



1201 15th Street NW  
Washington, DC 20005

David L. Ledford  
Senior Vice President

T 800 368 5242  
F 202 266 8400

www.nahb.org

September 17, 2013

Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 7<sup>th</sup> Street, S.W.  
Room 10276  
Washington, D.C. 20410-0500

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

Dear Sir or Madam:

On behalf of the National Association of Home Builders (NAHB), I would like to submit comments on the above-referenced proposed rule. NAHB is a Washington-based trade association representing more than 140,000 members involved in the development and construction of for-sale single family homes, including homes for first-time and low- and moderate-income homebuyers, as well as the construction, ownership and management of multifamily rental housing, including affordable rental housing.

NAHB members and their customers use a variety of the U.S. Department of Housing and Urban Development's (HUD) programs, including the HOME Investments Partnership Program, FHA mortgage insurance, and Community Development Block Grants, as well as the Low Income Housing Tax Credit (LIHTC) program administered by state housing finance agencies (HFAs) and the housing programs administered by the U.S. Department of Agriculture's Rural Development (RD) agency. NAHB members, as builders of housing and related community amenities, have a vital interest in local land use decision-making, housing and community development planning issues, and potential availability of local, state and federal funds that advance private sector participants' ability to provide a wide range of housing types to meet the needs of all members of the community. We appreciate the opportunity to comment on this proposed rule.

HUD is proposing to provide program participants with more effective means to affirmatively further the purposes and policies of the Fair Housing Act. HUD notes that the U.S. Government Accountability Office (GAO)<sup>1</sup>, stakeholders, program participants and advocates report that the current practice of affirmatively furthering fair housing (AFFH) carried out by HUD grantees, which involves the preparation of an Assessment of Impediments (AI) to fair housing and a certification that the grantee will affirmatively further

---

<sup>1</sup> Report to Congressional Requesters, United States Government Accountability Office, September 2010, Housing and Community Grants, HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans, GAO-10-905.

fair housing, has not been effective. HUD therefore proposes changes to existing requirements through this proposed rule.

NAHB supports HUD's efforts to improve the affirmatively furthering fair housing planning process, but opposes the process as proposed in this rule. The requirement for program participants to prepare an Assessment of Fair Housing (AFH) as described in the proposed rule is not the right approach to ensuring that program participants actually meet their obligations to affirmatively further fair housing. The proposed AFH goes well beyond the recommendations provided in the GAO 2010 report to improve the effectiveness of the current requirements, but the key issue – enforcement – has not been adequately addressed. HUD's failure to enforce its current requirements has led program participants to believe that they do not have to take their obligations to affirmatively further fair housing seriously. As a result, builders all over the country continue to meet opposition to developing and rehabilitating affordable housing.

NAHB believes that HUD should withdraw the rule in favor of reworking it with more input from the development community and other stakeholders with an assessment and elimination of the unintended negative consequences of the rule as proposed. There should be more emphasis on enforcement and ensuring there is a more manageable process for program participants. As proposed, the process will be burdensome and costly for program participants, as well as for the development industry, which will only result in less housing for all persons, including those who are in a protected class. We provide specific concerns in detail below.

## **Background**

Under the proposed rule, instead of preparing an AI, program participants will prepare an Assessment of Fair Housing (AFH). The AFH would allow for the evaluation of fair housing challenges and goals using regional and national benchmarks and data tools to facilitate the measurements of trends and changes over time. HUD states that the proposed rule would strengthen AFFH by providing data to program participants related to fair housing planning, clarifying the goals of the AFFH process, and providing for a more effective HUD review and oversight of fair housing planning.

HUD states that the proposed rule does not mandate specific outcomes for the planning process. Rather, it recognizes the importance of local decision-making and establishes basic parameters to help guide public sector housing and community development planning and investment decisions to fulfill their obligation to affirmatively further fair housing. According to HUD, the new process will also help educate other public sector agencies in their planning and investment decisions and will provide relevant civil rights information to the community and other private and public stakeholders.

