

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

RIN No. 2501-AD33

Dear Sir/Madam:

The National Association for County Community and Economic Development (NACCED) and the National Community Development Association (NCDA) are pleased to jointly submit the following comments with respect to the proposed rule regarding “Affirmatively Furthering Fair Housing.” NACCED is a national non-profit organization that represents county government professionals who administer HUD’s affordable housing and community development programs. NCDA is also a national non-profit organization that represents both city and county government professionals that administer HUD’s affordable housing and community development programs. Collectively, our organizations represent over 600 HUD grantees.

These comments are endorsed by:

- United States Conference of Mayors
- National Association of Counties
- National Association of Local Housing Finance Agencies

As a general comment, NACCED and NCDA commend HUD for the effort to develop a more structured fair housing process for program participants to follow. We note, however, that all grantees receiving CDBG, HOME, ESG, and HOPWA funding (the programs which our members administer), by the nature of each program, affirmatively furthers fair housing by providing housing opportunities to the protected classes under the Fair Housing Act.

As a further general comment, NACCED and NCDA are concerned that HUD may be attempting to impose additional requirements on grantees that are not required under the Fair Housing Act. HUD should make clear in the rule as to what is required and what is optional, but encouraged.

Much as Naturally Occurring Retirement Communities (NORCs) have been developed in older communities across the country allowing residents to age in place, HUD must recognize that

some clustering of racial/ethnic groups, which resulted in “statistical imbalances,” has been the result of exercise of choice by a household and not because of limitations of choice imposed by others.

Also as a general comment, NACCED and NCDA wonder if HUD is trying to create uniformity where it does not already exist and may never exist. We wonder how HUD expects very low minority areas, particularly in states like Montana, Idaho and Wyoming with African American populations in their entire states of .4%, .6% and .8% respectively, and West Virginia, Maine and Vermont with Hispanic populations in their entire states of 1.2%, 1.3% and 1.5% respectively to address the historic racial and ethnic settlement patterns and identify and take meaningful actions to change these demographics.

HUD makes the statement in the “Summary of Major Provisions” in the rule that “One of HUD’s aspirations for the proposed rule is that it will reduce the risk of litigation for program participants.” We have that same aspiration. However, the description of the proposed rule goes on to say, “... HUD’s acceptance of the AFH does not mean that HUD has determined that a jurisdiction has complied with its obligation to affirmatively further fair housing under the Fair Housing Act; or has complied with other civil rights laws, regulations, or guidance.” These two statements are contradictory. The purpose of preparing the AFH and submitting it to HUD for review and approval, and for the jurisdiction to make a good faith effort in addressing its goals, *should absolutely mean* that the jurisdiction has complied with its legal obligation to affirmatively further fair housing. Program participants that comply with the standards of this rule must be provided with a safe harbor from litigation, and we strongly urge HUD to insert such language in the final rule.

We offer the following general comments on the rule.

- We strongly urge HUD to issue an interim rule next in lieu of a final rule to allow for additional comments.
- It is difficult for us to comment on the AFH until we review the actual template upon which the assessment will be based. HUD has not provided the template in the proposed rule and we, therefore, recommend that HUD provide adequate time for review of the template in another proposed rule or in an interim rule before issuing a final rule.
- We strongly 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. Moreover, the incorporation of the two plans will save time and resources. HUD specifically invites comments as to whether these time frames will achieve their objective. The time limits (i.e. the first time a program participant submits an AFH of 270 days prior to start of the program year prior to the 3- or 5-year

consolidated planning process; and 195 days for subsequent submissions) may not allow adequate time for the preparation, required citizen participation and local approvals process for the AHF and its incorporation into a subsequent Consolidated Plan. The incorporation of the AFH into the Consolidated Plan will eliminate the need for these time frames. It should be noted that for urban counties and large cities, the lead time associated with preparing a Consolidated Plan is extensive, particularly to incorporate substantial citizen participation, and we question whether HUD will be prepared to review an AFH one and one half to two years before a Consolidated Plan is due.

Given that HUD has identified the need for a timeframe in which to review the AFH and give direct feedback to the grantee, which is a positive development to ensure good communication regarding the AFH, once a Consolidated Plan is submitted that incorporates the fair housing analysis and planning requirements into the document, HUD should provisionally accept the Consolidated Plan while the review ensues. HUD would review the AFH elements of the Consolidated Plan following submission along with other Consolidated Plan elements (this would also allow FHEO and CPD to work together on the review and analysis), and give feedback to the grantee to resolve any issues identified. If a grantee has not resolved the issues identified by HUD this could be a warning sign affecting final approval of the Consolidated Plan. This type of consolidated process would be more efficient, more manageable and less disruptive to grantees in balancing all of the planning requirements and the annual grant cycle. In addition, for grantees that want to undertake a regional AFH work (as encouraged by HUD), they are going to have to coordinate their Consolidated Plan cycles, and HUD should be flexible and supportive of working with grantees to help them make these efforts as efficiently as possible.

