



National Association of Housing and Redevelopment Officials

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Via regulations.gov [<http://www.regulations.gov/#!submitComment;D=HUD-2013-0066-0001>]

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

To Whom It May Concern:

The National Association of Housing and Redevelopment Officials (NAHRO) is pleased to submit comments in response to the Department of Housing and Urban Development's Proposed Rule on Affirmatively Furthering Fair Housing (AFFH). NAHRO represents more than 3,100 agencies and over 20,000 individual members and associates. Collectively, our membership manages over 970,000 public housing units, or approximately 83 percent of the entire inventory, as well as 1.7 million vouchers. Many of our members are also involved in the administration of entitlement funding through Community Planning and Development programs. Clearly our members have a vested interest in any effort to retool regulations governing local housing and community development agency planning and operations.

The Fair Housing Act is one of the most significant pieces of civil rights legislation in the history of our nation, and NAHRO fully supports the principles that animate federal efforts to combat discrimination and affirmatively further fair housing for all people, particularly the protected classes established under the law. NAHRO recognizes the importance of the AFFH goals of promoting integration, deconcentrating poverty, improving access to community assets, and addressing disproportionate needs; however, we are concerned that this highly procedural proposed rule will add significant administrative burden for PHAs and other HUD grantees while doing very little to actually promote fair housing outcomes. As a result, the potential for unintended negative consequences is great, with small communities opting out of federal programs and resources being diverted away from actually serving the populations intended to benefit from the regulations. In fact, despite HUD's aspiration that the proposed rule will reduce the risk of litigation for program participants, NAHRO believes that the rule increases that risk, forcing grantees to acknowledge fair housing issues but

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providing no tools with which to actually address them. The rule dictates substantial new planning and assessment requirements, but does little to create actual change or address the resource limitations of grantees that prevent them from undertaking additional, meaningful AFFH activities.

The proposed rule fundamentally fails to recognize the scarcity of resources available to PHAs and other HUD grantees. Now more than ever, PHAs are faced with the difficult choice between serving fewer households with more intensive resource investments or serving more households through shallower subsidies. Never has there been a worse time for the Department to propose adding a new burdensome, unfunded administrative mandate of such questionable value. Moreover, in an attempt to draft a one-size-fits-all regulation, HUD has created a proposed rule that simply fails to respond to the realities on the ground. To be clear, NAHRO does not challenge the importance of AFFH, but rather the planning requirements as outlined in this proposed rule.

The proposed rule blurs the definition of “protected classes,” overlooking the reality that all people are members of a protected class—we can all be classified by sex, race, color, national origin, etc. United States law protects against discrimination based upon an individual's membership in a protected class, a fairly clear standard. The requirement to affirmatively further, however, is much less clear. If everyone is a member of a protected class, for whom do PHAs have an obligation to AFFH? The proposed rule appears to focus much more on race and color than on any of the other classes. Furthermore, it appears that the rule implicitly treats economic status as a protected class; for example, rather than simply focus on segregation, the proposed rule requires PHAs to assess ethnically and racially concentrated poverty. Does this suggest that maintaining segregated neighborhoods, so long as they are not poor, does not violate the FHA?

Another area not addressed by the proposed rule is individual choice. The rule promotes “enabled choice” while at the same time seeking to hold PHAs responsible for predetermined goals. Evidence from the Moving to Opportunity evaluation shows that individual preferences, including the value that individuals place on community ties, have a strong impact on households’ location decisions. The study further shows that location factors do not necessarily impact employment, income, education, and other behavioral outcomes -- all factors assessed by HUD’s social science indicators, the data upon which PHAs are supposed to construct their Analyses of Fair Housing (AFH). The proposed rule as written would seem to compel local agencies to take actions specifically designed to disrupt the outcomes that result in part from individuals exercising the right to choose where they live.

In addition to the comments above, NAHRO offers the following comments and recommendations:

- 1. The proposed rule fundamentally fails to recognize the scarcity of resources available to PHAs and other HUD grantees.** It is worth noting that the Department has issued this proposed rule in a year in which its own budget request included only 90 percent of the funding PHAs needed to operate their existing public housing (let alone develop new units in high-opportunity neighborhoods) and 80

percent of the pre-QHWRA administrative fees earned by PHAs for managing Housing Choice Voucher (HCV) programs. In reality, current funding levels are substantially lower than even the President's budget. With such sharply reduced funding and additional constraints in the policy tools available to them, NAHRO can only wonder how the administration believes PHAs can maintain the fair housing opportunities currently being provided, let alone increase them.

