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

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

September 17, 2013

Gentlepeople:

The Public Housing Authorities Directors Association (PHADA) is a membership organization representing the interests of approximately 1,900 chief executives who serve state chartered local housing authorities. As administrators of federal assisted housing programs, these institutions are charged with implementing elements of federal housing policy at the point where delivery of program benefits occurs. Thus PHADA and its members have unique insights into the wisdom associated with the development of federal housing policies including HUD's implementation of the Fair Housing Act (FHA) and its requirement to Affirmatively Further Fair Housing (AFFH). PHADA appreciates this opportunity to submit comments to the Department of Housing and Urban Development (HUD) concerning its proposed AFFH rule published in the Federal Register of July 19, 2013

PHADA supports steps HUD may take to enforce the FHA, to clarify its guidance and the standards it uses in that enforcement, and to oversee compliance with requirements of the act and with legitimate regulations the department issues to implement the act. In the present case, PHADA has significant concerns with HUD's proposed AFFH rule on several fronts. We believe there are policy issues, administrative and operational issues and procedural issues that HUD must address as it proceeds to amend the proposed rule and publish a final rule. PHADA is also deeply concerned with the rule's potential to produce unintended adverse consequences that are clearly not in the best interests of members of protected classes, participants in assisted housing programs, members of populations eligible for assisted and deeply assisted housing, businesses, agencies and institutions that administer assisted housing programs or manage assisted housing assets, or the federal government.

The proposed rule has broad ranging implications for HA, and a broad range of state and local stakeholders. PHADA will confine these comments to issues directly of concern to its members. However, we acknowledge potential concerns of other stakeholders with the intrusion of HUD into state and local policies related to land use, education, transportation, economic development, community development and even governance. While these policy arenas lie outside PHADA's range of expertise, we expect others will raise concerns in these areas and urge HUD to consider seriously the potential consequences, both intended and unintended, raised by all stakeholders.

One major overarching concern relates to the procedures HUD is using to accept public comments. The department has spent up to 6 years developing this dense, complicated proposed rule. HUD has granted the public 60 days in which to digest the import of the proposed rule and prepare comments concerning issues it raises. That comment period seems disproportionately inadequate to the complexity of the rule and to the time the department has taken in its development. PHADA urges HUD to extend the comment period in order to permit further, more detailed comments from the public before it proceeds to amend the proposal and issue a final rule. In addition, since the proposed rule would amend very important regulatory elements, and since changes HUD may make in response to comments it will receive may be significant, PHADA urges the department to reissue an amended proposed rule for public comment before finalizing a new Affirmatively Furthering Fair Housing rule.

Background

During the years HUD has been developing this proposal, the Government Accountability Office (GAO) reviewed the department's oversight of compliance with existing statutory and regulatory requirements contained in the FHA. In its 2010 report (*Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdiction's Fair Housing Plans*), the GAO found that:

- Many grantees' Analyses of Impediments are outdated or otherwise out of conformance with HUD guidance, and
- HUD's limited regulatory requirements and oversight and enforcement approaches may explain the first finding.

In order to address these deficiencies, the GAO recommended that HUD:

- Expeditiously complete its revision to AFFH regulations,
- Establish standards for updating analyses of impediments and the format for completing this document,

- Facilitate efforts to measure grantees' progress in addressing identified impediments to fair housing, include time frames for implementing recommendations, and require the signature of responsible officials, and
- Require that grantees submit analyses of impediments to HUD and that HUD:
 - Verify the timeliness of the documents,
 - Determine if they adhere to format requirements,
 - Assess grantees' progress in overcoming identified impediments, and
 - Assure consistency between analyses of impediments and other required grantee reports.

Although the department cites this GAO report as one justification for its proposed rule, the GAO has recommended modest, incremental changes to HUD's oversight processes to address the substantial, systemic weaknesses the GAO identified. In its proposed rule, the department has elected not to implement effective means to oversee compliance of grantees with AFFH requirements. The effectiveness of the existing rule has never been tested due, in part, to HUD's ineffective oversight. Instead, the department has proposed a radical revision to the definitions underpinning AFFH and the processes used by some HUD grantees to determine methods for overcoming identified fair housing issues and their determinants.

Policy Issues

Policy issues of concern to PHADA include the expansion through regulation of the definition of protected classes beyond that established in statute, the use of an unreasonably broad interpretation of AFFH, and unclear standards HUD will use to assess entities' effectiveness in affirmatively furthering fair housing.

Protected Class Definition

Congress extended the original protections of the FHA to people based on their race, color, creed, or national origin. Since original passage of the act, Congress has expanded protected classes to include gender, handicap or disability and familial status. Administratively, HUD recently interpreted the ban on discrimination based on sex to include matters related to sexual preference, orientation and identity, an expansion clearly and rationally related to the statutory requirement. But Congress has not yet chosen to extend those protections based on economic circumstances (that is, poverty is not a protected class).

However, in its regulation HUD endeavors to extend FHA protections to certain classes of poor people without statutory authority. The rule requires an analysis of areas of racially or ethnically concentrated poverty. This appears to

privilege poor members of protected racial and ethnic groups over other group members who are not poor. The regulation also offers special protections to poor members of protected racial and ethnic groups not afforded to poor members of other protected classes such as poor members of handicapped populations, poor women, poor members of LGBT communities, poor people identifiable by their religious affiliation, and poor members of communities identifiable based on national origin.