- While the availability of data is necessary for grantees to examine certain fair housing indicators in their community, we do not agree that requiring grantees to examine data surrounding access to education, employment, low-poverty, transportation, and environmental health are required as part of the Fair Housing Act and urge HUD to list these data elements as an option for program participants to use in their AFH, not a requirement.
- Some of the elements highlighted in the rule are outside the control of some program participants, such as the modification of local codes, which in many States, are associated with State codes that local program participants have no jurisdiction or control over. For example, mandatory inclusionary zoning is not allowed in Texas. Also, construction of new developments is not a choice if a participant's city is "built out" and has little or no affordable property to develop.
- We urge HUD to make available the data that program participants will use in the AFH at least six months prior to the start of the AFH preparation process.
- We urge HUD to designate the Office of Community Planning and Development as the

entity to review and approve the Assessment of Fair Housing (AFH) for CDBG, HOME, ESG, and HOPWA grantees since these programs fall under its jurisdiction. One urban county noted a delay in the approval of a fairly recent Consolidated Plan because the local FHEO field office staff did not understand that the county had no jurisdiction over the local public housing authority (PHA).

- We also urge HUD to fully examine the data provided to grantees to ensure its accuracy before grantees begin using it in their AFH.
- We also urge HUD to set forth ahead of time the potential reasons for the disapproval of an AFH and that HUD not have pre-determined expected findings for what municipalities must have arrived at after analysis of their data, for it to be approved by HUD.
- HUD should focus additional resources on the Fair Housing Initiatives Program (FHIP) that assists persons who have been victims of housing discrimination, particularly in the private housing market, as a means to affirmatively further fair housing.

The following provides specific comments to the questions posed in the rule.

1. Specific request for comment on data metrics. The field of geo-coded data is rapidly evolving and, as HUD works to refine data related to access important community assets, it welcomes suggestions for improvement. Such comments can include the description of cases or situations where the indicators may or may not appropriately portray neighborhood qualities. Are the nationally uniform data that HUD is providing to assist in the assessment of segregation, concentration of poverty, and disparities in access to community assets appropriate? Do these data effectively measure differences in access to community assets for each protected class, such as people with disabilities? To what extent, if at all, should local data, for example on public safety, food deserts, or PHA-related information, be required to supplement this nationally uniform local and regional data?

We welcome HUD's plan to provide nationally uniform data to jurisdictions to assist in the development of their AFHs. However, we request that HUD issue the data set for each jurisdiction for review and comment prior to issuing the data for use in preparing the AFH. Jurisdictions have reported errors and other issues with similar data sets provided by HUD for the Consolidated Plans, particularly in some urban counties where there are villages within town limits or multiple jurisdictions acting with other larger jurisdictions and some of those jurisdictions are not part of the urban county. Also, we would encourage HUD to limit the number and complexity of the metrics required to be included in an AFH. The metrics should be simple enough to be understood by the general public and not so numerous that the important ones get lost in a sea of interesting but less critical indicators.

Racially/Ethnically-Concentrated Areas of Poverty. HUD should be looking at poverty through a color-blind lens. HUD is proposing to use non-white population of 50% or more as the threshold for determining areas with a race/ethnic concentration. However, many major cities

are now “majority minority”. Rather than using a fixed standard, it may make more sense to use a concentration standard pegged to the citywide race/countywide race/ethnic composition of each community. For example, if a community is 55% “minority”, the threshold for areas with a race/ethnic concentration might be set at 10% above that -- or 65% or higher “minority.” It is important to note that many of the immigrants and refugees coming into the United States are of Middle Eastern descent and may not identify as racial or ethnic minorities. Many in these populations may be smaller in numbers, but they may have a greater need for access to social services. It becomes difficult to identify these groups for outreach as they become invisible in the white alone category or lost in the other category of race.

Segregation. The term segregation is a politically and emotionally loaded term and its use may create obstacles to rational discussion of the reasons why certain racial/ethnic groups are clustered in particular locations. For example, is the clustering of Asians in a community’s Chinatown a result of limitations of choice about living elsewhere, or is it a matter of a decision of Asians choosing to live in a culturally cohesive community? The use of more neutral terms such as “dissimilarity index” and “isolation index” enables communities to explore these questions without the value-laden judgment implicit in the use of the term “segregation.” Much as NORCs have been developing in older communities as residents age in place, HUD needs to recognize that some clustering of racial/ethnic groups, that has resulted in “statistical imbalances” has been a result of exercise of choice by a household, not because of limitations on choice imposed by others.