- 2. The proposed rule fails to speak to the programmatic context of most PHAs.** In most communities, public housing developments are fixed and very little new development is being done. Furthermore, the proposed rule fails to take into account the discretionary needs of PHAs when managing their HCV programs. Put simply, the rule fails to recognize the tensions PHAs face between increased per-voucher Housing Assistance Payment (HAP) costs and serving a larger number of households. A May 30, 2006 report from GAO states that budget constraints in the HCV program “require making difficult trade-offs between limiting program costs and achieving long-standing policy objectives, such as serving more needy households, having assisted households pay a relatively small share of their incomes in rents, making it easier for voucher holders to find housing (especially in tight rental markets), reducing the concentration of poverty, and giving PHAs the flexibility to respond to local rental market conditions.” Stated another way, the policies and interventions that could affirmatively further fair housing carry with them an increased cost that cannot currently be covered under the existing voucher program funding levels.

Despite listing affirmative marketing, tenant selection and assignment policies, applicant consultation and information, provision of additional supportive services and amenities, as well as construction, rehabilitation, modernization, demolition, disposition, designation, or physical accessibility modifications as covered activities, the proposed rule fails to recognize that PHAs have very few tools at their disposal to actually AFFH. Few of the characteristics of protected classes can be taken into account for purposes of tenant selection and assignment. Dispersion of households with similar needs, as the rule seems to encourage, makes the provision of services and amenities targeted towards these needs more difficult. The rule fails to recognize that most PHAs rarely make siting decisions, and that even when new developments are being constructed, rehabilitated, or acquired, it is not without a host of other constraints. For the most part, PHAs are struggling to preserve existing assisted housing in their communities, even in instances where it has no impact on reducing segregation or concentrations of poverty, but ensuring continuing availability of affordable housing to low-income families. This falls outside of the proposed rule's requirement that all of a PHA's activities must AFFH, but is clearly a necessary and appropriate effort.

- 3. The proposed rule adds substantial administrative burden and cost without providing incremental resources.** HUD's discussion of the data that the Department will provide to all grantees far overstates the data's value. First, there is significant reason to believe that the data measures proposed by the Department will not provide reliable information in small and rural communities. In these instances, PHAs will have the added burden and liability of not only disregarding the data, but compiling alternative data to replace it. This places a disproportionate burden on small and rural

PHAs, many of whom have the least capacity to take on these additional tasks. Second, HUD's discussion fails to acknowledge the complexity involved in interpreting and translating the various measures into terms that relate to PHAs' programs and activities. Contrary to HUD's claims, simply providing data does not mean that the proposed requirements will not be extremely burdensome to PHAs and other grantees. HUD is presuming that the data will reveal a clear, consistent, and easily comprehensible picture, which is a highly unlikely outcome in most communities. More plausible is a muddled picture showing divergent needs across various locations, which the PHA or other HUD-grantee will have to parse and interpret in order to make use of the data. This subjective work is not nearly as cut-and-dried as the Department would suggest, and will require a significant investment of time and resources to complete.

NAHRO is also concerned about the requirement to assess the "determinants" of fair housing issues, noting that such a task is very complex and is often related to factors outside of the PHA's control. While it is relatively easy to identify fair housing issues based on some of the thresholds in the rule, determining their exact causes can be exceedingly complex, with many factors of history and geography -- most of which are well outside of the control of the PHA -- coming into play. NAHRO recommends that the Department amend the rule to place less emphasis on an analysis that may or may not be of any relevance, freeing up resources to be targeted towards developing solutions.

As for the actual cost of the assessment, HUD continues to make contradictory statements about the importance of the data in the AFH process. While claiming on the one hand that the provision of the data will diminish the burden faced by PHAs, the Department is also insisting that the data is only the starting point and that grantees will be required to furnish additional information. Even if the data provided were sufficient, we suspect that the costs of compliance with the regulation will be far greater than HUD is estimating.