Although PHADA supports efforts to reduce rates of poverty and the concentration of poor households, we believe that the department has other, more appropriate tools to use to encourage both the geographic deconcentration of poor households and the avoidance of geographically concentrated areas of poverty in the first place. As the FHA does not extend fair housing protections to people based on poverty, PHADA believes that the FHA is an inappropriate vehicle for pursuing these policy goals.

Expansive Interpretations of AFFH

The statutory requirement that HUD, “affirmatively further fair housing,” has never been defined or interpreted by Congress and as a result, HUD has broad discretion to define the term and frame policies and procedures to comply with the mandate. However, broad discretion is not unlimited. The context of the AFFH requirement in the FHA is the prohibition of discriminatory practices in the sale or rental of residential real estate (housing) based on race, color, religion, national origin, sex, handicap or familial status. As the department argues in its preamble to the proposed rule, the legislative history of the FHA can certainly support the encouragement of integrated residential housing patterns.

In the proposed AFFH rule, HUD appears to expand the AFFH requirement from the prohibition of discriminatory practices and the encouragement of integrated residential living patterns to include matters such as access to employment centers, high quality educational opportunities, transportation facilities and other community facilities, and to include elimination of disproportionate housing needs among members of protected classes.

HUD’s apparent treatment of disproportionate need appears to conflate potential disparate impact on protected classes (a contested standard scheduled for review by the Supreme Court of the United States) with the effects of real estate markets. The question HUD appears to pose is whether members of protected classes have disproportionate housing needs compared to members of unprotected classes across jurisdictions. Although PHADA does not believe disproportionate housing needs to be covered by the FHA, if included in a final rule, HUD should consider whether members of protected classes have disproportionate housing needs compared to similarly situated members of unprotected classes (e.g. households in protected classes living

near transportation hubs or near high performing schools compared to households living near these community assets who are not in protected classes).

PHADA and its members have been in the business of developing, managing and administering resources to address the housing needs of the most impoverished households in fiscally prudent non-discriminatory ways. PHADA strongly supports efforts to expand those opportunities and it has consistently advocated for funding sufficient to support and maintain deeply assisted housing with federal administrations from both political parties. However, the FHA appears to be an inappropriate vehicle to further the goals of overcoming differential levels of access to various community facilities or for overcoming different levels of need for assisted or deeply assisted housing among various eligible populations. The latter case is particularly salient given recent irresponsible budgets and appropriations for the Housing Choice Voucher program administrative fees, the Operating Fund and the Capital Fund.

Effects of These Broad Expansions

By all reports illegitimate discrimination in the sale and rental of housing continues throughout the United States 45 years after enactment of the FHA, PHADA is concerned that the broad expansion of the act's coverage in the proposed rule will dilute and dissipate efforts to eliminate the kinds of discrimination explicitly prohibited by the FHA since 1968. We would hope that HUD, collaborating with its state and local partners, would use its resources to effectively reduce or eliminate illegal housing discrimination, a task that the GAO found was inadequately supported under the existing regulatory regime. The proposed rule's extensive broadening of the scope of the FHA may place at risk effective reduction or elimination of illegal discrimination while offering no particular hope for effective accomplishment of the much broader aims expressed in the proposed rule.

PHADA urges the department to reconsider its approach to AFFH implementation and attend to its own performance with regard to AFFH before expanding the policy reach of the FHA. An alternative approach could strengthen HUD's support for and oversight of effective implementation of AFFH consistent with the department's existing *Fair Housing Planning Guide*. The GAO report of 2010 offers a number of steps that are consistent with elements of the proposed rule and which could affect such strengthening without the risks inherent in HUD's proposed approach.

Standards of Effectiveness

PHADA understands that the proposed rule is primarily procedural. HUD has indicated in several places that it did not intend to be prescriptive as to

outcomes from AFFH or as to fair housing goals it expects as a result of an AFH. PHADA supports that approach.

However, at the present time, grantees remain in the dark concerning how HUD will demand reports or assess progress toward AFFH. Possibilities hinted at in the proposed rule are troubling (e.g. numeric or proportional goals based on HUD's measures or indices; quotas for admission based on protected class status). While the general approach to this AFFH rule amendment is encouraging, PHADA is waiting for the other shoe to drop concerning federally anticipated outcomes from AFFH, and incentives and sanctions the department may employ based on those outcomes.

In that regard, HUD proposes rules governing its challenges to civil rights certifications that offer little guidance concerning acceptable standards for evaluating those certifications. Further, if HUD challenges civil rights certifications, HAS bear the burden of establishing that it is providing a full range of housing opportunities without any definition of that range.

Without building a rigid regulatory infrastructure, the department should include in the rule or its preamble a commitment to the kinds of methods it may use in the future concerning the outcomes developed through AFFH initiatives.

Administrative and Operational Issues

The GAO report identified serious weaknesses in HUD's implementation of FHA mandates and in its oversight of grantees' compliance with those mandates. However it also uncovered good faith efforts on the part of a majority of local and state institutions to comply with existing FHA and AFFH requirements. For example, despite HUD's decades long inattention to the ways fair housing has been addressed in localities' and states' Comprehensive Plans and in HAS' Public Housing Agency Plans, 64 percent of their Analyses of Impediments were deemed current by the GAO.

