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Office of General Counsel
Regulations Division
Department of Housing and Urban Development
451 7th St. SW, Room 10276
Washington, DC 20410
Submitted electronically through www.regulations.gov

Re: Docket No. FR-6123-P-02, Affirmatively Furthering Fair Housing

To Whom It May Concern:

The following comments are submitted on behalf of the Poverty & Race Research Action Council (PRRAC). PRRAC is a civil rights policy organization based in Washington, DC, committed to expanding access to housing opportunity for low-income families by promoting federal policies that affirmatively further fair housing.

The Fair Housing Act was passed to address discriminatory policies and practices that denied housing opportunities to people of color and created entrenched residential segregation across the United States. The Act does so by both prohibiting housing discrimination and by requiring the government to take affirmative steps to achieve the Act's aims: to promote integration and true housing choice. This proposed rule, however, would do none of those things. It does not even ask that HUD grantees or the HUD staff providing oversight *consider* segregation or the unavailability of real housing choice across protected characteristics – much less take active steps to remedy those problems. It erases a functioning rule that, in contrast to the proposed one, squarely addresses fair housing problems and was producing significant benefits and gains until suspended.

We oppose the proposed rulemaking, which fails on its face to further fair housing. In addition, we strongly support the 2015 Affirmatively Furthering Fair Housing (AFFH) Rule, and we urge HUD to restore its implementation. That 2015 rule has benefited numerous communities by providing a valuable planning framework, one which aids program participants to better understand their fair housing obligations, provides accountability to ensure that they take meaningful steps to meet those obligations, and enables engagement by community groups.

1. HUD'S PROPOSED RULE IS A DERELICTION OF ITS DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING

The Fair Housing Act creates a nonnegotiable “statutory duty to promote fair housing” for HUD.¹ HUD’s discretion “must be exercised within the framework of the national policy . . . in favor of fair housing.”² This policy entails not only the prohibition on housing discrimination, but HUD’s affirmative duties to promote both housing choice and integration. The Rule’s current definition of AFFH embodies this balance. *See* 24 C.F.R. § 5.152 (AFFH means “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics” and “replacing segregated living patterns with truly integrated and balanced living patterns”).

There is no ambiguity as to whether the Act includes a focus on integration as a critical component of fair housing. The legislative record makes the Act’s integration purpose clear,³ and the Supreme Court has long recognized this congressional intent.⁴ The Court has explicitly noted that, with the Act, “Congress has made a strong national commitment to promote integrated housing.”⁵ And, as recently as 2015, the Court “acknowledge[d] the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”⁶

As a result, courts have long recognized that the duty to affirmatively further fair housing “requires something more of HUD than simply to refrain from discriminating itself or purposely aiding the discrimination of others.”⁷ For example, the First Circuit has held that AFFH requires HUD to “consider the effect [of a HUD grant] on the racial and socio-economic composition of the surrounding area,” that is, its effect on integration.⁸ The Seventh Circuit has relied upon the AFFH provision for the notion that “Congress imposed on HUD a substantive obligation to promote racial and economic integration in administering the section 8 program.”⁹ And the

¹ *Hills v. Gautreaux*, 425 U.S. 284, 302 (1976).

² *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 819 (3d Cir. 1970).

³ *See* 114 Cong.Rec. 2274 (statement of Sen. Mondale) (Act is “an absolutely essential first step” toward reversing the trend toward “two separate Americas constantly at war with one another”); *id.* at 2524 (statement of Sen. Brooke) (“Discrimination in the sale and rental of housing has been the root cause of the widespread patterns of de facto segregation which characterize America’s residential neighborhoods.”); *id.* at 2985 (statement of Sen. Proxmire) (Act will establish “a policy of dispersal through open housing . . . look[ing] to the eventual dissolution of the ghetto and the construction of low and moderate income housing in the suburbs”).

⁴ *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (broad definition of victims of housing discrimination supported by statement of Senator Javits that discrimination harms “the whole community,” 114 Cong.Rec. 2706, and of Senator Mondale that Act was intended to replace the ghetto “by truly integrated and balanced living patterns.”)

⁵ *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 95, 97 S. Ct. 1614, 1619, 52 L. Ed. 2d 155 (1977)

⁶ *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525–26, 192 L. Ed. 2d 514 (2015)

⁷ *N.A.A.C.P. v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 151, 154 (1st Cir. 1987) (Breyer, J.); *see also Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702, 713 (8th Cir. 2003); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973), *Shannon v. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809 (3d Cir. 1970).

