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

RE: FR-6030-N-01 Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777

To Whom It May Concern:

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) submits the following comments in response to the above referenced notice that was published in the Federal Register by the U.S. Department of Housing and Urban Development (HUD) on May 15, 2017. The notice solicits input from stakeholders and members of the general public regarding the burden associated with existing HUD regulations. The Lawyers' Committee is a national, nonpartisan, nonprofit civil rights legal organization that was founded at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity. Through the work of the Lawyers' Committee's Fair Housing & Community Development Project, the Lawyers' Committee possesses deep familiarity with HUD regulations, particularly those implementing the department's obligations under applicable civil rights statutes. These comments highlight the critical role of two regulations – "Affirmatively Furthering Fair Housing" and "Implementation of the Fair Housing Act's Discriminatory Effects Standard" – in HUD's efforts to comply with its own statutory obligations and explain the limited burden posed by these rules. The Lawyers' Committee also fully joins in the comments submitted by the Poverty & Race Research Action Council on behalf of a coalition of civil rights organizations and shares the concern expressed in those comments about the underlying premise of Executive Order 13777.

I. Affirmatively Furthering Fair Housing

On July 16, 2015, HUD promulgated its final "Affirmatively Furthering Fair Housing" regulation.[1] The rule, which succeeded a 1994 regulation,[2] implements the affirmative obligations of HUD and its grantees under the Fair Housing Act[3] and the Housing and Community Development Act of 1974. HUD grantees, including states,

[1] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42271 (July 16, 2015).
[2] Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878, 1905 (Jan. 5, 1995).
[3] 42 U.S.C. § 3608(e)(5).

municipalities, and public housing authorities, have had a duty to affirmatively further fair housing since at least 1968 when Congress passed the Fair Housing Act, and that duty has been explicit since the passage of the Housing and Community Development Act of 1974[4] and the Quality Housing and Work Responsibility Act of 1998.[5] Despite this clear obligation, compliance with the duty to affirmatively further fair housing by HUD grantees has been uneven at best. The lack of a clear framework from HUD for its grantees to follow in their efforts to affirmatively further fair housing was, in significant part, to blame for this inconsistency.[6]

In response to serious non-compliance with the duty to affirmatively further fair housing, civil rights advocates over the decades had to resort to litigation to ensure the fulfillment of Congress's vision of inclusive communities.[7] These landmark cases did a great deal to advance access to opportunity across the country and to clarify the meaning of the duty to affirmatively further fair housing. Litigation is, however, a slow and costly way of providing guidance to HUD grantees about how to comply with their obligations. Although the time and expense of litigation to ensure compliance with the duty to affirmatively further fair housing has been entirely justifiable, HUD recognized in promulgating the 2015 "Affirmatively Furthering Fair Housing" rule that there is a better way. By defining key terms, providing a standard template for fair housing planning, and establishing a set timeline for the planning process, the rule actually decreases the burden on HUD grantees while advancing fair housing goals.

Like the 1995 regulation that required state and local governments to develop Analyses of Impediments to Fair Housing Choice (AIs), the 2015 regulation directs HUD grantees to engage in a planning process in order to inform the steps that they take to advance the policy goals of the Fair Housing Act.[8] This planning process, called the Assessment of Fair Housing (AFH), empowers local officials, stakeholders, and residents to utilize HUD-provided data to inform a community-driven effort to identify systemic policies and practices that limit access to opportunity and prevent cities and regions from becoming truly inclusive. HUD grantees then develop goals and strategies to address these barriers and then take action to implement their chosen strategies.

What has at times been lost in the process of developing and implementing the 2015 "Affirmatively Furthering Fair Housing" rule is that developing an AFH that meets the requirements of the new rule requires undertaking virtually the same steps as were involved in devising an AI under the former rule.[9] What has changed is not the substance of the planning process, it is that HUD is now being much clearer about what it expects from grantees and has taken the guesswork out of the process of complying.[10] Under the prior rule, there was a significant risk that grantees would invest significant time and resources in conducting an AI but

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[4] 42 U.S.C. § 5304(b)(2).
[5] 42 U.S.C. § 1437c-1(d)(16).
[6] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 22 (2010).
[7] *See, e.g.*, Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973); U.S. *ex rel.* Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, 668 F. Supp. 2d 548 (S.D.N.Y. 2009); Langlois v. Abington Housing Authority, 234 F. Supp. 2d 33 (D. Mass. 2002).
[8] 24 C.F.R. § 5.154.
[9] *Compare* 24 C.F.R. § 5.154; *with* U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, FAIR HOUSING PLANNING GUIDE 2-16 (1995).
[10] 24 C.F.R. §§ 5.152, 5.154.

remain exposed to litigation because they lacked insight into what was expected of them. Now, grantees can have much more confidence that, if they follow the steps required by the rule, they will not face liability stemming from a failure to affirmatively further fair housing.

Additionally, both the AI and AFH processes require the analysis of data about the demographics of communities and housing and community developments conditions within those places.[11] Under the former rule, HUD grantees were responsible for collecting all of that data themselves. As a result, in light of the laborious nature of that data collection effort, many jurisdictions felt compelled to hire consultants to prepare their AIs for them. For the AFH, by contrast, HUD provides its grantees with substantial data covering many of the key topics of analysis. HUD specifically took this step in order to reduce the perceived need for grantees to hire consultants.[12] Lastly, the 2015 rule also allows and encourages HUD grantees to participate in joint and regional AFHs, which have the potential to significantly reduce the time and expense involved in producing a fair housing planning document like an AFH, particularly for smaller jurisdictions and public housing authorities.[13]

In sum, the 2015 "Affirmatively Furthering Fair Housing" rule is an exemplary example of HUD's efforts to balance the burden of complying with a regulation and the statutory prerogatives that often necessitate rulemaking. The rule has the potential to save HUD grantees significant time and money in the years to come by reducing the risk of litigation, clarifying the scope of fair housing planning obligations, providing data, and facilitating efficient collaboration. The rule represents a landmark effort by the Department to ensure that HUD itself is abiding by the obligations that Congress placed upon it in passing the Fair Housing Act in 1968. HUD should retain this critical rule.