The GAO report also cited an internal 2009 HUD report on AFFH oversight which raised concerns that:

- Analyses of Impediments were not submitted to HUD,
- HUD's human resources limitations contributed to oversight and monitoring shortcomings, and
- Competing policy priorities limited HUD's ability to assess AFFH compliance.

As of 2010, HUD had not implemented recommendations contained in its own 2009 internal report to begin to remedy deficiencies. The GAO pointed out that

some HUD Field Offices have taken the initiative to address some of these deficiencies within their jurisdiction. One FO requested that grantees within its jurisdiction forward Analyses of Impediments to the FO for review. The GAO reported that all grantees within this jurisdiction submitted up to date analyses. However, the GAO characterized these FO initiatives as, “isolated examples within HUD’s general approach to AI [Analysis of Impediments] and AFFH oversight.” As of 2010, HUD had not yet learned from best practices initiated in some of its FOs or implemented those practices as departmental policy.

Given these administrative shortcomings, PHADA has concerns on 2 general fronts. First, HUD has not demonstrated the capacity to oversee existing requirements or follow existing guidance on AFFH and AIs. Yet it has proposed a substantial amendment to the AFFH regulations which will place substantially greater burdens on HUD’s administrative infrastructure and on its human resources. Given ongoing fiscal constraints and competing policy priorities, a more complicated, expanded AFFH rule may be treated by the department in the same fashion the current rule and standards have been treated over almost 2 decades when HUD’s funding was more generous.

Second, although the proposed rule includes provisions that would simplify grantees’ analytic tasks in connection with the new AFH, those analyses will still require an assessment of goals to address in Comprehensive Plans and Public Housing Agency Plans which will consume grantees’ resources. Particularly for HAs facing public housing funding at no more than 80 percent of eligibility and administrative fees for the Housing Choice Voucher program prorated below 70 percent of eligibility, local HAs may simply not have the resources available to do the new AFFH regulatory regime justice. Even for agencies who successfully navigate this new process, irresponsibly inadequate funding of these programs will likely hamstring any efforts to ameliorate fair housing issues and determinants.

A more immediate and responsible approach for HUD to take could address the lack of oversight, guidance and standards related to existing AFFH standards. The department could make sure grantees prepare current AIs that meet standards laid out in guidance such as HUD’s *Fair Housing Planning Guide* until such time as an administration or a Congress elects to restore funding that fully supports the operational and capital needs of public housing and the administrative infrastructure to operate the HCV program. Such an approach would also avoid the substantial increase in administrative responsibilities envisioned in the proposed rule for HUD.

Procedural Issues

Submission Time Frames May Waste Increasingly Scarce Resources

An initial AFH must be submitted to HUD 270 days before the start of the submitters' program year. Presumably it will take some months for a grantee to prepare an AFH to submit, and the data collection process through HUD's web based assessment tool must be the first step in the process. That step must be followed closely by a complicated analysis of the data and development of goals designed to overcome fair housing issues. Those goals must then be incorporated into local plans affected by the AFH. In subsequent years, AFHs must be submitted to HUD 195 days prior to the start of a program year. It appears that grantees must gather data and begin the AFH process 18 months before the start of the program year affected by the AFH. This process is hardly agile. For example, Las Vegas, NV would have had to submit a first AFH affecting calendar year 2009 in the first quarter of 2008, and would have had to start to collect data and begin its analysis for an AFH in the second quarter of 2007. Thus the city would have begun AFH planning almost 18 months before the mortgage crisis ravaged its housing market and would have had to submit the AFH to HUD 8 months ahead of the crisis. The time and resources invested in this planning would have gone for naught once Nevada experienced foreclosures on more than 10 percent of its owner occupied housing stock. In addition, since the mortgage crisis may be construed as a significant change, Las Vegas may have then been required to redo its AFH to account for the new circumstances, diverting additional resources from addressing the housing crisis.

Submissions by Public Housing Authorities Are Especially Wasteful of Resources

HAs are one set of entities required to submit an AFH (as they are now required to conduct an AI). HAs may choose 1 of 3 methods to comply with this requirement. They may participate in an AFH prepared by their locality if it must complete a Consolidated Plan because it receives CDBG, ESG, HOME, or HOPWA funding, or they may prepare their own AFH in conjunction with Public Housing Agency Plans. The current rule language limits Option 3 to HAs, "covered by state agencies," but all HAs are covered by one state agency or another. It appears that all HAs have the option of participating in the state AFH and Consolidated Plan. If that is not the case, HUD must clarify language to indicate which HAs may participate under a state's AFH. Finally, the regulation seems to permit agencies within jurisdictions subject to Consolidated Plan requirements and those which are not to conduct their own AFH. However, although HAs outside of jurisdictions required to submit Consolidated Plans, "may choose whether to participate or not with the State in the preparation of the state agency's AFH," they, "will be bound either way by the state agency conclusions contained in the State's AFH." HUD should clarify this language. If HAs have 3 options available, as it appears, the rule should state those choices clearly. If HAs have only 2 options available, the rule should state so clearly. If HAs outside local jurisdictions required to submit

Consolidated Plans have only 1 option available, HUD should amend the proposed rule to allow those HAs discretion to conduct their own AFH.