The proposed rule sets out four clear fair housing goals for all communities to ensure greater opportunities for all Americans:

- Reduce segregation and build on the nation's increasing racial, geographic and economic diversity;
- Eliminate racially and ethnically concentrated areas of poverty;
- Reduce disparities in access to important community assets such as quality schools, job centers and transit;

- Narrow gaps that leave families with children, people with disabilities, and people of different races, colors, and national origins with more severe housing problems, also known as disproportionate housing needs.

At a minimum, the AFH must include the following elements:

- Summary of fair housing issues and capacity to address: This includes any findings or judgments related to fair housing or other civil rights laws and assessment of compliance with existing fair housing laws, regulations and guidance, and an assessment of the jurisdiction's fair housing enforcement and fair housing outreach capacity.
- Analysis of data: Using data provided by HUD and/or available local or regional data and community input, identify integrated and segregated patterns and trends across protected classes within the jurisdiction and region; identify racially or ethnically concentrated areas of poverty; identify whether significant disparities in access to community assets exist across protected classes; and identify if there are disproportionate housing needs based on protected classes.
- Assessment of determinants of fair housing issues: Using an assessment tool provided by HUD, identify the primary determinants influencing conditions of integration and segregation, concentrations of poverty, disparities in access to community assets, and disproportionate housing needs based on protected classes.
- Identification of fair housing priorities and general goals: Consistent with the data analysis and assessment of determinants, identify and prioritize fair housing issues arising from the assessment and justify the chosen priorities; identify the most significant fair housing issues and set and prioritize one or more goals for mitigating or addressing the determinants.
- Summary of community participation: Detail the community participation process, public comments, and efforts to broaden community participation. A summary of public comments, written and oral, and a summary of comments not accepted and the reasons why must be included.

HUD states in the proposed rule that, under this new process, program participants will achieve more meaningful fair housing outcomes. HUD further expects that more clarity and direction should help program participants comply with their affirmatively furthering fair housing responsibilities. Finally, HUD says that one of its aspirations for the proposed rule is to reduce the risk of litigation for program participants.

### **NAHB's Major Concerns**

While HUD's proposed rule attempts to address the concerns raised in the GAO report, NAHB believes that there are many unintended negative consequences that will result because of the approach taken. NAHB's major concerns are detailed below.

It is unclear how HUD will determine compliance and what enforcement mechanisms will be put into place.

There is no indication of what criteria HUD will use to determine if a program participant's AFH is actually meaningful. There is no discussion of enforcement beyond the threat of withholding funds if a program participant does not prepare its AFH. For example, will HUD withhold funds from program participants that do not make progress on the goals actually set out in the AFHs? As pointed out in the GAO report on the AI, HUD's track record in the past on enforcement has been spotty. Although HUD has stepped up enforcement in recent years, if it is committed to rigorous enforcement, that must be clearly spelled out in the proposed rule. Enforcement is key to whether program participants take these obligations seriously. NAHB supports HUD withholding funds from program participants that do not meet their obligations to affirmatively furthering fair housing.

The proposed process is not manageable or practical for program participants or HUD.

HUD describes the new requirements as a "refinement" to the current process in which program participants prepare an Analysis of Impediments (AI) to fair housing. However, the proposed rule presents a major overhaul of how program participants must demonstrate that they are meeting their obligations to affirmatively further fair housing. The new process is complex, time-consuming, and costly. It will demand a significant amount of resources from program participants, as well as from HUD as it attempts to review, approve and enforce thousands of AFHs within the timeframes laid out in the proposed rule.

As proposed, the development and approval of the AFH is an arduous task, based on the large amount of data HUD believes should be analyzed by program participants, the coordination needed among numerous agencies, and the long lead time needed to develop and vet the plan with the community. Faced with many competing needs among multiple constituencies, ever-dwindling resources, changing political environments and demographic shifts, program participants will feel overwhelmed by HUD's proposed process. Some program participants may be forced to take staff away from important worthy projects to devote the time needed to complete the AFH, as there is no additional funding provided by HUD to undertake this process.