⁸ *N.A.A.C.P.*, 817 F.2d at 156 (alterations in original) (internal citations omitted).

⁹ *Alschuler v. Dep’t of Hous. & Urban Dev.*, 686 F.2d 472, 482 (7th Cir. 1982).

Eighth Circuit has characterized the AFFH provision as motivated by the congressional intent “to cure the widespread problem of segregation” in housing funded by HUD.¹⁰

However, the proposed rule seeks to revise the definition of affirmatively further fair housing so that it will mean “advancing fair housing choice within the program participant’s control or influence”. “Housing choice” is in turn defined in a way that is unrecognizable within the body of fair housing jurisprudence and longstanding, well-established HUD policy. As per the proposed rule, it entails a rough-hewn look at housing “affordability” and “availability” but fails utterly to give any consideration to racial or ethnic disparities in access or those for other protected classes, or to choice across neighborhoods or other boundaries.

Instead, HUD’s proposed definition completely disregards the Act’s focus on integration as a critical component of fair housing and will weaken fair housing enforcement. Under this revised definition, jurisdictions will no longer be expected to make substantial progress towards reducing segregation. With HUD’s sanction, jurisdictions may well choose not to pursue efforts to promote integration. This proposed rule serves to communicate to HUD’s grant recipients that they need not attend to fair housing in any affirmative way. Indeed, the proposed rule delivers the message that HUD grantees, throughout their housing and development decisions and even in their direct use of HUD funds, may for the most part engage in policies that actually exacerbate segregation – because they are guided to boost production of affordable housing but without a fair housing analysis, planning process, or even a regulatory definition that stewards them to avoid concentrating such housing in already-concentrated, segregated areas.

The patterns of racial and economic segregation created by the U.S. government in the mid-20th century¹¹ continue to be perpetuated – and even exacerbated – by present day government action. For example, our four major federal housing programs essentially steer low income children to lower performing, higher poverty schools than their peers¹² – and even the Housing Choice Voucher program, a program that was intended to provide individual choice in the private market, fails to deliver meaningful choice to recipients, and as a result the program is extremely concentrated in most metropolitan areas.¹³ Although federal housing programs do contain other civil rights and fair housing standards, the degree of flexibility in local implementation means that these standards function only as a floor (and in many places an inadequate one), such that improved local policies and more rigorous HUD oversight are needed. This has been

¹⁰ *Clients' Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir. 1983)

¹¹ See generally, Rothstein, *The Color of Law* (2017)

¹² See, e.g., Ingrid Ellen and Keren Horn, *Housing and Educational Opportunity: Characteristics of Local Schools Near Families with Federal Housing Assistance* (PRRAC 2018) <https://www.prrac.org/pdf/HousingLocationSchools2018.pdf>.

¹³ A. Mazzara and B. Knudsen, “Where Families with Children Use Housing Vouchers: A Comparative Look at the 50 Largest Metropolitan Areas” (Center on Budget & Policy Priorities and the Poverty & Race Research Action Council (forthcoming)).

documented across a broad range of programs that entail local and/or state administration, including the HOME program, LIHTC, public housing redevelopment, and others.¹⁴

Over the past several decades, increasingly compelling social science research has documented the harms faced by low income families, particularly children, who grow up in high poverty, segregated neighborhoods.¹⁵ These include health impacts such as heightened risk of severe asthma, increased exposure to lead and airborne toxic chemicals, increased exposure to neighborhood violence, fears for personal safety, and other triggers of toxic stress.¹⁶ Children in high poverty neighborhoods are more likely to attend an under-resourced and under-performing school that also has a disproportionate concentration of low income children, which further hampers learning.¹⁷ Economic segregation is also related to income and wealth inequality, and

¹⁴ See, eg, *Is the HOME Program Affirmatively Furthering Fair Housing?* (PRRAC, Ebony Gayles & Silva Mathema, September 2014), <https://prrac.org/is-the-home-program-affirmatively-furthering-fair-housing/>; *Creating Balance in the Location of LIHTC Developments: The Role of State Allocation Plans* (PRRAC, Jill Khadduri, 2013), https://prrac.org/pdf/Balance_in_the_Locations_of_LIHTC_Developments.pdf.