Finally, HUD once again singles out PHAs for less favorable treatment, saddling PHAs who elect to submit an independent AFH with the burden of annual updates to their plan while all other grantees are required to submit only every five years. NAHRO believes this is an unsavory, heavy-handed attempt to force PHAs to collaborate with their local or state governments, using administrative burden as a punitive measure to achieve HUD's desired outcome of regional plans. For many PHAs, submitting an AFH with their local government will not be an option because the local jurisdiction is not an entitlement community. In many cases, it would simply not make sense for these small and rural agencies to collaborate with the state, as the units of geography and community needs can vary so widely. By acknowledging the adequacy of updates every five years for those PHAs that participate with a governmental entity, HUD has clearly eviscerated any credible argument that there is a legitimate public policy need for annual updates, especially when new data is not available. It is unlikely that PHAs would see major changes in their communities on an annual basis and, in many cases, new data will not be available, further underscoring the inefficiency of annual updates as

opposed to the five-year requirement. NAHRO believes HUD should treat PHAs in a manner equal to any of the other covered entities and require submissions of an AFH only on a five-year cycle.

- 4. The proposed rule competes with other HUD policies and directives.** While we commend HUD's efforts to increase choice and access to high quality neighborhoods, we note that many of the Department's own recent policy statements and proposals act in contradiction to this goal. Over the last few years, HUD has promoted a change to the flat rent policies set by PHAs, requiring that they all be set no lower than 80 percent of FMR without regard to the condition of the property or the quality of its surrounding neighborhood. Flat rents, as constructed under the Quality Housing and Work Responsibility Act of 1998, were intended to provide PHAs with a way to incentivize higher-income households to remain in public housing, thereby deconcentrating poverty. The requirement that flat rents be raised to an arbitrary level will render flat rent policies useless in many communities and will result in higher concentrations of poverty than currently exist in public housing developments. The administration has also explored limiting CDBG eligibility for higher-income communities. Doing so would reduce the resources available to these communities to expand affordable housing opportunities, thereby reducing choice and access to high quality communities.

Another cause for concern is the inaccurate methodology by which HUD determines annual Fair Market Rents (FMR). This methodology results in large year-over-year fluctuations in the FMRs, causing instability in HCV programs and for the households they serve. Unwarranted FMR decreases can lower per-family Housing Assistance Payments (HAP) levels, creating higher income-to-rent burdens for voucher-assisted households to the point where the inadequate FMRs may actually contribute to exacerbating PHAs' compliance with HUD's "affordability standard"[24 CFR §982.102(e)(3)(iii)] [Sec. 982.503 (g)(1) and (2)] and [Sec. 982.503 (d)], lower the quality of housing units, increase the concentration of voucher-assisted households in developments and neighborhoods with higher concentrations of poverty, decrease success rates of voucher holders securing dwelling units, and lead to existing property owners canceling their participation in voucher programs. Undue increases in FMRs lead to increases in per-voucher HAP costs, potentially resulting in PHAs serving fewer authorized families than they otherwise could. NAHRO has filed comprehensive comments on HUD's proposed FY 2014 FMRs, and we urge the Department to consider the effects of these policies on PHAs' ability to AFFH.

- 5. The proposed rule puts forth an unreasonable expectation by requiring PHAs to certify that they "will take no action that is materially inconsistent with its obligation to affirmatively further fair housing."** Under this standard, a PHA would be hard-pressed to justify capital improvements on a property located in a neighborhood lacking community assets. Similarly, a PHA would struggle to explain how lowering its voucher payment standard in order to be able to stretch its budget to continue to serve the same number of families meets the definition of AFFH.

- 6. The proposed rule lacks a “safe harbor.”** The proposed rule provides no assurances that a PHA or other grantee has sufficiently met its AFFH obligations. The rule should be amended to include a safe harbor, a provision that would recognize PHAs’ efforts and hold them harmless for factors outside of their control. NAHRO strongly recommends that such a provision be added.

In addition to competition between other program priorities and HUD policies, NAHRO is concerned about the tensions between competing fair housing goals and measurements, a tension which could be alleviated by the provision of a “safe harbor.” Given the diversity of needs of protected classes, the rule sets up a catch-22 for PHAs. Investing additional funds into physical improvements for wheelchair accessibility may come at the cost of buying more expensive land for development of new units in integrated neighborhoods. Developing larger units to accommodate families with children may come at the expense of developing units for elderly populations. To meet the service needs of elderly residents to enhance their access to community assets, a PHA may choose to designate housing as elderly-only, thereby failing to meet needs experienced by large families. In other words, by taking additional steps to AFFH in one regard, the PHA may be exposed to claims that it is failing to AFFH in another.

