Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
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Washington, DC 20410-0500  
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September 17, 2013  

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

To Whom It May Concern,  

On behalf of the Equal Rights Center (ERC), we thank the U.S. Department of Housing and Urban Development (HUD) for this opportunity to comment upon the proposed Affirmatively Furthering Fair Housing rule. This proposed rule reaffirms and clarifies the affirmatively furthering fair housing requirement of the FHA, while providing much-needed guidance, data, and tools to carry it out. We commend HUD for its multi-year effort to obtain the views of a wide range of stakeholders, and believe this regulation has the potential to substantially improve equal housing opportunity across the country.  

Founded in 1983, the Equal Rights Center is a national non-profit organization dedicated to promoting equal opportunity in housing, employment, access to public accommodations and government services. With nearly 7,000 members across the country, the ERC has been a leader in identifying and addressing housing discrimination against all protected classes for more than 30 years. We are proud to work closely with HUD as a Fair Housing Initiative Program (FHIP), as well as with state and local Fair Housing Assistance Program (FHAP) agencies in the greater Washington, DC metropolitan region.  

The ERC endorses the comments submitted by the Poverty and Race Research Action Council (PRRAC), and likewise applauds the many positive aspects included in those comments. We provide these additional remarks to highlight the issues most directly impacting the ERC, and the thousands of members and others for whom we provide Fair Housing information and assistance every year.
A. Purpose and Definitions

The definition of “affirmatively furthering fair housing” (§ 5.152) is clear and comprehensive, and should provide program participants with a better understanding of what they must do to fulfill their fair housing obligations. However, the purpose section as drafted requires programs to choose between “strategically enhancing neighborhood assets ... or promoting greater mobility and access to areas offering vital assets such as quality schools, employment, and transportation consistent with fair housing goals.” (§ 5.150, emphasis added). Changing the “or” to an “and” would ensure that program participants engage in a balanced approach to community development that includes both strategies to stabilize and revitalize neighborhoods that constitute racially/ethnically concentrated areas of poverty as well as strategies to enhance mobility and expand access to existing community assets.

The proposed rule also frequently refers to reducing racial and ethnic concentrations of poverty, as well as reducing disparities in access to community assets. The language, as written, could be misunderstood to prohibit the use of resources in neighborhoods that have such concentrations. The final rule should recognize that affirmatively furthering fair housing may include devoting resources to improve areas of concentrated racial and ethnic poverty, and protecting residents, who wish to remain in their communities, from displacement.

As with the Fair Housing Act, “protected classes” is invoked throughout the proposed rule, and limited to those classes of persons explicitly protected by the law (race, color, sex, religion, familial status, national origin, and disability). However, affirmatively furthering fair housing should recognize and consider a wider range of classes targeted for discrimination. In particular, we urge HUD, in the final rule, to recognize members of the LGBT community, Housing Choice Voucher holders (often subject to source of income discrimination as a proxy for discrimination based on race, familial status, and disability), and migrant workers, as groups in need of protections. These vulnerable populations are disproportionately members of federally protected classes, and HUD should encourage program participants to address their housing barriers as part of their efforts to affirmatively further fair housing.

B. Assessments of Fair Housing (AFH)

The proposed rule replaces the Analysis of Impediments with a new framework—the Assessment of Fair Housing (AFH)—through which program participants must identify, analyze and mitigate barriers to fair housing choice. The rule ties the AFH to other planning processes through which federal, state and local resources are allocated. Incorporating the AFH in existing processes will both increase efficiency among the agencies required to participate in these various processes, and will ensure consistency among the plans developed and activities conducted by a jurisdiction.
The public participation and consultation requirements (§5.158) are critically important, and align the AFH regulations with the relevant provisions on the expenditure of block grant funds under the Consolidated Plan and the PHA Plan processes. Enhanced community engagement will encourage the participation of the people with the most direct knowledge of the barriers to equal housing opportunity and need for them to be addressed — those “historically excluded because of characteristics protected by the Fair Housing Act.” It will also facilitate a more open discussion about issues of segregation, racially concentrated areas of poverty, and remedies to segregated housing patterns. As discussed in the section below (Review and Oversight), community involvement should not just be required in the development of the AFH, but should be encouraged throughout the process, including the acceptance and monitoring of the AFH, as well as enforcement of any AFFH violations.

The ERC also commends HUD on the greater reliance on data and the dissemination of uniform data sets (§5.154). In addition to encouraging jurisdictions to expend more resources on developing solutions (rather than just measuring the problem), uniform data sets will allow for meaningful comparisons across jurisdictions, and will help expose problems that a jurisdiction may be unable or unwilling to identify itself.

While the proposed regulation enhances data collection and information gathering, we believe the regulation needs to be strengthened to define clearer expectations and obligations for the strategies to be adopted in response to the data gathered. In particular, the proposed rule provides much detail on what goes into the AFH, but offers little guidance on what steps to take in response to the findings of that analysis, and ultimately, what constitutes an acceptable AFH. In this regard, the ERC recommends the following:

1. The proposed rule requires program participants to “set and prioritize one or more goals for mitigating or addressing the determinants” of fair housing issues in their communities (§ 5.154 (d)(4)). This language should be modified to better reflect the in-depth analysis required to assess a community’s housing needs, as well as the full breadth of affirmatively furthering fair housing obligations by requiring more than one goal. Moreover, the goals set should not be to just “mitigate or address” problems, but to “overcome” them.