HUD also does not address the reality that compliance with affirmatively furthering fair housing could substantially increase the cost or availability of federal housing programs, as well as non-assisted single and multifamily housing, because of new requirements imposed by program participants. This is particularly true for program participants in smaller communities that will have more of a cost burden, and that cost burden may be passed on to developers, renters and homebuyers. Needlessly raising the cost of housing should not be an outcome of this process.

While HUD states that it is not prescribing specific actions or solutions, it has the potential to greatly influence local decisions by issuing guidance that becomes akin to regulations. Clearly, one-size-fits-all solutions should not be suggested or imposed by HUD, and any guidance must clearly present pros and cons for different types of situations. NAHB strongly believes that approaches to affirmatively furthering fair housing must be practical from an implementation perspective.

It is unclear how HUD expects to review and approve thousands of AFHs in a timely fashion. HUD admittedly does not have enough staff in the Office of Fair Housing and Equal Opportunity to manage the review and approval process in the proposed timeframes. Taking staff from other program offices, even temporarily, is not desirable as other pressing work will not get done. HUD will need to request additional staff and budget authority from Congress to support this process, which is not likely to be granted in the current budget environment.

There is no way to measure progress, nor any timeframe under which program participants must demonstrate progress.

Typically, the process of analyzing issues, setting goals, developing solutions and implementing actions produces measurable results. We are very concerned that the process as proposed in this rule will not deliver the desired outcomes expressed by HUD. As HUD states in the proposed rule, there will be uncertainty about the potential impacts of policies selected by program participants, depending on a complex interaction of a broad set of judgments and decisions by the jurisdiction, other jurisdictions, private and non-profit actors and families, both within and outside protected classes. It may take many years before any particular set of actions can be assessed as to its success in furthering fair housing.

During the interim, it is very possible that program participants will become indecisive because they do not know what to do to achieve results, which could slow down or stop needed housing development. From the building community perspective, the long process and uncertain outcome of what decisions will be made and how they will be implemented is of great concern.

NAHB's members work on a day-to-day basis with program participants, including cities, counties, state housing finance agencies and public housing agencies, and their decisions as to how to comply with HUD's new regulations will seriously affect the ability of our members to conduct the business of providing housing. Builders and their partners create jobs – short-term and permanent jobs – that are needed not only as the economy struggles to mend but for the continued economic health of individual communities and neighborhoods. The development community needs to be an equal partner with program participants in this discussion.

Further, NAHB believes that key to achieving desired outcomes will be political support from elected officials, which can be extremely challenging to obtain, especially during election years. NIMBYism (not-in-my-backyard) persists in all communities, and NIMBYism impedes not only affirmatively furthering fair housing, it often blocks the implementation of a wide range of needed policies related to schools, transportation, economic development, and environmental and health concerns.

The proposed rule does not make clear that affirmatively furthering fair housing is not an either/or proposition; that is, multiple strategies are appropriate, balancing needs will be challenging and limited resources may dictate what can be achieved.

At the heart of the definition of affirmatively furthering fair housing is desegregation of poor minority communities. NAHB is very concerned that the proposed rule is not clear enough that devoting resources to poor neighborhoods is a critical piece of affirmatively furthering fair housing. HUD itself has provided financing for thousands of properties in such neighborhoods; does this proposed rule mean that owners of these properties will not be able to obtain federal funds again to maintain them?

What are the implications for programs such as Choice Neighborhoods, the Neighborhood Stabilization Program, and Low Income Housing Tax Credits? Without further clarification, the end result is that poor residents will be left without decent, affordable and safe housing.

NAHB believes that mobility initiatives are also an important component of affirmatively furthering fair housing. But such initiatives require significantly more than simply moving people from one neighborhood to another; HUD knows full well that other services and support are needed for poor families. These challenges have not been adequately addressed in the proposed rule.

#### Unintended Negative Consequences for Financing of Affordable Housing

A primary concern related to this proposed rule and its impact on financing affordable housing is that program participants may feel pressed to more narrowly target HOME and CDBG funds, without considering potential unintended negative consequences. Providing more resources to “neighborhoods of opportunity,” in an attempt to facilitate the movement of people means that poor neighborhoods in need of investment to improve living conditions get less.