Community Asset Indicators. These are useful as background information, but their use in the AFH should be optional, not required. The Neighborhood School Proficiency Index will not work well in communities that do not have neighborhood schools. For example, in Boston, enrollment in all high schools is by citywide lottery. For lower-level schools, neighborhood residents are given a priority for half of the seats and the other half are selected by citywide lottery.

Disproportionate Housing Need. Economic recessions, like the one the Nation has just experienced over the last five years, have clearly shown that housing need is color-blind, and as we noted above, communities should review housing data through a color blind lens. According to HUD’s “Worst Case Housing Needs 2011: Report to Congress,” the greatest increase in new “worst case” households were white households at 48%. HUD has already made this housing need data available to grantees as part of the pre-populated data for the Consolidated Plan. Based on experience with that data we have the following recommendations. First, the data for each of the four housing problems should be presented separately and not lumped together under “any of the four housing problems.” Second, HUD should present the data separately by tenure and for all income categories, including 80-100% of AMI and over 120% of AMI. Third, HUD should not require grantees to address disproportionate need for extremely small racial/ethnic groups. Given the margin of error in the ACS data, the disproportionate need determination for extremely small populations may not be statistically valid. We would recommend that HUD establish some minimum threshold (either population count or % of the total population) below which the calculation of disproportionate need is not calculated or reported. Fourth, HUD should

provide the complete and detailed population breakout by race/ethnicity so that jurisdictions can tell how many people define themselves as multi-racial, did not respond or chose a category other than one of the standard categories. These groups may be larger than some of the standard categories in some jurisdictions.

2. HUD requests comments on how the goals and priorities arising out of the AFH would influence local regulations, siting decisions, infrastructure investments, and policies, in comparison to the existing processes using the AI.

That AI and the AFH have similar formats. The HUD suggested AI format involves an assessment of how local laws, policies, regulations, and procedures affect the location, availability, and accessibility of housing, and how conditions, both public and private, affect fair housing choice. The jurisdiction must summarize the impediments identified in the assessment and describe the actions that will be taken to overcome the impediments. Section 5.154(d)(4) of the proposed rule discusses the goals and priorities and requires the AFH to (1) identify and prioritize fair housing issues arising from the assessment and justify the chosen prioritization; and (2) identify the most significant fair housing determinants related to these priority issues and set and prioritize one or more goal(s) for mitigating or addressing the determinants. Because HUD has not provided the AFH template as part of the proposed rule, we cannot fully comment on the goals and priorities arising out of the AFH since they are based on the assessment portion of the AFH template.

One of the biggest differences between the AFH and the AI will be standardization. The AFH will be standardized into local government and PHA planning, requiring mandatory attention to fair housing issues on a regular basis. This will more effectively incorporate fair housing priorities and concerns into housing, community development, and infrastructure planning. Currently, there is no such standardization in the analysis of impediments (AI) process. AIs are not submitted or approved by HUD and there is no required schedule for updating the AI. Probably the biggest impact the AFH will have is in the data that will now be provided by HUD at the national and local levels and incorporated into the AFH. This data will provide added information to decision makers, particularly in the siting of affordable housing projects. The 6 indices and associative input variables will provide a strong visual argument backing up siting decisions.

There is concern that HUD may have pre-determined expectations of the findings of data and impediments, and that communities that do not reach the same conclusions as HUD, will not have their AFHs approved by HUD.

There is also concern over the degree to which the AFH is intended to direct infrastructure investments. The AFH will be useful in identifying significant disparities in access to community assets, but it will not and should not replace the Consolidated Plan's housing and community development needs assessment, which is the primary tool for identifying local infrastructure, facility and public service needs.

3. To what extent would the AFH and related public engagement and planning processes increase or decrease paperwork cost for program participants?

As we mentioned in our general comments, HUD should incorporate the AFH into the Consolidated Plan to prevent the occurrence of two planning processes, and thus reduce paperwork and confusion among public participants. While paperwork may be decreased, the time needed by grantees to study and use the data elements will increase the time they devote to the AFH. One concern raised is whether the citizen participation should be driven by data, or if it would be more productive for members of the public to share their thoughts and experiences, or those of their clients from an agency that participates in the discussions. These thoughts and experiences may be a better reflection of reality and something that the data hides.