¹⁵ For reviews of these studies, see Duncan, Greg J. and Stephen W. Raudenbush. 1999. "Assessing the Effects of Context in Studies of Child and Youth Development." *Educational Psychologist* 34(1):29–41; Durlauf, Steven N. 2004. "Neighborhood Effects." *Handbook of Regional and Urban Economics* 4:2173–2242; Ellen, Ingrid Gould and Margery Austin Turner. 1997. "Does Neighborhood Matter? Assessing Recent Evidence." *Housing Policy Debate* 8(4):833–66; Jencks, Christopher and Susan E. Mayer. 1990. "The Social Consequences of Growing Up in a Poor Neighborhood." Pp. 111–86 in *Inner-City Poverty in the United States*, edited by L. E. Lynne and M. G. H. McCreary. Washington, DC: National Academy Press; Leventhal, Tama and Jeanne Brooks-Gunn. 2000. "The Neighborhoods They Live in: The Effects of Neighborhood Residence on Child and Adolescent Outcomes." *Psychological Bulletin* 126:309–37; Mayer, Susan E. and Christopher Jencks. 1989. "Growing up in Poor Neighborhoods: How Much Does It Matter?" *Science* 143:1441–45; Pebley, Anne R. and Narayan Sastry. 2004. "Neighborhoods, Poverty, and Children's Well-Being." Pp. 119–45 in *Social Inequality*, edited by K. M. Neckerman. New York: Russell Sage Foundation; Sampson, Robert J., Jeffrey D. Morenoff, and Thomas GannonRowley. 2002. "Assessing 'Neighborhood Effects': Social Processes and New Directions in Research." *Annual Review of Sociology* 28:443–78; Sharkey, Patrick and Jacob W. Faber. 2014. "Where, When, Why, and for Whom Do Residential Contexts Matter? Moving Away from the Dichotomous Understanding of Neighborhood Effects." *Annual Review of Sociology* 40:559–79; Hahn, Robert A., "Racial and Ethnic Residential Segregation as a Root Social Determinant of Public Health and Health Inequity: A Persistent Public Health Challenge in the United States," *Poverty & Race* (April-June 2017), available at <http://www.prrac.org/newsletters/aprmayjun2017.pdf>.

¹⁶ Sampson, Robert J. and Alix S. Winter. 2016. "The Racial Ecology of Lead Poisoning: Toxic Inequality in Chicago Neighborhoods, 1995-2013." *Du Bois Review* 13(2):261-283; Winter, Alix S. and Robert J. Sampson. 2017. "From Lead Exposure in Early Childhood to Adolescent Health: A Chicago Birth Cohort." *American Journal of Public Health* 107(9):1496-1501; Sharkey, Patrick. 2010. "The Acute Effect of Local Homicides on Children's Cognitive Performance." *Proceedings of the National Academy of Sciences of the United States of America* 107(26):11733–38; See generally David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 *Pub. Health Reps.* 404, 409 (2001), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC1497358/pdf/12042604.pdf; see also Hahn, Robert A., *Ibid.*

¹⁷ Mickelson, R. A. (2008). Twenty-first century social science research on school diversity and educational outcomes. *Ohio State Law Journal*, 69, 1173–1228; Schwartz, Heather (2010), "Housing Policy is School Policy," *The Century Foundation*, [Journal of Planning Education and Research 27:20–35; Horn, Keren Mertens, Ingrid Gould Ellen, and Amy Ellen Schwartz. 2014. "Do Housing Choice Voucher Holders Live Near Good Schools?" *Journal of Housing Economics* 23:28–40; DeLuca, Stefanie and Peter Rosenblatt. 2011. "Increasing Access to High Performing Schools in an Assisted Housing Voucher Program." Pp. 35–43 in *Finding Common Ground: Coordinating Housing and Education Policy to Promote Integration*, edited by P. Tegeler. Washington, DC: Poverty & Race Research Action Council \(2011\).](http://www.tcf.org/assets/downloads/tcf-Schwartz; Deng, Lan. 2007.)

constraints on upward social mobility.¹⁸ The cumulative effects of exposure to high poverty environments are intergenerational, passing on inherited disadvantage from parent to child.¹⁹ The AFFH rule helps local jurisdictions address these ongoing harms through a step by step analysis that leads to meaningful goals for both community reinvestment and housing integration.