Unfortunately, while AFHs must generally be submitted once every 5 years, the proposed rule requires HAs preparing their own AFH to update that assessment annually without any justification for this differential treatment. While many HAs may elect to participate in an AFH with their locality, many smaller agencies are located in localities which do not receive grants covered by this proposed rule and so do not prepare Consolidated Plans. The only choices available to them are to participate in their state's AFH or prepare their own assessment, and the latter alternative carries with it the unreasonable burden of revising the assessment annually rather than quinquennially. With federal funding for HAs at unprecedented low levels, HAs simply will not have the funds or other resources to implement an exceptionally burdensome requirement for annual reviews and revisions. At the very least, HUD should not impose revision and updating requirements on HAs that are more burdensome than requirements imposed on other grantees required to prepare an AFH and Consolidated Plan.

AFFH Indicators and Data Documentation

The proposed rule includes a thumbnail description of data that will be provided by HUD for use in preparing affected plans. PHADA commends the department for taking this approach. AFHs may use other data available to grantees, but the HUD provided data will form a base for analysis of fair housing issues. Providing the data, particularly on the web such as with HUD's geospatial tool will mitigate the administrative burdens of conducting AFHs. The approach does not simplify the analysis, but it certainly simplifies data collection.

PHADA is concerned that the exact nature of HUD provided data remains uncertain. The document concerning data documentation is labeled "DRAFT," and HUD's short paper, "A New Assessment Process to Affirmatively Further Fair Housing," seem to imply that HUD provided data may change. It is important as grantees develop plans that affect development of long lived assets at least every 5 years that ground rules and standards be valid, robust and stable. While some measures and indices in HUD's June 2013 DRAFT are commonly used, other unique measures have been developed by the department. In particular, these idiosyncratic measures must be validated ahead of their use on a national basis for such an important task. Following are some questions and concerns of PHADA's with measures and indices listed in the DRAFT.

1. Racially Concentrated and Ethnically Concentrated Areas of Poverty (RCAPA and ECAPs): Why has HUD chosen the thresholds it describes? They do not seem consistent with other commonly used measures of the

concentration of poverty, race or ethnicity. The department should justify and validate these thresholds.

2. Indices of Dissimilarity and Isolation: Although both are common measure of spatial segregation, it isn't clear why grantees should use both. Where did HUD discover the values it uses to define low, moderate and high segregation using the dissimilarity index? Are these arbitrary values?
3. Predicted Racial/Ethnic Composition Ratio: Why has the department proposed using income brackets in this ratio? They appear to be irrelevant to the measure. Additionally, the ratio appears to treat higher than predicted proportions of high income minorities and lower than predicted proportions of low income minorities as a problem. Is that the case? Since the income brackets described are, "notional," how does HUD propose to develop actual brackets, and how are those brackets related to the predicted racial/ethnic composition ratio? How did HUD arrive at values of this ratio in its example for, "Extremely Below Predicted," "Moderately Below Predicted," "Slightly Below Predicted," "Approximates Predicted," and "Above Predicted?"
4. Community Asset Exposure Indices: The descriptions of these indices and their uses implies that there may be more or different indices used in the future. It is important for HUD to establish robust, validated measures and standards that will remain stable. Does HUD expect indices and their underlying data to be available nationally for all grantees affected by the proposed rule? The data underlying indices may be contested (e.g. test scores used for school proficiency) or unavailable (e.g. transit access for smaller metropolitan, suburban and rural areas). HUD's Environmental Health Hazard Index seems untested. Will measurements of air quality across localities vary sufficiently to be of any use? Will the indices be standardized before HUD produces final Access or Exposure to Community Assets Indices?
5. Disproportionate Housing Needs: Where did HUD find a basis for its threshold of 10 percent as defining "disproportionate?"

In general, the approach HUD has described seems overly complicated, and HUD has failed to demonstrate that these measures and indices are valid, robust and stable. Measures that influence local policies concerning the investment of public resources in housing and community development across the nation need to have all 3 of those characteristics.

Potential Unintended Consequences

PHADA's concerns with HUD's proposed rule are highlighted by potential consequences of the rule that are inconsistent with HUD's fair housing goals but which are conceivable given the very significant changes the rule proposes and the complexity of the rule and its implementation. For example:

- Localities receiving small CDBG grants or other funds requiring development of Consolidated Plans may assess the requirements of the proposed rule and decide that their funding doesn't warrant the burden of preparing an AFH pursuant to the rule and withdraw from the program. The ultimate costs for such a decision will be to the beneficiaries of those grants.
- Although the department's discussion downplays the risks, it appears that an outcome of the AFH and of goals based on identified fair housing issues could be disinvestment in poor communities, communities of color, communities with concentrated populations of people with disabilities or other protected class members. These communities may suffer under a new version of benign neglect as development resources flow to more attractive communities of opportunity, rich in transit, educational, employment and other assets.
- Remarkably, gentrification is described in HUD's discussion as a potentially positive fair housing outcome as long as it doesn't occur too much. Gentrification may become the retort to concerns with disinvestment in racially and ethnically concentrated areas of poverty or areas with concentrations of other protected classes. Urban renewal efforts may become associated again with the removal of some residents who are members of one or another protected class, ironically in order to achieve fair housing goals.
- Communities of opportunity will often be more costly for community development and assisted housing programs. One implication of the AFH's encouragement of investment in communities of opportunity is that increasing per participant program costs will inevitably reduce the number of program participants. Conflicting program priorities may present localities and HAs with the Hobson's choice of encouraging the movement of development and assisted housing initiatives to more costly areas (and increasing disproportionate housing needs) or maintaining or reducing per participant program costs by discouraging movement to more expensive neighborhoods (and failing to deconcentrate poverty for members of protected classes). Increasing land costs to locate development in communities of opportunity may also render HA applications for Low Income Housing Tax Credits less competitive and place development proposals at unnecessary risk.
- Several unintended outcomes of HUD's proposed rule involve movements of people resulting from implementation of goals derived from AFHs. People with the resources to have broad choices about where to live may choose to move from communities which receive HUD funds subject to