The rule requires jurisdictions to engage the public at various points and revises 24 CFR part 91.100 (Consultation; local governments) to include fair housing consultation with agencies representing protected class members, organizations that enforce fair housing laws, and public housing agencies. The rule further adds a new paragraph (91.100(e) – affirmatively furthering fair housing – that describes in detail the consultation process including the groups to be consulted during the development of the AFH. Local jurisdictions are already required to hold public hearings as part of the Consolidated Plan process and use the feedback gathered from the hearings to guide the development of the Consolidated Plan. We, therefore, agree with the language in the rule at 5.158 that provides that a jurisdiction must follow the policies and procedures described in its applicable citizen plan adopted pursuant to the Consolidated Plan regulations in 24 CFR part 91 and that the jurisdiction consult with local agencies and organizations identified at 24 CFR part 91. We believe these requirements will allow members of the public to share their thoughts and experiences, or those of their clients from an agency that participates in the discussions, particularly the protected classes.

The public engagement and planning requirements will likely not significantly increase paperwork costs for program participants; however, depending on the scope of the public engagement and planning process taken on by the jurisdiction, increased administrative costs (staffing) may occur. HUD should consider providing additional resources to jurisdictions (from the Office of Fair Housing and Equal Opportunity's appropriation) to supplement these added administrative costs.

4. What experiences do HUD program participants have with the policy interventions considered in the Regulatory Impact Analysis? What outcomes were observed? What data is available related to those outcomes?

HUD needs to develop a set of examples of actual projects and regulatory changes at the local level for program participants to use as an option in their fair housing planning and implementation. Having concrete policy and program examples for grantees to follow will more easily facilitate changes at the local level to affirmatively further fair housing. But HUD also needs to recognize that many jurisdictions do not control those local regulations or codes and have no authority to modify them. HUD also needs to provide guidance on what an acceptable

analysis of zoning should look like.

HUD's guidance over the years has been contradictory on the matter of construction of new developments. Starting with the Model Cities program, through the Moving to Opportunity program, to the more current promotion of Transit Oriented Development (TOD), HUD's studies have analyzed the impact of providing both urban and suburban housing opportunities. Encouraging urban sprawl does not benefit anyone – not the low income households that must rely on their own private transportation to get around, nor the local municipal budgets that must pave and plow the roads, nor the impacted environment by the expanded development on water, wetlands, steep slopes, endangered species, etc.

Encouraging development in areas without appropriate infrastructure and amenities also does not benefit anyone, as noted above. While the opportunity of living in a community with great schools is a plus, having to travel to the next town to find a grocery store makes one wonder if that development was appropriate or not. And the grocery store developers cannot bring their markets closer without enough population to support the costs of building and running that store. Developers are much more cautious than the old adage “build it and they will come” promoted previously. There are economic consequences to moving people and providing amenities where they cannot be supported. No one wants to see that grocery store built, but then deserted.

There needs to be emphasis in the rule on reinvestment as a strategy that needs to carry more weight. Larger jurisdictions, in particular, have invested multiple resources in low-income minority neighborhoods over the years. More than one urban county has invested as much as \$50 million from General Obligation bonds in housing and community infrastructure in low-income minority neighborhoods in the last 15 years, including redevelopment of older public housing authority projects. This is exclusive of other federal investments which were also leveraged by these projects. So the AFFH should incorporate intentional programs that support re-investment in declining economically disadvantaged neighborhoods to benefit those who reside there.

More than one jurisdiction has communities that have historically been comprised of those of the same ethnic heritage living among one another. The rule should recognize and accommodate this. The rule also should address Indian Tribes and their Reservations, which by virtue of their sovereignty, the jurisdictions within which they reside have no control over their allocation of resources.

More specifically:

Local Regulations and Codes. It would be helpful if HUD could give specific examples of codes or regulations and specific standards that it considers to further fair housing or that it considers to be barriers to fair housing. There are few simple answers. For example, what minimum lot size is considered a barrier to fair/affordable housing? What minimum lot size would HUD propose as a model? What about rent control? Is that a barrier to affordable

housing as some would argue or an affirmative action to prevent displacement of low-income and minority households?

Construction of New Developments. There are many more policies to be examined in addition to inclusionary zoning. Is there a way to determine what each community's "fair share" of the region, state or nation's affordable housing stock should be? In Massachusetts under Chapter 40B, for example, developers seeking to create affordable housing in communities with less than 10% of their housing stock affordable can petition the state to override local zoning ordinances to facilitate development of affordable housing in these communities. In communities such as Boston, over 20% of its housing stock is subsidized, affordable housing. It would be helpful for HUD to issue guidelines for determining an appropriate affordable housing target.

Inclusionary zoning is even more complicated to implement than HUD describes. One important consideration is the question of whether to require the inclusionary units to be built on-site, off-site or allow a cash payment in lieu of producing the units. For example, does it make sense to require a developer of luxury housing to set-aside 10% of the units on-site as affordable housing in order to maximize economic and racial/ethnic diversity or to allow a cash-out equivalent to build twice as many units elsewhere?