Concerns about racial isolation, and the disproportionate exposure of families of color to concentrated poverty, are not hypothetical, or limited to rare neighborhoods. These patterns of extreme segregation are prevalent throughout the United States, and they are expanding. In his 2015 report, “The Architecture of Segregation,” Paul Jargowsky documents, from 2000 to 2013, a substantial expansion of the number of concentrated poverty census tracts (tracts with a neighborhood poverty rate above 40%), and a rapid growth in the number of persons living in those areas, almost doubling from 7.2 million to 13.8 million people. One in four African Americans, and one in six Latino Americans lived in such concentrated poverty neighborhood in 2013.²⁰ These concentration totals have declined slightly since 2013, from 13.8 to 12.7 million people, as the country continues its recovery from the great recession,²¹ but they continue to be extreme, and continue to affect low income people of color to a harsher degree. In addition, the number of Americans living in “high poverty” (>30%) neighborhoods has also increased dramatically, from 19.9 million persons in 2000 to 34.4 million persons in the most recent (2016) count.²² Assessing the needs of these communities, and addressing the factors that perpetuate and expand them, is one of the main areas of focus of the AFFH obligation.

2. THE PROPOSED RULE FAILS TO ACCOUNT FOR HUD’S FAIR HOUSING RESPONSIBILITIES WITH REGARD TO PUBLIC HOUSING AUTHORITIES

Public housing authorities administer important programs that serve millions of households throughout the country. These programs seriously impact the degree of racial segregation that is still found embedded in most communities. For many individuals and families, the current patterns of segregation and racial/poverty concentration that are found throughout subsidized housing administration translate into diminished life opportunities, health risks, a lack of true housing choice across neighborhoods, and impaired access to other key resources – all of which compound the harms of discrimination across generations.

Public housing authorities and the ways that they administer federal housing programs are core concerns of HUD’s AFFH responsibilities. This has been true since the Act’s passage and

¹⁸ Reardon, Sean F. and Kendra Bischoff. 2011. “Income Inequality and Income Segregation.” *American Journal of Sociology* 116(4):1092-1153; Chetty, Raj, Nathaniel Hendren, Patrick Kline, and Emmanuel Saez. 2014. “Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States.” *The Quarterly Journal of Economics* 129(4):1553-1623; Raj Chetty, Nathaniel Hendren, and Lawrence F. Katz, “The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment,” *The Equality of Opportunity Project* (2014), www.equality-of-opportunity.org/images/mto_paper.pdf.

¹⁹ Sharkey, Patrick and Felix Elwert. 2011. “The Legacy of Disadvantage: Multigenerational Neighborhood Effects on Cognitive Ability” *American Journal of Sociology* 116(6):1934-1981; Sharkey, Patrick, *Stuck in Place* (2013).

²⁰ Paul Jargowsky, *The Architecture of Segregation* (Century Foundation 2015).

²¹ Paul Jargowsky, “Spatial Context and the Path to Permanent Inequality,” (forthcoming, *Pathways* 2018)

²² *Id.*

consistently held to be the case by courts ever since²³ – and their ongoing importance in this area has been well documented by researchers and other experts studying the impacts of PHA policy decisions and related HUD directives across the years.²⁴

As noted above, PHAs too frequently continue to administer federal housing programs in ways that fall short of furthering fair housing. This includes policies such as siting decisions for subsidized housing; redevelopment plans; voucher administration policies that may impair rather than advance families’ ability to move across neighborhoods or jurisdictional lines; inadequate counseling and outreach to landlords to enable moves to opportunity; and numerous others in which HUD has granted PHAs considerable programmatic leeway even while fully understanding the implications for desegregation and housing choice.

In crafting the 2015 regulation, HUD recognized the need to offer PHAs, local advocates, and HUD reviewers a framework wherein such policies are to be examined using a fair housing lens and adjusted as needed. Absent this regulation or an equally robust fair housing alternative, there is no coordinated and publicly-available platform that presents material data (such as the characteristics of the areas where subsidized housing is located, the extent to which it is clustered, and who occupies it in which areas) along with relevant policy analyses (such as tenant selection policies for various developments or rental payment standards) – all of which is required under the 2015 rule, as is the commitment to take specific “meaningful actions” to address any significant problems the analysis reveals. As HUD previously recognized, that existing rule provided a long-needed mechanism through which it could require that PHAs be transparent about fair housing issues, undergo a meaningful self-examination also available to advocates and to HUD (one that includes community input), and be prompted to undertake policy changes as needed.