AFFH requirements to communities that do not receive those funds. One result of such movement would be the further concentration of households which rely on HUD provided resources. Goals derived from AFHs may encourage the migration of poor households to inner ring suburbs where poverty is rapidly rising, inadvertently creating new concentrations of members of protected classes and of poverty. Finally, encouragement of these kinds of migrations may isolate members of protected classes from traditional support networks.

None of these potential unintended consequences of an AFH and related fair housing goals need be inevitable. However, avoidance of these problems will require thoughtful execution of an AFH, thoughtful inclusion of the assessment's outcomes in plan development, and thoughtful review of AFHs, Consolidated Plans and Public Housing Agency Plans by HUD.

HUD's Questions

In its *Federal Register* notice, the department posed a lengthy series of questions for comment. Following are responses to those questions that are of concern to PHADA.

- Does the proposed rule increase or decrease paperwork?

For entities which have diligently complied with current AFFH regulations and guidance, the proposed rule may represent a moderate increase in paperwork and administrative overhead compared to the existing rule. HUD's provision of data may streamline base data collection, but the analysis of this data will be very complicated. The rule adds to already extensive federal, state and local public participation requirements applicable to Consolidated Plans and Public Housing Agency Plans. However, for entities which have not complied with these requirements in the past, this proposed rule represents a substantial increase in paperwork and administrative overhead. Finally for HAs which have conducted AIs in conjunction with their Public Housing Agency Plans every 5 years and which choose to continue to conduct their own AFHs, the proposed rule represents a 5 fold increase in paperwork and administrative overhead compared to the current rule and guidance due to the annual update requirement.

- Are there nonfinancial incentives for regional collaboration?

PHADA is aware of at least one nonfinancial tool to facilitate regional collaboration among HAs. QHWRA, signed into law 15 years ago, instructed HUD to develop regulations facilitating HA consortia. The department has yet to publish regulations in response to that Congressional mandate. Many HAs have entered into administrative arrangements to share operating and

management capacity, but those agencies must still disaggregate information in order to submit reports to the department. An incentive for these kinds of regional collaborations would be HUD's publication of reasonable regulations to facilitate consortia in response to Congress's mandate.

- Should disproportionate need remain in both the AFH and the Consolidated Plan?

No. Disproportionate need is a matter appropriate for inclusion in Consolidated Plans and Public Housing Agency Plans but is an inappropriate matter for inclusion under AFFH standards.

- What are indicators of the effectiveness of AFFH?

As entities complete AFHs, develop goals for addressing fair housing issues and determinants, and develop Consolidated and Public Housing Agency Plans, they comply with publication, public hearing and public participation requirements. HUD oversees these processes at every step. Entities will revise AFHs at least every 5 years and will analyze new data HUD makes available on its web site. The primary measure of effectiveness should be whether entities have carried out the tasks they have set with substantial public input and significant HUD oversight. Quinquennial AFH preparation will inform planning entities concerning outcomes of goals set to overcome fair housing issues. No further indicators need be employed to monitor AFFH effectiveness.

- Compliance for small grantees

All small grantees, and particularly small HAs, need to have a simplified, streamlined process available for completing AFHs in conjunction with Public Housing Agency Plan development. The alternative of collaborating with localities in this task may be an attractive alternative for small HAs, but many of them may be located in jurisdictions which aren't required to prepare a Consolidated Plan. All HAs should be freed from the current requirement to amend AFHs annually, but particularly small HAs should not face such an onerous requirement.

- Should the timing of participation and consultation processes be coordinated?

Timing of these processes must be coordinated to the extent feasible in order to reduce the administrative burden of new AFH requirements. Since other processes may be tied to events that are difficult to reschedule (e.g. start of fiscal or program years), HUD should provide flexibility in the timing of AFH submissions.

- How long should HAs have to address AFH recommendations in PHA Plans?

HAs should be free to determine whether the contents of an AFH represent material changes that require plan amendment. If so, consideration of AFH outcomes should occur during the routine revision of a Public Housing Agency Plan due to material changes. If AFH outcomes do not represent material changes requiring plan amendment, then HAs should include consideration of those outcomes during the routine preparation of Public Housing Agency Plans. In and of itself, the AFH should not automatically require Public Housing Agency Plan amendments or changes to the routine schedule of plan development.

- Should HUD waive or delay AFH requirements for localities with recently completed AIs?

HUD may request submission of recently completed AIs, and if those AIs comply with existing regulatory requirements and largely conform to HUD's guidance on development of AIs, entities should not need to conduct an AFH until such time as the rule would require (e.g. not later than 5 years from the completion of the AI, when material changes occur that warrant updating or amending the AI, or when instructed to do so by HUD).