We feel these decisions are best left to local communities.

Creation of New Assets. While we feel that developing an inventory of community assets and identifying gaps or inequities may be useful background information for planning purposes, local governments may not have the ability or resources to impact the creation of new assets to any significant extent and, given the existence of tax caps in certain states, would not have the ability to do so without significant impact on local taxpayers. This is especially true of major investments in public transit which are usually the responsibility of the state or a regional transit authority. Further, creation of new assets would seem to be only indirectly related to the primary purpose of affirmatively furthering fair housing.

Movement of People. We are concerned that a focus on mobility could provide a perverse incentive for some communities to shirk their responsibilities to provide affordable housing "on-site" by moving their low-income people somewhere else. Also, the literature on "Moving to Opportunity" program shows very limited results in improving the economic outcomes for the households who moved.

5. Are there nonfinancial incentives that HUD should consider to encourage regional collaboration among local governments and greater engagement with public housing planning; for example, bonus points for specific grant programs?

Before discussing incentives, some discussion about PHAs is warranted. There is a great deal of emphasis in the proposed rule regarding public housing planning and even the suggestion in proposed Part 91 that local government should be providing financial or other assistance to the local PHA(s). HUD needs to consider that the governance of public housing agencies varies

from state to state. Not all local governments have authority over their local PHA or even the ability to require the PHA to engage in any type of collaborative effort or planning, nor do many local governments financially support (or have the means to financially support) the local PHA.

One way to promote regional collaboration would be to provide the technical assistance needed to bring all parties to the table and then assurance that the work product will be accepted by HUD. In large regions with many HUD-funded jurisdictions, including multiple PHAs, there are often multiple HUD representatives assigned to the local jurisdictions. When local jurisdictions meet to discuss common issues, they sometimes find that the guidance they have been given by their various HUD representatives is not consistent; this strengthens a perception that collaboration is difficult and puts the local jurisdiction at risk of monitoring findings. Further, the various HUD Offices (CPD, Public & Indian Housing, and FHEO) do not look at issues the same way, which adds to the confusion. Therefore, a consistent message from HUD would be one way to promote regional collaboration.

A second way to promote regional collaboration would be to streamline mechanisms to allow cross-jurisdictional projects. When spending authority stops at a geographic border, there is not much incentive to collaborate on projects. While there are regulatory mechanisms for jointly-funded HUD projects, joint funding is sometimes difficult because of project approval requirements in each jurisdiction or the amounts of funding available. Project collaboration and cross-jurisdictional projects should not necessarily require joint funding of the project or tax or fee relief if the project could be of significant benefit to the residents of a jurisdiction. Also, the geographic boundaries for funding from other Federal agencies are not always the same as the HUD geographic boundaries.

6. In terms of the cooperation of Consolidated Plan jurisdictions and PHAs, what are the best models and approaches and other considerations to facilitate that joint participation? What is the best method for Consolidated Plan program participants to use to begin their engagement with PHAs in the AFH process? Would a letter or other similar solicitation of involvement be sufficient?

Currently, in most locations, fair housing planning between jurisdictions and PHAs is not significantly interwoven. PHAs are oftentimes distinct legal entities outside the control of local governments, even though they may be located within the geographical boundary of a jurisdiction. The only linkage may be the appointment of PHA board members by the local elected official or body. The process exists today in a checklist format whereby each entity checks a box on a HUD form signifying that they have reviewed the other's plan. PHAs need the cooperation of the local government only for a signature on the "Consistency with the Consolidated Plan" certification for their PHA plan. Yet a discussion with PHAs is often very helpful in better understanding the real "impediments" their residents face in trying to locate affordable housing outside of the public housing developments and gaining a better understanding of the nuances of any discriminatory actions they may encounter. Therefore, it is important for jurisdictions and PHA to come to the table and fully collaborate in the development of the AFH. A requirement for a letter affirming cooperation between the two

entities in the development and implementation of the AFH might be a good start, but this decision should be left to the local jurisdiction and the PHA.

7. In this regard, the proposed rule acknowledges that the 5-year planning cycles and program/fiscal years for PHAs and Consolidated Plan program participants might differ. While PHAs can adjust their 5-year planning cycles to more closely coincide with Consolidated Plan program participant planning cycles simply by submitting the 5-year plan early (e.g., after 3 years instead of 5), it is more difficult to adjust program/fiscal year ends. The AFH is an important input for the Consolidated Plan and the PHA plan, and it should be conducted before the PHA and Consolidated Plan program participant cycle begins. What would be the best way to accomplish this?