2. The final rule should require programs to establish clear, measurable benchmarks, a timetable in which to complete those benchmarks, and information about the entity responsible for completing each one them. This will enable HUD and stakeholders in the community to measure actual progress toward realizing fair housing goals, and to assess the extent to which the Consolidated Plans and PHA Plans comply with the obligation to affirmatively further fair housing choice.
C. Review and Oversight

The proposed rule requires that AFHs be submitted to HUD, which then has 60 days from the date of submission to review the AFHs, after which an AFH is deemed “accepted” unless HUD provides written notice to the contrary (§5.162(a)). The rule as currently written does not clarify how the AFH review will be conducted, including which divisions within HUD will play a role and what those roles will be. Nor does the rule currently provide enough examples of what constitutes a “substantially incomplete” AFH submission. To provide greater clarity and guidance, and to ensure a sufficiently rigorous process, the ERC recommends the following changes for the final rule:

1. HUD’s Office of Fair Housing and Equal Opportunity must play a lead role in AFH reviews, and be provided with sufficient resources to carry out this important new responsibility. The final rule should specifically charge HUD’s Office of Fair Housing and Equal Opportunity with review of AFH submissions, as well as general implementation of the AFFH mandate as outlined by the proposed rule.

2. Given HUD’s limited resources, and huge responsibility, an explicit procedure for community based groups or advocates to object to AFHs is particularly important. Incorporating community input in the review process will allow for HUD to provide a more comprehensive review and will best ensure that the concerns raised by stakeholders during the public meetings are incorporated and prioritized.

3. The rule should incorporate a phase-in plan that will allow HUD to deploy its staff resources most effectively to provide the highest possible level of review for all AFHs. This phase-in plan should result in AFH submission dates that are spread out more evenly over the course of the year, and more evenly over a number of years. At the same time, the plan should ensure that all AFHs will be subject to review within two years after the effective date of the AFFH regulation.

4. The consequences of submitting a unacceptable AFH, after the initial re-submission, should be clarified in Section 5.162(c). Financial penalties would emphasize the importance of the AFH process, but must also be sensitive to the impact of further frustrating efforts to affirmatively further fair housing. Possible penalties could include (a) withholding funding for an interim period while the program participant cures the deficiencies in its AFH; (b) deeming program participants ineligible to qualify for discretionary funding; and/or (c) imposing restrictions on the types of waivers participants may obtain. These same sanctions should apply to participants who fail to submit an annual update to their AFH.
Once an AFH is accepted, there remains the need for oversight and meaningful enforcement. As discussed above, requiring clear benchmarks that include specific goals and a timetable will ensure that the plan developed is feasible and will allow for accountability to HUD and the community. Additionally, the ERC recommends the following.

5. The final rule should require annual performance reports to document actions taken to address or mitigate each of the goals identified in the AFH, describe the results of those actions, and specify which fair housing issues were impacted and how they were impacted.

6. In addition to the standard review process, and to ensure in-depth evaluation of AFHs, the rule should provide for periodic audits by HUD of selected AFHs. In the event that program participants have not met their substantive benchmarks, HUD should require that these participants provide specific reasons for why these goals have not met – and disclosure of how the participant is working to overcome any barriers to completion.

7. A formal complaint process for community stakeholders to object to the program participant’s actions or certification that they are AFFH is critically important, and must be added. At minimum, HUD should formalize a complaint process that includes: (1) a mechanism for community stakeholders to challenge the acceptability and/or implementation of an AFH; (2) meaningful review by HUD of meritorious complaints; and (3) investigation and enforcement actions that HUD will follow in processing these complaints and conducting compliance reviews, including options for sanctions.

D. Transparency

For AFHs to have their greatest impact, they must be made readily available to all stakeholders, including the general public. To encourage community involvement and participant accountability, proposed and final AFHs, and all related documents, should be posted in a timely manner on an accessible (Sec. 508-compliant) website. In addition, HUD should also establish a page on its website containing information about the dates on which program participants must submit their AFHs and copies of all AFHs that have been submitted.

The proposed rule rightfully recognizes that the citizen participation plan must include procedures for addressing language needs, and require reasonable steps to provide language assistance to non-English speaking persons (§§ 91.105(a)(4), 91.115(a)(4)). In keeping with this important principle, the rule should require program participants to have the AFH, or at least the AFH’s executive summary, available in appropriate languages for community residents with Limited English Proficiency or No English Proficiency (LEP/NEP). The final rule should also remind program participants that summaries of a proposed AFH or Consolidated Plan (as
referenced in §§ 91.105(b)(2) and 91.115(b)(2)) must be published in non-English language newspapers and media that serve stakeholders who are LEP/NEP.

Removing housing barriers for people with disabilities is an essential component of the AFH, and the final rule should also explicitly guarantee that the community participation requirement is accessible to people with disabilities. While these jurisdictions are already covered by the ADA and Section 504 requirements, their obligations to provide accessibility to people with disabilities throughout the AFH process should be explicitly endorsed in the rule.

Conclusion

This rule is an enormous step forward for HUD generally, and fair housing in particular. State and local entities will have more clear guidance on how to comply with the affirmatively furthering fair housing obligation, will be provided with a template for their reports, and base data for each community will help save costs and allow for comparisons across communities. Increased accountability, more avenues for community engagement, and the additional recommendations offered will strengthen the ability of program participants, HUD and other stakeholders to proactively foster more inclusive communities and access to community assets.

Thank you for your consideration. We look forward to working with HUD and our local partners to implement the final rule, and continuing to affirmatively further fair housing.

Sincerely,

[Signatures]

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[Signatures]

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