Contrary to HUD’s characterizations, the burden on PHAs was substantially eased by their ability to collaborate with local jurisdictions also going through the AFH process.

3. HUD’S JUSTIFICATION FOR ITS RULE REVISION IS ARBITRARY AND CAPRICIOUS

In its Notice of Proposed Rulemaking, HUD advances several unfounded claims to justify replacing the 2015 AFFH rule. HUD does not properly consider all of the circumstances of the initial implementation of the 2015 rule including the success of its oversight efforts. Furthermore, HUD does not adequately or accurately consider the benefits of the AFH framework.

²³ A discussion of the Congressional record and numerous cases on this point can be found in Robert Schwemm’s treatise, *Housing Law & Litigation*, Chapter 21:1.

²⁴ See, e.g., Stacy Seicshnaydre, *Missed Opportunity: Furthering Fair Housing in the Housing Choice Voucher Program*, 79 *Law and Contemporary Problems* 173 (2016); Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 *Wake Forest L. Rev.* 333, 334 (2007); Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 *How. L.J.* 913, 921 (2005).

a. **The AFH review procedure is working as designed**

HUD concludes that the failure of some jurisdictions to gain approval for their Assessment of Fair Housing (AFH) in the initial round of AFH submissions is proof that the AFFH process *as set forth in the 2015 regulation itself* is necessarily too complex and demanding for grantees. This conclusion is based on faulty reasoning.

First, HUD's rationale ignores why the AFH submission requirement and review procedure was established by the 2015 AFFH rule. As the Government Accountability Office noted in its 2010 report on fair housing planning, the Analysis of Impediments (AI) process was inadequate and often produced weak documents partly because there was no submission requirement and because HUD did not properly review AIs to ensure their effectiveness.²⁵ To rectify this problem, HUD included a submission requirement and review procedure in the 2015 AFFH rule to more effectively evaluate AFH submissions and provide further guidance and technical assistance if needed to achieve an AFH that would be accepted. The 2015 rule specifically contemplated that there would be a need for revisions to some initial submissions and outlined two general conditions for why HUD would not accept an AFH: 1) The AFH is inconsistent with fair housing or civil rights requirements or 2): The AFH is substantially complete.²⁶ This AFH review procedure is a marked improvement over the highly flawed AI process.

Second, contrary to what HUD claims, the non-acceptance and subsequent revision of deficient AFHs shows that the iterative review process prescribed by the 2015 rule is working exactly as it was intended. HUD has been actively working with jurisdictions whose submissions were not accepted to help them produce a successful AFH. Indeed, an analysis of non-accepted AFHs found that HUD "engaged in a careful and thorough review of the AFHs".²⁷ HUD identified specific reasons for non-acceptance ranging from deficiencies in setting goals to a failure to include protected classes in an analysis of disparities in access to opportunities.²⁸ HUD also provided a variety of forms of detailed technical assistance that helped lead to improved AFHs.²⁹ HUD's refusal to accept deficient AFHs and commitment to providing concrete guidance is evidence that the agency is exercising meaningful oversight and is working with jurisdictions to improve submissions and enforce compliance with the duty to AFFH. The AFH review procedure cannot be used to justify eliminating the 2015 rule.

HUD also does not consider that the implementation of any new regulation will inevitable involve trial and error – and that hard work is simply required in order to begin to undue the long and heavy legacy of segregation. This is particularly true for the 2015 rule as it overhauled the fair housing planning process and introduced more rigorous requirements. HUD simply does not take into account how time and experience would affect the implementation of the AFFH

²⁵ U.S. Government Accountability Office, GAO-10-905, Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans, 22 (Sept. 14, 2010), <http://www.gao.gov/new.items/d10905.pdf>.

²⁶ AFFH Rule Guidebook page 35

²⁷ Justin Steil & Nicholas Kelly, *Survival of the Fairest: Examining HUD Reviews of Assessments of Fair Housing*, 29 HOUSING POL'Y DEBATE 736, 747 (2019).

²⁸ *Id.* at 743.