There should only be one AFH per jurisdiction, not one for the Consolidated Plan program participant and a separate one for the PHA(s). CPD grantees have the flexibility to adopt a 3-, 4- or 5-year Consolidated Plan and can request to adjust their program/fiscal year. We recommend that HUD leave it up to grantees and their PHAs to figure out how best to coordinate the timeliness for submission of the AFH and their required HUD plans. PHA requirements under the proposed rule do not appear to differ significantly from current Fair Housing requirements, and the PHAs will be providing input and feedback to the jurisdictions in the preparation of the new AFHs. In circumstances where a PHA has a major new initiative, the PHA could be required to update its Fair Housing procedures and data in its PHA Plan for review by the jurisdiction prior to the jurisdiction signing a Certification of Consistency, just as they will be doing for their new 5-Year Plans when they become due.

In some urban counties, where there are multiple entitlements and smaller jurisdictions with different fiscal years, aligning them for a single planning cycle might be unattainable. For example, some cities operate on a calendar year, other towns operate on a June 1st start date, multiple PHA's each on their own fiscal year, the federal fiscal year begins October 1st, the state's fiscal year begins on April 1st, and entitlement jurisdictions have annual start dates that attempt to make the most of the short construction season in the northern parts of the country. Getting all of these entities to a single planning cycle would be like making the stars align.

8. Are there other planning efforts (for example, in transportation, education, health, and other areas) or other federal programs, such as the Low-Income Housing Tax Credit, that should be coordinated with the fair housing planning effort contemplated by this rule, and, if so, how and what issues would be best informed by this coordination? In recognition of the interdependent nature of how communities develop and what influences community progress related to the goals set forth in this rule, what are the appropriate scope of activities that should be considered “activities relating to housing and urban development” under the Fair Housing Act for purposes of this rule?

NACCED and NCDA believe that coordination with other planning activities from other federal agencies would be a positive development. The Fair Housing Act “directs other federal agencies to administer their programs relating to housing and urban development in a manner

affirmatively to further the policies of the Fair Housing Act.” As such, programs under the supervision of the Department of Treasury, such as the Low-Income Housing Tax Credit (LIHTC), should be coordinated within the fair housing planning process contemplated by this rule. It should extend to the development of a State’s Qualified Allocation Plan (QAP) for allocating the LIHTC. Currently, under the tax credit program a credit allocation agency must provide the chief local elected official with a reasonable opportunity to comment on the potential allocation of the 9% credit to a specific project within the jurisdiction. It does not encourage or require such consultation in the preparation of the QAP, which, if it did, would be a positive outcome and a tool to affirmatively further fair housing in the community.

One urban county has inquired as to when HUD is actually going to produce all the data that it has promised. Question 8 asks about other planning efforts. Some health departments and hospitals are being asked to look at the same indicators stated in the AFH for planning processes they must perform. The County has already convened a collaborative “collective impact” group to jointly analyze these indicators from a “health of the community” perspective. The County intends to include the AFH in this effort, as well as some of its Continuum of Care planning, so knowing when data will be released would be helpful.

Transportation planning is also done on a multi-year cycle of reviews, with projects being identified for funding as far as ten years into the future. Transportation planning often does not include the municipalities within a region. Some counties may also do surveys and planning for parks and recreation improvements that will directly impact the quality of life within a community. Comprehensive planning might consider these other planning efforts, but they often involve other players within the jurisdiction than those who administer the HUD programs. While considering all of these additional planning cycles, one has to also factor in the reality of the political calendar, and recognize that the outcome of one election can result in all previous planning efforts going in a new direction.

9. An analysis of disproportionate housing needs is currently required as part of the Consolidated Plan, and this proposed rule would make disproportionate housing needs an element of the AFH as well. If a disproportionate housing needs analysis is part of the AFH, should it remain in the Consolidated Plan as well? Is this analysis most appropriate in either the AFH or the Consolidated Plan, or is it appropriate, as the current proposed rule contemplates, to have the analysis in both places, assuming the analysis is the same for both planning exercises?

The AFH should become a component of the Consolidated Plan; as such, an analysis of disproportionate housing needs should be covered once, in the AFH component of the Consolidated Plan.

10. Are there appropriate indicators of effectiveness that should be used to assess how program participants have acted with regard to the goals that are set out?

We believe that the same performance report contained in Section 91.250 Performance Reports

and 91.525 Performance Review by HUD of the current Consolidated Plan regulations should be used to assess how program participants have acted with respect to the goals they set out for affirmatively furthering fair housing. This would be a self-evaluation that is then reviewed by HUD.