As reported in *The State of the Nation’s Housing 2013* by the Joint Center for Housing Studies at Harvard University, the housing crisis of the Great Recession wreaked havoc on neighborhoods all across the country, but especially harshly on poor and minority neighborhoods. The report states that persistent neighborhood distress remains; these neighborhoods have high numbers of vacant and abandoned housing, which has depressed property values and encouraged the spread of crime. The report goes on to say that “Since the broader housing market recovery is likely to bypass these neighborhoods, some concerted federal action is necessary to improve conditions for the 12 million people residing in these distressed communities.” The report rightly points out that policymakers must make difficult choices in allotting scarce public resources among so many competing needs.

Both for-profit and non-profit affordable housing developers need federal, state and local assistance to build and maintain affordable housing for very-low and low-income families. The cost to build housing in affluent suburbs or in up-scale city neighborhoods is prohibitive absent significant government subsidies or philanthropic support. With resources extremely scarce – both HOME and CDBG funding have been reduced over the past two years – program participants are increasingly stressed in making funding decisions. In meeting their obligations to affirmatively further fair housing, program participants should be encouraged by HUD to consider a range of financial strategies to supplement their federal funds.

Finally, affordable housing developers are well aware of local NIMBY issues and will try to avoid building in neighborhoods where they know they have no or limited chance of success because they cannot afford to put their own scarce resources at such risk. How program participants support the development community as they set goals and formulate actions to implement their AFHs will be critical to the success of affirmatively furthering fair housing.

#### *Impact on the Low Income Housing Tax Credit Program*

We also are concerned that successful programs could inadvertently be affected by the proposed rule unless HUD provides further guidance. For example, the Low Income Housing Tax Credit (LIHTC) is

the most successful affordable rental housing production program in U.S. history. Since its inception, the program has produced and financed more than 2.5 million affordable apartments for households earning 60 percent or less of the area medium income (AMI) with rents restricted for at least 30 years. The program allows for both new construction and rehabilitation of existing units.

State housing finance agencies (HFAs) award the LIHTC to developers according to criteria outlined in the state's qualified allocation plan (QAP). As prescribed by the LIHTC statute, the QAP must set forth selection criteria to be used to determine housing priorities of the HFA which are appropriate to local conditions. As the need to preserve existing affordable housing units has grown, more states are setting aside credits for rehabilitation.

Rehabilitation projects may be part of a community's redevelopment effort, but generally these projects are not found in higher-income areas. Redeveloping communities receive substantial economic benefits that flow from the construction and operation of low-income housing. It is critical that any efforts undertaken under the AFFH rule do not constrain or diminish the distribution of LIHTCs to low-income communities where there may be a high concentration of minorities.

Further, it is evident through the statute that it was Congress' intent in creating the LIHTC to ensure lower-income areas would benefit from improved housing. The statute allows for a boost in credit allocations for buildings located in qualified census tracts (QCT). A QCT, which is designated by HUD, is any census tract for the current year in which 50 percent or more of the households have an income that is less than 60 percent of the AMI. Receiving additional credits improves a project's feasibility, which attracts investors and gives lenders a higher level of comfort in regard to risk. Therefore, the neighborhood becomes the beneficiary of high quality, decent, safe and affordable housing that will serve residents for the long-term. Improved housing has the ability to foster additional development in these distressed neighborhoods, which is an important first step to eliminating racially and ethnically concentrated areas of poverty.

Another consideration for the LIHTC program is the rule's potential impact on financial institutions meeting their Community Reinvestment Act (CRA) requirements. Financial institutions subject to CRA regulations play a critical role in the LIHTC program as both lenders and investors. Historically, the LIHTC has been the primary financial tool used by major banks to meet the investment test requirements of the regulation. Through this investment, the CRA has successfully leveraged private capital to benefit low- and moderate-income neighborhoods by creating affordable housing, jobs and spurring economic development in distressed communities across the country. It is imperative that through the AFFH planning process, jurisdictions maintain their ability to support projects in CRA assessment areas, especially if they are located in high-minority, high-poverty areas. CRA provides an opportunity for investment in these communities that they might not receive otherwise.