²⁹ *Id.* at 746-747.

process. Although HUD points to the fact that a number of submissions required revisions or were never accepted, it provides no reason to believe that the rate of non-acceptance from the limited roll-out of the 2015 rule will continue at the same rate in the future. As HUD and jurisdictions learn lessons from the review process and gain familiarity with the implementation of AFFH process, there is substantial reason to believe that submissions will be more successful in the future.

b. There is no justification for eliminating the AFH’s community participation requirement

In support of its proposed rule, HUD claims that the community participation requirements for the AFH created a process that was duplicative of the requirements for the consolidated plan. However, a separate public participation process from the consolidated plan process is warranted in order for the full range of fair housing concerns to be addressed in a more precise and meaningful way. Merging the AFFH community participation process into the Consolidated Plan process could lead to fair housing issues being overlooked since the Consolidated Plan deals with a broad array of housing and community development issues.

The community participation requirements in the 2015 rule have led to a number of benefits. Robust community participation efforts for AFHs have allowed jurisdictions to connect with new stakeholders who would not otherwise be involved with the consolidated plan process, educate the public about fair housing, and give residents the opportunity to provide significant input for fair housing goals and strategies rather than respond to already developed proposals. The community participation requirements have been especially helpful in increasing engagement with PHA residents. Diminishing community participation efforts will only hurt efforts to comply with the duty to AFFH.

c. A comprehensive AFH helps program participants fulfill their mission

HUD asserts that the AFH burdened program participants by requiring them to engage in overly complex analysis. But HUD does not consider how such an analysis can help them be more effective in carrying out their mission. Specifically, HUD points to the issues that PHAs would have had to analyze using the draft PHA assessment tool. The tool would require PHAs to examine patterns of segregation, community attitudes, disparities in access to opportunity, and the presence or lack of private or public investment.³⁰ HUD asserts that analyzing these issues would be improper as these issues may be beyond their jurisdictional control or typical expertise. However, housing issues do not exist in a vacuum. Housing is deeply connected to a range of issues and has an enormous impact on life opportunities as it affects access to education, jobs, and a variety of other resources and services.³¹ Analyzing patterns of segregation as well as access to opportunity is crucial for PHAs and other program participants to gain context for

³⁰ PHA Assessment of Fair Housing Tool (<https://www.hudexchange.info/resources/documents/assessment-of-Fair-Housing-Tool-For-Public-Housing-Agencies-2017-01.pdf>).

³¹ See Stefanie DeLuca & Peter Rosenblatt, *Walking Away From the Wire: Housing Mobility and Neighborhood Opportunity in Baltimore*, 27 HOUSING POL’Y DEBATE 519-546 (2017).

housing issues and will help them address important substantive issues that have a fundamental effect on the people they serve.

d. HUD mischaracterizes the AFFH process and does not adequately consider the benefits of maintaining the proposed rule

HUD further asserts that the scope of the 2015 rule is burdensome because all jurisdictions are required to complete an AFH using the same template. HUD claims that the process of completing an AFH denied jurisdictions the needed flexibility to identify relevant issues. This reasoning is flawed. First, HUD does not consider how a standardized AFH template can be helpful for program participants. A standardized AFH template can help provide much-needed guidance and clarity to jurisdictions. Additionally, a standardized process can help jurisdictions share information and learn lessons from others who have already gone through the process.

HUD's claim that the AFH template denied jurisdictions flexibility in identifying issues and a course of action is also unfounded. HUD does not prescribe what issues program participants will address in their goals and strategies. The assessment tool for local governments also provides flexibility as it allows program participants to discuss and provide any additional information that it deems relevant for each section.³² Additionally, an analysis of submitted AFHs concluded that the process was a dramatic improvement over the AI process as it encouraged program participants to create innovative strategies to address disparities in access to opportunity and led to more concrete goals to actually address unique fair housing problems in their jurisdiction.³³

e. The AFFH process enhanced HUD's ability to evaluate fair housing progress

HUD contends that the 2015 rule focused too much on planning and process, and not enough on evaluating fair housing results. In support of this claim, HUD asserts that the requirement to consider every question in the assessment tool and provide extensive documentation discouraged innovation and made it difficult to compare jurisdictions over time. However, HUD provides no evidence in support of this claim. Nor does HUD explain how a uniform process inhibits its ability to evaluate a jurisdiction's improvement instead of easing HUD's administration of the rule by allowing it to more efficiently evaluate progress on past efforts and compare jurisdictions. Indeed, HUD's rationale does not take into account the fact that the AFH assessment tool includes an entire section designed to evaluate past goals, actions, and strategies.³⁴ Program participants have considerable flexibility to discuss what progress has been made toward the achievement of goals, where they have fallen short in achieving goals, and possible strategies that could help achieve past goals or mitigate problems. The requirement to