- Should entities revisit AFHs when unexpected things occur (e.g. declared natural disasters, significant changes in local economic conditions)?

For HAs, a material change requiring Public Housing Agency Plan amendment may or may not require updating the AFH. Local HAs should be free to determine when events have occurred that warrant revisiting the AFH, as they determine when material changes warrant amendment to the Public Housing Agency Plan. In the case of declared natural disasters, the timing of updating the AFH is unclear in the rule. It is unreasonable to impose requirements to update AFHs on communities coping with the crises of natural disasters. HUD should leave it to the local entities' determinations whether events warrant updating the AFH, and if so what the timing of updating the AFH should be.

Detailed Comments

Part 5 Subpart A – Generally Applicable Definitions and Federal Requirements; Waivers

Sec. 5.152 Definitions

Affirmatively furthering fair housing

PHADA objects to the expansion of the term to include differential access to community assets. Access may be driven by market pressures, by individual choices unrelated to either discriminatory practices or disparate impacts, or by other externalities unrelated to fair housing. The term is too broad to be meaningful as entities prepare AFHs and affected plans. Further, PHADA objects to expansion of the term to include, “to end racially and ethnically concentrated areas of poverty.” Economic status is not the basis for a protected class in the statute, and the statute does not grant HUD the discretion to treat poor people in different protected classes differently, as it proposes to do in the proposed rule.

Disproportionate housing needs

PHADA objects to HUD’s inclusion of this standard in fair housing regulations. Disproportionate housing needs, particularly unreasonable cost burdens, may exist due to market forces unrelated to fair housing. HUD and the Congress have the authority to resolve disparate housing needs based on cost burdens by expanding assisted housing programs so that they may serve more than 25 percent of the eligible population. PHADA also objects to HUD’s arbitrary use of a threshold of 10 percent as representing real or significant disparities in housing needs.

Fair housing choice

This definition includes housing choices not constrained by barriers “related to,” protections contained in the act. PHADA objects to HUD’s apparent inclusion of matters correlated with protected classes but not related causally to those characteristics.

Fair housing issue

PHADA objects to HUD’s use of, “disparities in access to community assets,” and, “disproportionate housing needs,” based on protections of the act for reasons discussed above. The definition includes, “any other condition that impedes or fails to advance fair housing choice.” By including anything and everything, the definition means nothing. HUD must provide a regulatory definition of fair housing choice that grantees and participants can understand. This definition can lead to the conclusion that, since men and women with disabilities have lower incomes than unprotected classes, and since lower incomes impede housing choice, the lower incomes of people with disabilities is a matter subject to requirements and mitigation under the FHA.

Integration and Segregation

Both of these definitions have problematic elements the department should address. First, the definition does not clearly define the geographic area under

review, but includes, “jurisdiction or Metropolitan Statistical Area.” Those geographic designations may represent vastly different areas with vastly different demographic characteristics. A community may be integrated in a jurisdiction but segregated in an MSA or vice versa. Second, in both definitions, the standard for people with disabilities is that they live, “in the most integrated setting appropriate.” Whom does HUD believe to be competent to determine what is appropriate? If it is the person with a disability, why did the department choose not to say, “... the most integrated setting the household chose?” PHADA urges HUD to grant people with disabilities the same variety of housing choices it has endeavored to grant to members of other protected classes.

Significant disparities in access to community assets

HUD’s definition of “significant disparities,” is, “measurable difference.” PHADA disputes that a measurable difference is a significant disparity. Although goals of overcoming education, transportation, economic and other disparities are laudable, PHADA disputes that these disparities are subjects appropriate to a Fair Housing Act.

Sec. 5.154 Assessment of Fair Housing

(c) Fair housing data provided by HUD

PHADA commends the department for taking this approach, providing base line information to entities to conduct an AFH and not require entities to carry out the data collection in connection with an AFH. PHADA also commends HUD for permitting the use of other local or regional information in preparing AFHs. PHADA objects to the curt descriptions of the kinds of data HUD will provide. Data used for AFHs that will inform Consolidated Plans and Public Housing Agency Plans must be valid, robust and stable. As written, the proposed rule will permit the department to change data sources, measures and indices at will, introducing unreasonable instability into a process that will steer significant investment of public and private resources into very long lived assets.

(d)(1) Summary of fair housing issues

PHADA objects to HUD’s inclusion in this summary of jurisdictions’ compliance with, among other things, “guidance.” The Office of Management and Budget published a Final Bulletin for Agency Good Guidance Practices on January 5, 2007 which HUD has routinely ignored. There, OMB distinguishes between required matters published in regulations and guidance which offers advice and best practices. HUD may insist that grantees comply with statutes and with regulations. It may urge grantees to follow its guidance. However it may

not require compliance by grantees with guidance until it publishes that guidance as a regulation.

In connection with this summary, the rule requires grantees to identify integration and segregation patterns and trends within jurisdictions and regions. HUD should not impose the burden on a jurisdiction to identify patterns of integration and segregation outside its boundaries unless the jurisdiction has elected to participate in a regional collaboration to complete an AFH.