With respect to coordinating with the LIHTC program, HFAs should be given the opportunity to consider the AFFH analysis when developing their annual qualified allocation plan. However, this analysis should not prevent the agency from implementing a balanced approach to meeting their local housing needs.

NAHB urges HUD to make clear that program participants' decisions to invest in distressed neighborhoods with high percentages of minorities or other protected classes is consistent with affirmatively furthering fair housing as identified in the program participants' AFHs.

### Land Use Planning

Another primary area of concern to NAHB members is how the proposed rule may impact land use planning, including zoning and land use ordinances. NAHB supports planning for growth that allows for a wide range of housing types to suit the needs and income levels of a community's diverse population. State and local jurisdictions must create an environment that both preserves and produces housing that is affordable for all residents at all income levels and meets a variety of lifestyle needs across neighborhoods.

However, NAHB is concerned about increased federal involvement in the local planning process. Land use planning should be primarily the province of local units of government. Housing activity is uniquely local and reflects the desire and aspirations of specific communities and the complex interaction of market forces at the local level. A federal regulation that potentially dictates the use of particular local planning tools and the location, place and form of development does not reflect local community or market circumstances and is not appropriate. Policies that work in one region may have serious unintended negative consequences in another. The United States is far too diverse demographically, historically, geographically and economically to successfully implement a "one-size-fits-all" program. Housing affordability is only one of many issues communities must weigh in shaping a local land use plan.

### *Inclusionary Zoning*

Specifically, NAHB is concerned that there is too much focus on Inclusionary Zoning (IZ) as a preferred method of achieving fair housing goals. We agree with HUD that the results on IZ have been mixed. NAHB has conducted extensive research on IZ and found that it is a complex market intervention that requires sophisticated local government capacity to manage it. NAHB commissioned a report, [\*National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances\*](#) which discusses this concept in greater detail. IZ is not a flexible enough tool to respond to changing market conditions. Like impact fees, it is dependent on the pace of construction, which goes up and down, and many communities have found it does not produce the amount of affordable housing they had hoped. IZ policies, as implemented in some communities, act like a tax on housing construction, and just like other taxes, the burdens of inclusionary zoning are passed on to housing consumers, housing producers, and landowners. The National Center for Smart Growth Research and Education at the University of Maryland has published [\*Housing Market Impacts of Inclusionary Zoning\*](#) which discusses these market impacts in greater detail.

As a result, IZ policies could exacerbate the affordable housing problem that they are designed to address. An example is the city of Madison, Wisconsin, which experienced a 40 percent decrease in housing construction after an IZ ordinance was passed in 2003. The dramatic downturn in new construction caused vacancy rates to decline in existing units and net rents to increase, thereby achieving the opposite effect of what the city intended--overall higher costs of housing for everyone.

IZ has also been the subject of litigation. In 2008, the Fourth Judicial Court of Idaho struck down an ordinance enacted by the city of McCall mandating private builders and developers to build and deed-restrict properties for workforce housing. The court's overturning of the ordinance highlights the perils faced by local jurisdictions considering adoption of an inclusionary zoning ordinance. HUD specifically states that one of the goals of the proposed rule is to reduce litigation; thus, we believe caution must be used by program participants who may be considering the use of IZ as a way to affirmatively further fair housing.

### *Other Land Use Tools*

HUD should encourage program participants to develop menus of voluntary incentives that would help offset the costs of building affordable housing, especially in higher-income neighborhoods. NAHB commissioned a report, [Research on State and Local Means of Increasing Affordable Housing](#), by Abt Associates, which provides an extensive compilation of state and local affordability strategies that are effective alternatives to IZ. Such examples include:

#### Land Assembly/Land Banks

- Local governments and non-profits use land assembly or land banking to acquire individual plots of tax-foreclosed or vacant property and reassemble them into larger, more marketable parcels. Land banks can make property redevelopment feasible in downward economic cycles as a stimulus for reinvestment and can reserve land for targeted purposes in upward economic cycles. Land banks benefit the community, as formerly vacant or unused property, often a public health risk and an eyesore, becomes part of the community's revitalization efforts. Affordable housing built on property acquired by land banks target low- and moderate-income renters and homebuyers.