With CAPERS already due three months after the end of the fiscal year, and comments back from the local field office sometimes six months after that, if at all, an entire program year could be lost before HUD's comments could be brought to a grantee's attention and any program concerns addressed. If HUD is going to review, then HUD should consider setting a schedule for timely field office review so the current scenario of CAPER reviews is more productive and concerns can be addressed during the current program year. HUD should also strive to ensure that field office review is equivalent from one field office to the next and one set of entitlement jurisdictions are not being held to a higher or different standard than others.

11. What forms of technical assistance would be most useful to program participants in undertaking the AFH called for in the proposed rule?

We recommend the following:

- Face-to-face training on the rule and the completion of the AFH with instructors that have thorough knowledge of the rule and the Consolidated Plan, and have experience with HUD programs at the local government level.
- Examples from the field on how local governments have evaluated and modified local regulations and codes, sited and constructed new housing developments, provided amenities, and facilitated the movement of people to affirmatively further fair housing.
- Post the AFHs to the HUD website.
- A template for what an appropriate analysis of zoning would include.

12. N/A

13. Are there any requirements of the new structure that the proposed rule will create that should be modified for small program participants, such as small units of local general government and small PHAs?

CDBG and HOME entitlement amounts awarded to small program participants are limited. Moreover, small program participants have smaller staffs which would be burdened with these new data requirements and goals in the rule. We urge HUD to allow an abbreviated AFH for program participants that

- receive CDBG as its only HUD resource; or

- receive CDBG and no more than \$500,000 in HOME funds

The AFH should be abbreviated to focus solely on (1) a summary of fair housing issues in the jurisdiction, if any, (2) community input through the Consolidated Plan, and (3) a discussion of the use of CDBG, HOME, and other possible resources to address fair housing issues in the community.

We agree with the language in the rule that allows program participants to supplement or replace HUD data when better local alternatives exist. The data for small program participants should be based on local needs and data as some of the national data contemplated by the rule may not be available or may not be as robust in smaller communities.

14. Are there aspects of incorporation of the new AFH community participation and consolidation process into analogous aspects of the existing Consolidated Plan process that could be improved? For example, is 15 days sufficient now for public comment on the Consolidate Plan program participants' annual performance report?

The rule should allow *up to* 30 days for public comment, leaving it to the local grantee to decide on an appropriate comment period within these parameters.

15. N/A.

16. If the AFH is not acceptable after the back-and-forth engagement provided for in 5.162 of the proposed rule because of disagreements between program participants collaborating on an AFH, what process should guide the resolution of disputes between program participants?

This is particularly worrisome, because failure to submit a Consolidated Plan within the federal fiscal year precludes the grantee's ability to work through the issues and ever receive that grant. At least by allowing a grantee to submit a Consolidated Plan, it gives a longer timeframe for the locality and HUD to work through their differences. It is also common knowledge that technical assistance offered by the various field offices varies, so there needs to be some HUD HQ involvement where a disagreement continues beyond some reasonable period, perhaps 60 – 90 days. HUD should offer technical assistance with the disapproval of the first AFH submitted, and needs to be clear about ALL issues in the first letter of disapproval, so that a grantee can expect that once those identified issues are addressed, approval of the AFH would be forthcoming, rather than learning that additional issues have been identified.

17. Should there be an end date for the technical assistance and back-and-forth engagement provided for in Section 5.162 if a portion of an AFH that involves multiple program participants can be accepted, thus allowing an individual program participant to be accepted?

Since question 16 addresses “collaborating” participants, it seems to apply strictly to a regional assessment as described in Section 5.156. Even a potential AFH done jointly with a Public Housing Agency is referred to as “coordination” in 5.158(b), not collaboration. Since “regionally collaborating program participants must designate one member as the lead entity,” the implication is that these participants should enter into an agreement for preparation of the regional AFH, which would include designation of the lead entity. To avoid the scenario described in question 16, HUD should require program participants wishing to collaborate on a regional AFH to enter into a written agreement which must state the process the regional collaboration will follow if HUD requires revisions to, and resubmission of, the document. Therefore, it would be the region’s agreement that would guide the resolution of disputes and HUD should not concern itself with the internal problem-solving mechanisms of the regional collaboration.

However, HUD should concern itself with the end date question posed in question 17. From HUD’s perspective, there is a timeline involved in this process and if a regional collaboration cannot solve its problems internally, then HUD should most certainly state how things will end from HUD’s perspective. HUD should state that if a revised AFH (which gives the regional collaboration two opportunities to get it right) is not accepted because one or more of the regional participants has not cooperated with resolution of the issue that caused the AFH to not be accepted in the first place, the non-cooperative regional participant(s) must either accept the resolution of the collaboration when the revised AFH is submitted for the second time or such participant(s) will no longer be considered part of the regional collaboration and will have to satisfy all timelines for submittal of an AFH individually.