(e) Specific types of program participants – (1) PHAs

PHADA appreciates the flexibility the rule grants HAs which participate with other grantees in preparing an AFH that it can record a dissenting position concerning specific details of the AFH. Unfortunately, the final 2 sentences of this section are particularly unclear as to meaning. HUD should draft these sentences so that HAs and others with whom they may collaborate in AFH preparation understand requirements and this flexibility.

Sec. 5.156 Regional assessments and fair housing planning

(b) Coordinating program years and submission deadlines

The rule provides HAs 18 months to conform their Public Housing Agency Plans to a regional AFH. Although the rule is not clear on how this would occur or what it would entail, HAs make decisions concerning the need to amend Public Housing Agency Plans based on the significance of changes. PHADA sees no reason why the process for determining the need for amending these plans in connection with regional AFHs should be any different. If an HA determines that the changes will be significant, it must amend its plans. If it does not, it may amend its Public Housing Agency Plans during routine reviews and updates of those plans. There is no need to create new or separate requirements for amending Public Housing Agency Plans based on AFHs.

Sec. 5.160 AFH submission requirements

(c) Frequency of submission

AFHs must be submitted not less than every 5 years, whenever a significant change has occurred that warrants updating an AFH, when HUD requests an updated AFH, or for HAs only annually. Without justification, the proposed rule includes a unique requirement that HAs update AFHs annually while in all other cases, entities may need to update their assessments every 5 years. The requirement seems punitive and is unnecessary. HUD should remove this specific HA requirement.

Sec. 5.162 Review of AFH

PHADA supports the provision that HUD may refuse to accept an AFH within 60 days of its submission, and that after 60 days, the AFH is deemed accepted. However, standards for HUD's refusal because, "it is inconsistent with fair housing or civil rights laws," is opaque and subjective. HUD must provide grantees with sufficient details concerning what the department deems inconsistent to avoid disparate treatment of grantees.

Sec. 5.164 Revising the AFH

While grantees will find some guidance concerning revisions helpful, PHADA is concerned that a grantee in an area subject to a national natural disaster declaration must revise its AFH. Disasters may not materially affect an existing AFH, and community institutions may be consumed by disaster recovery for some time. AFH revisions may divert human resources from disaster recovery, a less than wise outcome. The regulation should provide guidance concerning AFH revisions and leave preliminary determinations of the need for and timing of revisions to local grantees. HUD retains the ability in the rule to request a revision due to material changes in circumstances.

Part 903 – Public Housing Agency Plans

Sec. 903.2 With respect to admissions, what must a PHA do to deconcentrate poverty in its developments and comply with fair housing requirements?

(d) Fair Housing Requirements

(3) Validity of Certification

After describing procedural bases for determining whether HAs have complied with fair housing requirements, the proposed rule indicates that HUD may challenge fair housing certifications if an HA, "Does not reduce racial and national origin concentration in developments or buildings and is perpetuating segregated housing," or otherwise, "Fails to meet the affirmatively furthering fair housing requirements." These challenges occur after HUD has accepted an AFH completed by a jurisdiction required to submit a consolidated plan, by an HA that elects to prepare its own AFH, or by a state; and after HUD has approved a Consolidated Plan or a Public Housing Agency Plan. Thus, after HAs have complied with these requirements in good faith, and after HUD has reviewed documents and determined that they meet fair housing requirements, agencies remain at risk of being found out of compliance with fair housing requirements. That risk may result from externalities out of the control of either an HA or of a jurisdiction or state.

If HUD challenges a fair housing certification, an HA is burdened with proving that it offers a, “full range of housing opportunities to applicants and tenants or that it is implementing actions described in paragraph (d)(2)(ii) of this section.” The proposed rule fails to define or provide guidance concerning the meaning of, “a full range of housing opportunities,” and actions described in (d)(2)(ii) are given as examples and are not exhaustive. Thus HAs are at risk of proving that they are meeting undefined standards subject to change or reinterpretation by the department. The proposed rule should not burden HAs with proving they are accomplishing tasks or outcomes which HUD does not define, nor should HUD be authorized to challenge civil rights certifications on the basis of general or ill-defined grounds.

Sec. 903.7 What information must a PHA provide in the Annual Plan?

(o) Civil Rights Certification

HUD has provided broad, unclear standards for civil rights certifications and for the department’s challenge of those certifications. The regulation must offer HAs clear standards for meeting compliance standards, the department must offer clear and concise grounds for challenging civil rights certifications, and HAs should not bear the burden of proving that they comply with ill-defined and changeable standards.

Sec. 903.15 What is the relationship of the public housing agency plans to the Consolidated Plan and the Assessment of Fair Housing

(a)(1) Option 1

Here an HA may collaborate with its general unit of government in preparing an AFH. Where an agency operates in more than 1 jurisdiction, the agency must collaborate with the jurisdiction within which 60 percent of its housing is located unless, “the majority is closer to 50 percent,” in which case the agency may choose the locality with which it will collaborate. PHADA believes that, since HAs will be attending to local political and policy relationships, they should have the discretion under this section to collaborate with any jurisdiction within whose boundaries it operates housing. That jurisdiction will likely be the one where most of the HA’s housing is located, but there may be good local reasons for HAs to collaborate with a different jurisdiction.

In addition, the rule does not address agencies operated under forms of consortia in several jurisdiction. The agency may prefer to operate under a single AFH and may need to collaborate with one jurisdiction that includes 60 percent of its housing stock. HUD should grant HAs the discretion to choose a jurisdiction with which to collaborate without federally imposed conditions.