- 7. The proposed rule puts PHAs at a competitive disadvantage for much-needed Low-Income Housing Tax Credits.** As written, it is unclear whether the proposed rule covers federal Low-Income Housing Tax Credits distributed through the state Qualified Allocation Plan. While it is unclear whether the regulations would apply to applicants that are not PHAs or other covered HUD grantees, it is also unclear how far down a PHA's organizational chain the restrictions would apply. Would subsidiaries or affiliates of a PHA and the tax credit partnerships of which they are a part be bound by the proposed rule? NAHRO recommends that the rule be clarified and amended so as not to place PHAs at a disadvantage when seeking LIHTCs.

Presently, PHAs face stiff competition in securing LIHTCs to improve their housing and create new units to serve additional families. Although the LIHTC program is the only major source of new investment available to PHAs, they already find themselves struggling to compete against myriad other developers in the oversubscribed pools. The proposed rule would further disadvantage PHAs by limiting their ability to tailor the type and location of the developments they propose to the scoring methodology of their state QAP while other applicants are not bound by the same restrictions.

A major concern for NAHRO is the additional costs of development in the types of neighborhoods envisioned by the rule. High-opportunity neighborhoods are generally more desirable, and simple market economics dictate that when demand is high and supply is fixed, prices rise. Land in these areas is significantly more expensive, and is already not part of the basis upon which LIHTC eligibility is calculated. In other words, building in high opportunity neighborhoods will substantially increase the costs of development without increasing the availability of equity to cover these incremental costs. Additionally, the rule casts doubt on a PHAs ability to invest in neighborhoods of concentrated

poverty, many of which meet the definition of a Qualified Census Tract for purposes of qualifying for the basis boost under the LIHTC program. This would further limit PHAs' ability to raise capital to preserve or develop much-needed affordable housing. Finally, vague language in the proposed rule, including language describing segregation within a housing development, call into question a PHA's ability to develop housing in which all units are assisted. Once again, this reduces a PHA's ability to raise equity to defray the costs of development and could limit the competitiveness of the application.

- 8. The proposed rule casts doubt about PHAs' ability to invest in neighborhoods with ethnic and racial concentrations of poverty, where much of their housing stock is currently located.** The rule should be clarified to ensure that preservation of existing housing is encouraged. As currently written, the only reference to investing in these neighborhoods is in the opening statement of purpose, which says:

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

However, the rest of the rule speaks to reducing segregation and increasing integration. Explicit language should be added to clarify that PHAs are not prohibited from investing in neighborhoods with racial and ethnic concentrations of poverty.

- 9. The proposed rule contains a number of vague or otherwise unclear terms. NAHRO recommends that these terms be clarified to provide certainty for program participants.**

- *“program year”*: PHAs are required to submit their AFH 270 days prior to the beginning of their program year. Does this refer to the PHA's fiscal year, the federal fiscal year, or the calendar year? Because many PHAs participate in multiple programs, they operate on a mix of schedules, rendering the term “program year” largely meaningless.

- *“PHAs that are covered by a state agency”*: This phrase is contained within § 903.15, but has no apparent meaning. The vast majority of PHAs are authorized by state enabling legislation. Does this suggest that they are covered by a state agency? Or is this provision intended to refer only to PHAs whose jurisdictions are not located in entitlement jurisdictions? NAHRO recommends that this section be rewritten to precisely define this criterion. NAHRO is also concerned that “[t]he PHA may choose whether to participate or not with the State in the preparation of the state agency's AFH but will be bound either way by the state agency conclusions contained in the State's AFH. These PHAs must demonstrate that their development-related activities affirmatively further fair housing and must submit a certification by the appropriate officials that the PHA Plan is consistent with the applicable Consolidated Plan and AFH.” This provision strips from local PHAs the discretionary authority to create and follow their own AFH responsive to their communities' needs. No other covered entities are

responsible for the AFH developed by another entity, and small and rural PHAs should not be held to a more demanding standard.