II. Discriminatory Effects

On February 15, 2013, HUD promulgated a final rule entitled "Implementation of the Fair Housing Act's Discriminatory Effects Standard."[14] This rule clarifies HUD's position on the appropriate burden shifting framework for claims of discrimination under the Fair Housing Act that allege that a facially neutral policy or practice has an unjustified disparate impact or perpetuates segregation.[15] Under the rule, complainants have the initial burden of showing that a policy or practice causes a disparate impact or perpetuates segregation on the basis of a protected characteristic.[16] Then, respondents have the burden of showing that the challenged policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest.[17] Lastly, complainants have the opportunity to show that that interest could be served by an alternative policy or practice with less discriminatory effect.[18]

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[11] *Compare* 24 C.F.R. § 5.154(c); *with* U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, FAIR HOUSING PLANNING GUIDE 2-26-2-28 (1995).
[12] Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42271, 42275 (July 16, 2015).
[13] 24 C.F.R. § 5.156.
[14] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013).
[15] 24 C.F.R. § 100.500.
[16] 24 C.F.R. § 100.500(c)(1).
[17] 24 C.F.R. § 100.500(c)(2).
[18] 24 C.F.R. § 100.500(c)(3).

The availability of disparate impact liability under the Fair Housing Act is critical to efforts to increase access to opportunity by removing unnecessary barriers and to foster inclusive communities that are free from discrimination. As the U.S. Supreme Court acknowledged when it recognized the availability of disparate impact liability in *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project*, allowing proof of a violation where a plaintiff has not proven intentional discrimination aids in efforts to eliminate conduct motivated by covert discriminatory intent, in addition to striking down arbitrary barriers.[19]

At the time that HUD adopted the rule, every federal circuit court that had addressed the question of whether the Fair Housing Act allows for disparate impact liability had answered that question in the affirmative.[20] Although the courts of appeal were consistent in holding that disparate impact liability was available, they had adopted many different approaches to adjudicating disparate impact claims.[21] Thus, depending on the judicial circuit in which a housing market participant like a real estate agent, landlord, lender, or insurer found itself, it may have different obligations and burdens under the law. Through the rule, HUD could, at a minimum, ensure that the same standard would be applied in all of its administrative proceedings. Since the adoption of the rule, in addition, multiple federal circuit courts have adopted the burden shifting framework of the rule to govern disparate impact claims within their jurisdictions.[22]

Accordingly, the primary results of HUD's promulgation of this rule have been to ensure uniformity in administrative proceedings and to encourage consistency in Fair Housing Act litigation in the federal courts. In doing so, as the Supreme Court's decision in *Inclusive Communities Project* made clear, HUD created no new legal obligations. Thus, it is clear that the overall effect of the regulation is to reduce burden by lowering litigation costs and creating predictability in an areas where housing market participants have long been subject to liability.

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HUD's "Affirmatively Furthering Fair Housing" and "Implementation of the Fair Housing Act's Discriminatory Effects Standard" rules play critical roles in advancing a shared vision of inclusive communities and access to opportunity for all that motivated Congress when it passed the Fair Housing Act in 1968. The rules are also essential to HUD's ability to comply

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[19] Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, 135 S. Ct. 2507, 2522 (2015).
[20] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11469 (Feb. 15, 2013) (citing Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n, 508 F.3d 366, 374–78 (6th Cir. 2007); Reinhart v. Lincoln Cnty., 482 F.3d 1225, 1229 (10th Cir. 2007); Hallmark Developers, Inc. v. Fulton County, Ga., 466 F.3d 1276, 1286 (11th Cir. 2006); Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 740–41 (8th Cir. 2005); Langlois v. Abington Hous. Auth., 207 F.3d 43, 49–50 (1st Cir. 2000); Simms v. First Gibraltar Bank, 83 F.3d 1546, 1555 (5th Cir. 1996); Jackson v. Okaloosa Cnty., Fla., 21 F.3d 1531, 1543 (11th Cir. 1994); Keith v. Volpe, 858 F.2d 467, 484 (9th Cir. 1988); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937– 38 (2d Cir. 1988), aff'd, 488 U.S. 15 (1988) (*per curiam*); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148 (3d Cir. 1977); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 987–89 & n.3 (4th Cir. 1984); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290–91 (7th Cir. 1977); United States. v. City of Black Jack, 508 F.2d 1179, 1184–86 (8th Cir. 1974).
[21] *Id.*
[22] Mhany Management, Inc. v. County of Nassau, 819 F.3d 581, 619 (2d Cir. 2016); Inclusive Communities Project v. Texas Department of Housing & Community Affairs, 747 F.3d 275, 276-77 (5th Cir. 2014).

with its own obligations that Congress placed on the Department by statute. Impressively, HUD crafted these two important rules in a manner that is likely to decrease, rather than increase, regulatory burden on HUD grantees and other housing market participants by providing data and reducing the likelihood of litigation. As HUD explores ways of decreasing regulatory burden in its programs, the Department must preserve these two landmark rules.

Sincerely,

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