³² Assessment of Fair Housing Tool for Local Governments, *available at* https://prprac.org/pdf/assessment_of_fair_housing_tool_for_local_governments_2017-01.pdf

³³ Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29 HOUSING POL'Y DEBATE 85, 102 (2019).

³⁴ Assessment of Fair Housing Tool for Local Governments, *available at* https://prprac.org/pdf/assessment_of_fair_housing_tool_for_local_governments_2017-01.pdf

answer the assessment of past goals section actually enhances rather than inhibits HUD's ability to evaluate a jurisdiction's progress towards advancing its duty to AFFH.

f. HUD does not fully consider how data analysis can help program participants

In addition, HUD does not fully consider the benefits that jurisdictions gained by using HUD-provided data and maps. HUD asserts without evidence that local jurisdictions found the tool difficult to learn and operate. But for many jurisdictions, the HUD data and mapping tool helped them easily access information and provided mapping capability that they would not otherwise have. The information provided by the data and mapping tool can help jurisdictions enhance their understanding of community conditions including segregation and the concentration of publicly supported housing. For example, the City of New Orleans found that the data and mapping capabilities provided by HUD allowed the city to discover that it was more segregated than in years past.³⁵ The data and mapping capabilities also allowed the city to fully examine all federal housing financing it receives, including low-income housing tax credits, and actually helped improve the city's local control and decision-making capabilities.³⁶

While HUD seems to view the data and mapping tool as fundamentally flawed because it does not include every possible factor that a jurisdiction could deem relevant, the HUD-provided data is not intended to be the only source of information for an AFH. Indeed, as HUD itself notes in the notice of proposed rulemaking, the completion of the AFH involves locally available data and data from other sources as well. The data and mapping tool is simply a starting point and should not be used as a justification to halt implementation of the 2015 rule.

g. HUD has not properly considered ways to improve the AFFH process

HUD has not properly considered ways to improve the AFFH process without eliminating the entire 2015 rule. To support its proposed rule, HUD contends that program participants were burdened by the AFFH process. Yet HUD could address these concerns without eliminating the AFH requirement or other aspects of the 2015 rule, by making improvements to the guidance and tools available, and without impairing the rule's focus on fair housing aims.

One way for HUD to address these concerns would be to improve the structure of the assessment tool to streamline the process or to enhance the capability of the data and mapping tool. HUD could also issue additional guidance on how to analyze issues such as contributing factors rather than choose to eliminate the 2015 rule entirely. Alternatively, HUD could address these concerns is by allocating more resources to technical assistance for program participants. Moreover, HUD does not consider another course of action to respond to concerns about the complexity and demands of the AFH: refining its technical assistance and sharing lessons learned from the first group of jurisdictions that submitted an AFH.

³⁵ *A Threat to America's Children: The Trump Administration's Proposal to Gut Fair Housing Accountability*: Hearing Before the Subcomm. on Civil Rights and Civil Liberties of the H. Committee on Oversight and Reform, 116th Cong. (2020) (written statement of Ellen Lee, Director of Cmty. and Economic Dev. for the City of New Orleans).

³⁶ *Id.*

h. HUD's proposed rule is not designed to actually affirmatively further fair housing

HUD contends that the proposed rule will help establish a more effective process to AFFH but does not offer any plausible explanation for why the process would be better than the 2015 framework. Under the proposed rule, the AFH will be replaced by an approach that does not require jurisdictions to evaluate fair housing issues. This new approach will eliminate any meaningful approach to AFFH oversight.

If HUD truly seeks to affirmatively further fair housing, it would reinstate the 2015 rule. Instead, the proposed rule sets up a framework that is substantially weaker than the AI process, which was widely regarded as a failure.

In conclusion, we strongly urge HUD to remember its fair housing obligations and to reinstate the 2015 AFFH regulation.

Regards,

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