As of June 2006, the Dallas Urban Land Bank Program had identified 1,087 properties for tax foreclosure referrals, filed 474 suits, purchased 51 parcels, and sold 42 properties to community housing development organizations for affordable housing development.

#### Overlay Zoning Districts

- Overlay zoning districts are created to promote certain types of development in an area. For example, the overlay district may provide zoning incentives and waivers to encourage affordable housing development (density bonuses, infrastructure financing assistance, and assistance with public education costs).
- Nashville, Tennessee, uses Urban Zoning Overlay Districts (UZO) to accomplish a number of goals, one of which includes an affordable housing requirement. To encourage residential development, a number of districts within the city permit a floor area bonus for mixed-use buildings in which at least 25 percent of the space is for residential use. Affordable units must be included to receive the bonus if the building has more than 10 living units.

NAHB urges HUD to encourage and coordinate with, and not prescribe to, local communities to adopt long-term comprehensive plans that will meet the demand for new housing and economic development. Eliminating exclusionary planning and zoning practices will encourage the production of the full range of

housing options for all members of the community, as will the adoption of such land use tools as described above.

### *Coordination and Streamlining of Local Regulations*

NAHB also believes that streamlining local regulations and removing unnecessary red tape that delays or prevents development is sorely needed. We wholeheartedly support the Administration's encouragement to local policymakers that they reduce local barriers to housing development. The White House's recently released Housing Fact Sheet said:

"In many productive regions – where companies are flocking to do business – it's harder for them to find workers because it's so hard for those workers to find housing. In some cases, this difficulty is not for lack of developers who are willing to invest, or construction workers wanting to get back to work – it's because localities have not gotten around to reforming outdated, decades-old rules on housing development. Overly burdensome barriers to developing new housing reduce the ability of housing supply to respond to demand, and cause higher housing costs for working families. In the most heavily regulated communities, delays for development approval average ten and a half months, compared to just over three months in less regulated communities..."

NAHB is concerned that the proposed rule could actually contribute to additional burdens and red tape as program participants seek to implement the actions they believe are needed to meet the goals and objectives of their AFHs. NAHB urges HUD to consider how it can address mitigating such outcomes.

### Data Issues

A key feature of the proposed rule is a commitment by HUD to provide data relevant to fair housing issues. A description of the data HUD intends to provide appears in a June 2013 supplement to the Federal Register notice: AFFH Data Documentation.

In general, this is a worthwhile endeavor. Compiling data from disparate sources and making it available to researchers and policymakers is a potentially useful public service. The AFFH Data Documentation did not provide complete details, however, so NAHB has a number of questions, as well as a few concerns.

### *Access to Data*

Much of the data HUD intends to provide consists of indices generated by analyzing block groups or census tracts within a jurisdiction. The Federal Register notice states that HUD will provide the data to states, local governments, insular areas, public housing agencies (PHAs), and the communities they serve. The Data Documentation refers to either "jurisdictions" or "program participants."

NAHB requests clarification on how the data indices will be computed and to whom they will be made available. If program participants are interpreted as jurisdictions receiving CDBG grants, that would limit it to states and larger cities, which seems overly restrictive and raises questions about how an individual state could use the data to distribute grant money to smaller cities within its boundaries. At

the other extreme, the preliminary count of governments in the 2012 Census of Governments is just over 89,000. It seems unlikely HUD intends to provide data for each of these, such as water districts, but what are the limits? If data will be provided for PHAs, as the text of the Federal Register suggests, have all issues involving geographic boundaries of PHAs, including possibly overlapping territories, been resolved?