(a)(2) Option 2

Under this option, an HA may conduct its own AFH. In this case, an HA “must update its own AFH every year.” While HUD may be interested in encouraging HA collaboration with local jurisdictions, there will be small HAs and consortia of HAs that operate in communities that are not subject to the Consolidated Plan requirement. These agencies may find that collaborating with development of a statewide plan is inappropriate for their agency or program. These agencies should neither be burdened with a punitive requirement to update their AFH annually, nor forced into an AFH collaboration that may not be in the agency’s best interests or those of its participants. PHADA recommends that HAs preparing an AFH under Option 2 be subject to the same revision requirements as all other grantees.

(a)(3) Option 3

Under this option, agencies, “covered by state agencies,” may elect to participate in the state’s AFH or not, but the HA “will be bound either way by the state agency conclusions contained in the State’s AFH.” Although it is not clear from the previous regulatory section, it appears that Option 2 is not available to agencies covered by state agencies, and that these agencies have no choice but to abide by the state’s AFH and Consolidated Plan.

This section must be redrafted to clearly spell out to which HAs this option is applicable and whether these agencies have any options for preparing AFHs or not. The current language is confusing and unclear.

Although most agencies not located in local jurisdictions required to submit Consolidated Plans may choose to participate in the states’ AFHs and comply with goals in their Consolidated Plans, these agencies deserve the same set of choices as are available to agencies in a local jurisdiction required to prepare a Consolidated Plan. In addition, this section is confusing as it pertains to agencies operating jointly with other agencies as consortia or simply under a memorandum of understanding concerning joint administration and management. Finally, this section does not discuss options available to HAs that may operate in more than one jurisdiction, one of which may prepare a local Consolidated Plan and another of which may not. Would that agency retain the flexibility to choose either of 3 options described? Would they retain 2 options as an agency operating in a jurisdiction preparing a Consolidated Plan? Or would they only have option 3 available as an agency operating in a jurisdiction not required to prepare a Consolidated Plan which is, “covered by state agencies?” PHADA urges that HUD permit all HAs to retain the ability to perform their own AFH and certify that their plans are consistent with that assessment.

Possible Comments from Other Stakeholders

PHADA is aware of some issues of concern to other stakeholders concerning this proposed rule. In particular, some are arguing that 1) the rule should include a process for public complaints or contestation of an AFH and the fair housing goals derived from that assessment, and 2) that the rule should provide interested members of the public with standing for individual actions concerning AFHs and fair housing goals.

PHADA is strongly opposed to both of these possibilities. Recent decisions surrounding fair housing litigation have demonstrated the imagination and persistence of fair housing litigants. There are ample tools available for fair housing litigation without any additional grounds created by this proposed rule.

Concerning an appeal process for the public concerning AFHs and fair housing goals to which some may object, PHADA is convinced that the requirements for public participation and feedback contained in this proposed rule and those surrounding the adoption of Consolidated Plans and Public Housing Agency Plans provide ample opportunities for members of the public to register their concerns. Elected officials who must finally endorse outcomes of this proposed rule and the referenced plans are more than responsive to concerns expressed by members of the public who constitute their constituencies. In addition, the department will evaluate the effectiveness of the public participation process as it choose to accept AFHs and fair housing goals or not. Any further appeal or complaint process will act to unreasonably delay the implementation of plans already a year or 2 in the making.

PHADA is confident that the department will see the wisdom in rejecting proposals to create a cause for private action or create any further appeal or complaint processes in the proposed rule.

Conclusion

PHADA remains concerned that since 1995, HUD has not been able to oversee and monitor grantee compliance with or performance related to its existing rule concerning AFFH, its requirement to conduct an Analysis of Impediments or determine whether grantees were successful in affirmatively furthering fair housing. The GAO report and HUD's internal report on the matter included suggestions for improving the department's performance of these tasks without a wholesale revision of the AFFH process or a radical expansion of the concepts involved in AFFH. Those approaches appeared to be well within HUD's reach and could have finally provided a baseline against which HUD could measure the effectiveness of the rule's approach to AFFH. As of 2010, the GAO reported that HUD had not yet implemented those recommendations.

Rather than taking those modest steps to improve AFFH performance and outcomes, HUD has proposed a dramatic expansion and modification to the rule governing AFFH. The proposal imposes new and burdensome tasks on grantees and on HUD at a time when the resources needed to administer existing programs are inadequate for grantees and for HUD. PHADA fears that this regulatory expansion will have the same impact on AFFH and fair housing goals as HUD's 1995 rule and its amendments. Grantees and HUD will complete additional analyses, submit additional reports to HUD in prescriptive formats, report on outcomes or the lack thereof, to approximately the same effect.

PHADA hopes that the department can take these and other comments it receives concerning this proposed rule, amend the proposal to address many of its shortcomings, publish a revised rule for further public comment, and a final rule that promises to achieve desirable outcomes rather than simply force HUD and its grantees through a series of processes whose complexities will consume rare resources with little or no impact.

Thank you for the opportunity to comment on this proposed rule. PHADA looks forward to an effective and efficient final rule concerning Affirmatively Furthering Fair Housing.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy G. Kaiser". The signature is fluid and cursive, with a large initial "T" and "K".

Timothy G. Kaiser
Executive Director