If HUD is clear about how and when the “back-and-forth engagement” will end, regional collaborations will be careful to deal with the disagreement issue stated in Question 16.

HUD needs to define “multiple participants.” HUD now encourages more than before that a regional analysis be done. In situations where there are entitlement cities within an urban county, which qualifies as an urban county because of cooperation agreements with the smaller cities and towns, the political reality is that the entitlement cities may not want to cooperate with the county to conduct such an analysis.

18. For program participants that have recently conducted a comprehensive AI, should HUD waive or delay implementation of the AFH requirement for those program participants?

Yes. It would seem unfair and a waste of resources to require a grantee that, in good faith, recently completed a comprehensive AI to start all over and create a new AFH. We would request that HUD provide a transition period for implementing the new AFH requirements. We request that grantees not be required to create a new AFH if an AI was completed within five years of the date that the Interim or Final AFFH rule is issued and the grantee’s current Consolidated Plan has already been submitted or their next Consolidated Plan is due to be submitted within 12 months or less of the date the Interim or Final rule is issued. In that case,

the AFH would be required to be submitted in conjunction with the grantee's next 5-year Consolidated Plan.

19. Section 5.164 of the proposed rule recognizes that events outside the control of a program participant may require revising the AFH during the course of a 5-year planning cycle. This is especially true in the case of a significant natural disaster, although the rule contemplates other similar material changes in circumstances that might likewise require revising the AFH. What process and challenges will a program participant face when an unexpected occurrence, such as a natural disaster, dictates that it take actions that may be contrary to its applicable plan contents? What impact might a natural disaster or similar type of occurrence have on a program participant's compliance with the AFH?

HUD should recognize that in the event of a natural disaster, making changes to the AFH and the Consolidated Plan will be the last thing on the minds of a program participant's staff. Staff's first responsibility at that point in time would be dealing with the victims of the disaster and trying to analyze the availability of housing available for use and locating the nearest safe environments. A natural disaster that involves the destruction of housing could totally disrupt the participant's compliance with the AFH for a long period of time. Neighborhoods could suddenly be eliminated and schools and places of employment destroyed.

It is impossible to predict in advance the disparate impacts that may result from a significant natural disaster. In Hurricane Katrina, a large percentage of the overall damage occurred in low-income and minority areas, including the lower Ninth Ward in New Orleans. In Super Storm Sandy, however, some of the hardest hit areas had primarily moderate- to upper-income coastal homes. Other hard-hit areas, of course, were low- and moderate-income neighborhoods, and there were even areas, many miles from the flooding, which lost power for weeks because of wind damage.

The AFH should initially be written to include the types of disasters that the participant might expect for the region and include the action(s) required to convert from one plan to another. Obviously, once the AFH can be revised, the course of action would be to accomplish the same original goals, but doing so while rebuilding the neighborhoods. It seems reasonable to expect that jurisdictions may need to make mid-cycle revisions to the AFH during the rebuilding activities in the wake of a natural disaster. Temporary relocation and other emergency actions, however, should be deemed not contrary to the AFH and should not be delayed.

HUD should consider drafting an AFH template specifically for a disaster-declared area, similar to what it does with waivers requests for the use of CDBG-DR funding, with options that a grantee can utilize under various categories.

Another major concern is that a natural disaster may require major portions of the funding originally intended to address disparate impacts of protected class members, the poor and minorities or other priorities identified in the AFH Plan, to be used to address urgent needs for persons impacted by the disaster such as infrastructure, cleanup and temporary housing. For

example, the AFH may recommend that entitlement funding be used to address de-concentration of poverty, racial and ethnic concentration, and public and assisted housing/neighborhoods in concentrated areas. Due to the disaster actions that may be taken to provide assistance to other areas that are not "concentrated" but impacted by the disaster can be given a higher priority than what was envisioned in the AFH Plan.

The major concern would be that HUD allow jurisdictions, at their discretion, to proceed with the priorities established in the AFH Plan with existing entitlement funding and address natural disaster activities for all persons impacted and eligible for funding when supplemental funding is provided to address the disaster. This would protect the integrity of the AFH Plan.

We thank you for the opportunity to provide comments on the proposed rule to affirmatively further fair housing. We urge HUD to incorporate our comments into an interim rule to be released prior to a final rule. Please direct any questions regarding our comments to John Murphy at NACCED, 202-367-1149, jmurphy@naced.org or Vicki Watson, 240-601-9356, vwatson@ncdaonline.org.

Sincerely,

National Association for County Community and Economic Development
National Community Development Association.