In cases where HUD computes indices based on summing characteristics over block groups or census tracts, it is clear that HUD intends to make the indices available, but will it also make available the data for individual tracts or block groups? For example, the dissimilarity index, which is based on racial or ethnic differences across block groups or tracts in a jurisdiction, could be useful to the jurisdiction in question, but so could the individual tract-level or block-group level data. The index may help a particular jurisdiction identify that overall it tends to have neighborhoods that are less than ideally integrated, but the jurisdiction would typically also like to identify particular neighborhoods where racial or ethnic groups are concentrated to help it geographically target its policies.

In addition, researchers would benefit from access to the block group or tract-level data compiled for this purpose. In the case of dissimilarity and some of the other indices described in the Data Documentation, the block group and tract data is readily available from another source (primarily the Census Bureau's American Community Survey), but this is not the case for other data, such as most of the community asset indicators. Providing these data in a geocoded format would make a wide range of new research on fair housing and other community issues possible.

Also, how often does HUD intend to update the data? The Federal Register notice and Data Documentation are both silent on this point, but it is an important one. If jurisdictions are to use the data to track the progress of their policies, they will need to have updates at regular, timely and predictable intervals.

#### *Data Uses and Other Concerns*

Most of the indices are potentially useful, and HUD is in general taking the right approach by simply computing each index and making it available to the public. However, the Data Documentation presents ten different indices in addition to several indicators of disproportionate housing needs, and the best way to use each index in a fair housing context may not always be obvious. As a result, we believe it nearly inevitable that HUD will eventually come under pressure either to roll every piece of data it has into a single "AFFH index," or dictate to communities which of the indices is most important and how to use it. We strongly believe that prescribing a one-size-fits-all formula like this would be inappropriate. We realize HUD has expressed no intent to do so, but requests for simplification are a predictable outcome of a system that produces multiple statistics.

While most of the statistics described in the AFFH Data Documentation have an established history in the academic literature and seem potentially useful, we nevertheless have questions or comments about a few of them.

1. The Predicted Racial/Ethnic Composition Ratio. While most of the statistics in the Data Documentation have a prior history, we are aware of no previous use of a measure like this

predicted ratio. It is not clear how this ratio can be interpreted or used to measure segregation and isolation.

2. Arbitrary Thresholds:

- The Poverty Threshold is set at 40 percent or more individuals living at or below the poverty line. The threshold refers to the “extreme poverty” threshold by Wilson (1980). But it might be inappropriate to use an “extreme” threshold as the yardstick. In addition, Wilson’s work is missing from the references list. HUD supplements the threshold with an alternative criterion – a poverty rate that is three times the average tract poverty rate for the metro/micro area. This criterion seems arbitrary as well.
- The High Segregation Threshold is defined as a dissimilarity index above 55. It is hard to comment on the validity of this without inspecting a distribution of these indexes. HUD should provide a statistical analysis of the distribution.

3. The Isolation Index. The numeric example on page three does not accurately reflect the formula. The example states that the index is 0.4  $(0.6-0.2)$  but, according to the provided formula, it is 0.5  $(0.6-0.2)/(1-0.2)$ .

4. The Poverty Index. The formula needs to be verified as it seems to be missing a multiplication sign. It is not clear how this formula is converted/scaled to an index since, according to the provided formula, the index can take on negative values. In the Table 4 example, the index seems to be from 0 to 100, with higher values indicating less poverty which might be counterintuitive. It works more like an economic prosperity index.

5. The Job Access Index. The formula provided on page 6 is difficult to interpret and may not be specified correctly. The index in the main summation sign refers to residential locations, but the surrounding text suggests the summation should be over job locations. The summation sign in the denominator is not indexed and may not be necessary.

### Impact on Small Entities

HUD, along with all federal agencies, is required by the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), to prepare an “Initial Regulatory Flexibility Analysis” or “IRFA” whenever it proposes a regulation. 5 U.S.C. § 603(a). An agency is exempt from this requirement if the agency determines, and then certifies, that the proposed action “will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. § 605(b). Along with this certification, the agency must also provide a statement providing the “factual basis” for the certification. *Id.*

The RFA is a critical statute for NAHB because an overwhelming majority of its membership qualifies as small businesses. But the RFA applies not only to small businesses, it applies to all small entities, including small organizations and “governmental jurisdictions.” Governmental Jurisdictions are defined in the RFA as the “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.” 5 U.S.C. §601(5). If small governmental

jurisdictions governing areas where NAHB members live and work are impacted by HUD's proposal, NAHB's members will be impacted as well.