-“*[d]isproportionate housing needs*”: The proposed rule defines this term as “when the percentage of extremely low income, low-income, moderate-income, and middle-income families in a category of housing need *who are members of a protected class* is at least 10 percent higher than the percentage of persons in the category as a whole” [emphasis added]. As previously discussed, this definition evinces a misunderstanding of what it means to be a member of a protected class. Membership in the protected class of sex, for example, simply means that someone is either male or female; it is *sex* that is the protected class, not the subset of *male* or *female*. As a result, it is logically impossible that people of the protected class *sex* (i.e., everyone) could have disproportionate housing needs relative to everyone else. The same applies for race, color, national origin, etc.; in fact, it applies for all of the classes protected under the Fair Housing Act except for “disability.” However, it appears that the proposed rule implies that it intends to address disproportionate needs between sub-categories of the same protected class, measuring whether people of one color have greater needs than another. This, however, is not the legal protection provided by the Fair Housing Act.

Setting aside the comments of the previous paragraph, NAHRO wonders how HUD intends to provide the data and apply this definition. Will the subcategories of each protected class be measured one at a time or simultaneously (i.e., will the categories for analysis be person of a particular sex, color, religion, etc. or will each of these factors be taken one at a time)? And to what level of granularity will HUD provide data? Will the data show the needs of the Bahai’i and immigrants from Colombia and those who are divorced with children? While some of these questions are obviously intended to be rhetorical, NAHRO is deeply concerned that HUD is overstepping both its capacity to provide information and its legal authority, and setting PHAs and other grantees up for an impossible task.

-“*material consistency with data*”: The rule states that HUD will review plans submitted for completeness and material consistency with the data. However, the absence of definition or standard for “material consistency” creates an unreasonable level of uncertainty. First, there is the question of which part of the plan is materially inconsistent. Does this refer to the summary of fair housing issues, the analysis of data, the assessment of determinants of fair housing, the identification of priorities and goals, or some combination of all of these? “Consistency with the data” is a highly subjective standard that could easily devolve into a means for HUD to interfere with decisions around strategies and actions that should rightly be made at the local level. If, for example, the HUD-provided data shows that a PHA’s property is located in an area of racially or ethnically concentrated poverty and the PHA plans only to make repairs to the property, will it be considered to be materially inconsistent with the data? NAHRO recommends that a definition be promulgated to reduce the possibility of uneven enforcement and interference in local decision making.

10. HUD does not have the staff capacity to properly monitor and oversee the requirements contained within the proposed rule. HUD simply does not have the staff resources to monitor these additional requirements. The rule should specify which division of HUD will be responsible for these reviews, and should ensure that those tasked with evaluating the AFH submissions have an understanding of PHAs, the programs which they manage, the budget constraints under which they operate, and the limitations of their power. NAHRO has serious concerns about the qualifications of FHEO staff to appropriately contextualize the AFH with the other requirements placed on PHAs by the Office of Public and Indian Housing.

11. Additional burdensome features recommended by other commenters should not be added to the rule. These include burdensome new reporting requirements, which would create yet another administrative task without value.

-Additional layers of review: Advocates are requesting a complaint process to appeal a Field Office's acceptance of a plan. This will add additional layers of burden and could easily be abused. If the Department does decide to add an appeals process, the grounds for an appeal must be narrowly defined and the burden of proof must be placed on the appellant, not the PHA.

-Private right of action: Advocates have called for a private right of action to enforce these regulations, a move NAHRO strongly opposes. Providing such a right would lead to unending, unproductive litigation. As currently written, the rule leaves PHAs exposed to extreme risks by laying out unreasonable (and sometimes even impossible) expectations. The rule suffers from an overwhelming vagueness in terms of expected actions and outcomes, a shortcoming that should be fixed through improvements to the regulations rather than court intervention.

12. The proposed rule, as currently constituted, is too flawed to appropriately serve as the basis for a final rule. Many of the comments and suggestions for changes being offered represent significant modifications to the proposed rule. NAHRO recommends that HUD revise the proposed rule and issue a second proposed rule, which would provide interested stakeholders and the general public with an opportunity to comment on these new provisions.

NAHRO thanks the Department for the opportunity to submit comments. As always, we remain committed to ensuring the success of federal housing and community development programs in partnership with the Department and our membership.

Sincerely,



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