single concern or violation will not justify a blanket negative determination.

Consequences

We ask that the second proposed rule specify the repercussions associated with failure to meet expectations with regard to the AFH. The proposed regulation is unclear about the consequences of a rejected AFH (with the exception of incomplete analyses) and the potential for HUD to withhold funds from a grantee due to a deficient AFH is a significant and paralyzing danger. We suggest the rule state:

- HUD may only withhold funds in cases where there is a *consistent and sustained* pattern of fair housing violations, rather than merely reporting concerns. There must be a problem in AFH implementation as well as with the AFH plan. In other words, an unsatisfactory AFH will not be the sole cause for suspension of funds.
- HUD will only suspend payment on the funding streams directly involved in the fair housing violation. For instance, ESG funds would remain unaffected if a jurisdiction is misusing HOME funds alone. It would be counter-productive to impact homeless shelters due to a problem with the location of affordable housing developments. Further, the proposed regulation should make clear that jurisdictions receiving only CPD funds are not responsible for PHA actions (or the converse).
- In cases where HUD determines that a jurisdiction's AFH or investment choices are unacceptable under federal fair housing law, HUD will offer an appeals process to that jurisdiction.

Respecting Local Discretion

Local jurisdictions like ours are using grant funds as permitted under their respective regulations to address needs as we see fit, and we want the AFFH rule to be very clear that we will retain this authority. We understand, from discussions with the department, that it is not HUD's intent to interfere with local control, local discretion, or local choice. However, the initial proposed rule could project blanket assumptions about what is best for certain demographic groups, regardless of other contextual information. Particularly in larger, denser cities, there are multiple racial and economic disparities, and local jurisdictions are trying to thoughtfully utilize resources to maximize the impact of both policy and financial strategies. We request that the HUD rule state unambiguously that local discretion provided by the Consolidated Plan programs will be preserved with the new rule.

4. Revise definitions to reflect the true intent of promoting fair housing.

HUD provided numerous definitions in the initial proposed rule, and we appreciate this effort to ensure that all stakeholders are using the same language. However, we suggest the following changes to key definitions in the rule:

- Affirmatively Furthering Fair Housing (AFFH). This definition should be revised to read: “Affirmatively furthering fair housing means taking proactive steps *including* combating discrimination to foster more inclusive communities and access to community assets for all persons. More specifically, it means taking steps to proactively foster and maintain compliance with civil rights and fair housing laws. For participants subject to this subpart, these ends will be accomplished primarily by making investments with federal and other resources, instituting strategies, or taking actions that address or mitigate fair housing issues identified in an assessment of fair housing (AFH) and promoting fair housing choice for all consistent with the Fair Housing Act.”
- Disproportionate Housing Needs. The proposed definition implies that affordable housing projects should only house families in protected classes with disproportionate housing needs and exclude other low-income individuals who qualify for such housing. We do not believe that HUD intended to dedicate federal funds exclusively to helping those in a protected class. We recommend that the definition reflect that members of a protected class are at least *20 percent* higher than the percentage of persons in the category as a whole, rather than the 10 percent included within the definition.
- Fair Housing Choice. We believe this definition should be revised to state: “...For persons with disabilities, fair housing choice *is the ability to live where they choose*, including disability-related services that an individual needs to live in such housing.”
- Fair Housing Issue. We believe this definition should simply read: “Fair housing issue means *unequal housing opportunities for persons in a protected class under federal law* and evidence of illegal discrimination or violation of existing civil rights law, regulations, or guidance, as well as any other condition that impedes or fails to advance fair housing choice.”
- Integration. We believe the reference to “...Metropolitan Statistical Area as a whole” should be removed in the definition of integration. MSAs cover broad areas that a single jurisdiction cannot influence, as multiple jurisdictions are often captured in a single MSA.
- Segregation. We believe the definition should not include the phrase: “...in a particular housing development.” Adhering to this definition could lead to an individual building denying eligible applicants housing if they do not meet the characteristics needed to create integrated housing on a project by project basis. For example, in neighborhoods in Los Angeles, many affordable housing projects are occupied almost entirely by African-Americans, but we would not want to deny an eligible African-American from renting an open unit until the development is integrated by the percentage of race, ethnicity, age, familial status, according to the jurisdiction statistics. We also recommend removing the phrase “...or other causes,” from the section stating “...resulting from fair housing

determinants or other causes.” Finally, to ensure that persons with disabilities face more than one form of obstacle to integration, the definition should state: “For persons with disabilities, segregation *may* include the failure to provide housing in the most integrated setting possible.”

5. Release additional information about the data and tools and maximize the utility of the information provided by HUD.

The nationally uniform data that HUD will make available represents an impressive and welcome provision in the rule. We also appreciate that the initial proposed rule allows and even encourages jurisdictions to supplement the HUD-provided data with local or regional indicators to allow for finer and more nuanced analyses. However, we are concerned about both the indices and thresholds that HUD has included in the initial proposed rule.

Respecting Qualitative Information and Local Expertise

The initial proposed rule appears to emphasize a data-driven focus in terms of analyzing fair housing issues and needs. Data and quantitative analysis is essential; however, the initial proposed rule should clarify the importance of qualitative analysis as well. Data points that are easily measured are not always the most important, and some indicators that are critical are not as easily measured. Fair housing analyses should always account and allow for local nuance, culture, and character that may not register in a quantitative analysis but captures a more complete assessment of the true circumstances. The rule should also clarify that local programs will not be expected to use indices to drive investment decisions, as many investment considerations are unrepresented in these data.

We would appreciate greater clarity around how HUD will use and evaluate any supplemental local data. Localities should have the opportunity to explain how the data should be properly interpreted and would welcome a dialogue with HUD regarding this data. We recommend that HUD explicitly offer this level of transparency and suggest this type of exchange. At a minimum, the second proposed rule should clarify that when localities submit supplemental data that is more accurate or telling, HUD will rely on that local source in place of the standard indices.

Standard Indices and Tools

The initial proposed rule requires an assessment of racially or ethnically concentrated areas of poverty but does not require assessment of poverty concentration based on any other listed protected class (e.g., national origin, religion, color, gender, familial status, or disability). In addition, HUD has identified six kinds of community assets but will not provide data reflecting