In this proposal, HUD has certified that this rule will not have a significant economic impact on a substantial number of small entities. 78 Fed. Reg. 43726. However, HUD has not provided an adequate factual basis for its certification. Moreover, HUD improperly attempts to shift its regulatory obligations to analyze the impacts of its own rule onto small entities. NAHB urges HUD to conduct an IRFA to determine for itself the universe of small entities that may be impacted by its proposal and the ways in which these entities may be impacted. Or, if HUD prefers to stand by its certification of no impact, NAHB requests the agency to produce the requisite statement of factual basis. The Small Business Administration's (SBA) "A Guide for Government Agencies: How to comply with the Regulatory Flexibility Act" (RFA Guidance) provides detailed and comprehensive guidance on complying with all aspects of the RFA, including preparing certification and the IRFA. If the agency determines that the impacts will not be significant, or will not impact a substantial number of small entities, the agency must certify to this assessment in its notice of proposed rulemaking and include a statement of factual basis. SBA has interpreted the factual basis requirement "to mean that, at a minimum, a certification should contain a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification." RFA Guidance p. 13.

In the proposed rule, HUD has not supplied the basic elements of a certification and statement of factual basis. There is no mention in either the proposal or the RIA of the number of small entities that may be impacted. There is also no reference to any data concerning potential economic impacts, and there is no evidence in the record that HUD submitted this certification to SBA, which is a requirement of the Act.

Perhaps even more troubling, HUD has attempted to shift its analysis obligations onto small entities. In both the notice of proposed rulemaking and the RIA, HUD solicits comment on the potential impacts small entities may face and "alternatives for compliance...as to how these small entities might comply in a manner that is less burdensome to them." 78 Fed. Reg. 43727, RIA p. 11. The RFA puts the onus of this analysis squarely on the agency, not the small entity. For example, section 603 explicitly requires agencies to develop and discuss "significant alternatives" which satisfy the authorizing statute and minimize regulatory burdens on small entities. 5 U.S.C. § 603(c).

NAHB urges HUD to rectify these errors by completing either a "threshold analysis," a process recommended by SBA prior to certification, or an IRFA, and to allow interested parties to comment on this analysis prior to the finalization of this rule.

### **Conclusion**

One of HUD's most important responsibilities is the enforcement of fair housing laws and the obligations of program participants to affirmatively further fair housing. NAHB believes that HUD's regulations that direct program participants as to their responsibilities on affirmatively furthering fair housing must be manageable and practical and be free from unintended negative consequences such as NAHB has described in this letter. Further, the regulations must include specifics on how HUD will enforce the regulations and upon what basis.

Regulations Division  
Office of the General Counsel  
Docket No. FR-5173-P-01  
Affirmatively Furthering Fair Housing  
Proposed Rule  
September 17, 2013  
Page 14

Therefore, NAHB believes that HUD should withdraw the rule in favor of reworking it with more input from the development community and other stakeholders with an assessment and elimination of the unintended negative consequences of the rule as proposed. NAHB especially urges HUD and program participants to engage the development community in future discussions about affirmatively furthering fair housing. Our members need to be part of the dialogue and have practical experience to offer as new policies are developed and implemented at all levels of government.

Thank you for the opportunity to provide comments on the proposed rule for Affirmatively Furthering Fair Housing. If you have any questions on NAHB's comments, please feel free to contact Claudia Kedda, Senior Director, Multifamily and Affordable Housing Finance (202-266-8352 or [ckedda@nahb.org](mailto:ckedda@nahb.org)).

Sincerely,

A handwritten signature in cursive script that reads "David L. Ledford".

David L. Ledford  
Senior Vice President  
Housing Finance & Regulatory Affairs