ANTI-DISCRIMINATION CENTER, INC.

"ONE COMMUNITY, NO EXCLUSION "

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VIA EMAIL

Hon. John Trasviña
Assistant Secretary, Fair Housing & Equal Opportunity
U.S. Department of Housing and Urban Development
451 7th Street, SW – Room 5100
Washington, DC 20410

Re: Affirmatively Furthering Fair Housing Regulations

Dear Mr. Assistant Secretary:

We write to suggest what we think are some of the important considerations as HUD contemplates the issuance of revised "affirmatively furthering fair housing" ("AFFH") regulations:

1. Identify AFFH as a "national objective" and a "priority need." AFFH can no longer be the "tack on" element to Consolidated Plans. As such, an important first step – one that would help to shift planning decisively – would be to identify AFFH and the means to achieve it as a national objective and a priority need.

2. Create a genuine deterrent against non-compliance. HUD has never had – and never will have – the resources to engage in a serious review and approval process of each and every Analysis of Impediments to Fair Housing Choice ("AI") that more than a thousand jurisdictions develop. That fact need not stop it from becoming an effective enforcer of either the existing or an enhanced regime of AFFH requirements.

   a. First, do no harm. The fact that existing regulations have frequently gone unenforced does not mean that the regulations do not cover at lot of ground. Indeed, with the important exception that current regulations could be construed as limiting the "action" requirement to that what has been "analyzed" (a perverse disincentive to analysis, discussed, *infra*, ¶ 3), the obligations are sweepingly broad and should remain so. Put another way, no one actually believes that the problem has been jurisdictions that simply don't understand what they are supposed to do; the problem has been jurisdictions that have believed that they will get away will not doing what they know they are supposed to do. As such, any attempt to delimit the requirements – whether directly or in the form of what are characterized as "performance

standards" – should be looked at skeptically, and the focus placed on getting jurisdictions to understand that they *won't* get away with not doing what they're supposed to do. Similarly, any move away from a certification system to an approval system is likely to do no more than generate rote approvals of inadequate analyses and plans.

b. Employ basic principles of law enforcement. With a few notable exceptions, almost every agency on every level of government that deals with civil rights enforcement makes two fundamental errors. The first is in not understanding that the primary task *is* law enforcement. As such, the agencies tend to ignore what is obvious to those who deal with criminal or with non- civil rights enforcement: effective enforcement requires effective deterrents. The second is in not understanding that the "softer" methods of achieving compliance – education, publicity, etc. – do not and cannot effectively work in isolation. The reality is that people and entities make decisions based on perceived choices. There is nothing like the presence of a real threat of detection and a real threat of serious consequences to make those obligated to obey the law not only more likely to do so as a matter of general deterrence, but also more likely to take advantage of offers to provide technical assistance in achieving compliance. Likewise, a prosecution or other enforcement action can seize public attention and act as public education in a way that a public service announcement never could.

c. Develop a serious AFFH auditing program based on a modified IRS model. The effectiveness of the Internal Revenue Service has obviously varied greatly over time (it is hard to enforce the law if the agency's marching orders are to reduce audits of high-earning individuals and companies). But the underlying problem faced by that agency is one well worth thinking about. Some taxpayers will meet their obligations because it would never occur to them not to. Others are committed to evading their obligations unless and until caught. But there is a vast third category: those taxpayers whose compliance is influenced by their perception of relative risk and reward. As such, the IRS engages in three basic types of enforcement: (i) focusing on areas of high yield, both for the specific impact and the general deterrence against a particular type of evasion or taxpayer profile; (ii) responding to information about non-compliance; and (iii) conducting random – or seemingly random – audits. All the categories foster general deterrence; the last is noteworthy precisely because of its *lack* of transparency. That is, deterrence is not enhanced by giving taxpayers a road map of what kinds of evasion are unlikely to be pursued, but rather by doing enough enforcement work across the board so that taxpayers in general sense that noncompliance does place them at risk.

For HUD, an effective auditing program will require a vast change in the ranks of the agency. The culture of going through the motions is, as you know, deeply entrenched. The fear of using discretion – let alone of taking decisive action –has been a defining feature of HUD in the past.[1] Accordingly, leadership is as important or more important than regulation.

[1] We do not mean to suggest that there have not been dedicated and effective individuals who have been employed by the agency. There certainly have been, though their efforts have frequently been stymied by the institutional culture we describe.

Substantively, however, the course is clear. Convert "high yield" from the IRS context to the AFFH context. For example, it is well known that African-Americans are willing to move to blocks and neighborhoods that have a wide variety of demographics. That willingness (not surprisingly) drops substantially in connection with all-white blocks and neighborhoods. Imagine selecting for AFFH-compliance scrutiny those jurisdictions that: (a) have a substantial number of neighborhoods of high opportunity; (b) have an all-white demographic profile; and (c) have significant barriers to fair housing choice (like exclusionary zoning). Doing so would be high-yield in two complementary respects. First, these are the doors that need to be opened to remove real inhibitions against the exercise of true fair housing choice; second, it is essential that people making decisions on where to live (or to relocate) understand that there will be no safe harbor from FHA enforcement.

Take advantage of information provided by fair housing advocates and other interested parties (*see* suggestion relating to the posting of AIs and Action Plans at ¶ 5, *infra*). Free up enforcement capacity by reorganizing and rationalizing the paperwork submissions process (*see* suggestion as to staggered time frames at ¶ 6, *infra*).

Finally, be prepared to engage in random audits. No recipient should be able to believe that it is immune from scrutiny.

3. Restore the "action" element of the AFFH obligation to its rightful place. The phrasing of the current definition of AFFH is one only a bureaucrat could love. Leaving aside the records maintenance element, the obligation is:

> Conducting an analysis to identify impediments to fair housing choice within its jurisdiction [and] taking appropriate actions to overcome the effects of any impediments *identified through that analysis* (emphasis added).

The rule confuses means and ends. Under the current regulation, the tool (an AI) is given primacy over the objective (elimination of all barriers to fair housing choice). There is a perverse incentive built in: jurisdictions may well believe that they can eliminate an obligation to *take action* by *not* identifying particular impediments.

a. The obligation to take appropriate action should stand alone. There should be no limitations on the requirement to take appropriate action. In other words, jurisdictions must be under an obligation to overcome the effects of any and all impediments to fair housing choice, regardless of whether the impediment was identified in an AI.

b. Clarify how to determine what is appropriate. "Appropriate" action needs to be expressly defined as those actions that result from an ongoing, circumstances-specific set of assessments that look at *all* the tools available to a jurisdiction – including the use of its legal authority – and look at the same time at *all* of the barriers to fair housing choice. Predetermined exclusions of particular kinds of actions (and particular kinds of impediments) are apt to result in a reflexive turning away from those actions that might be politically uncomfortable at a local political level.

c. Expand prospective certification to encompass retrospective certification. Except for a jurisdiction that is receiving funding for the first time, the certifications should expressly reference a jurisdiction's previous conduct as well as its prospective conduct. In other words, jurisdictions must only promise to AFFH in the future, they must certify that they have complied with their AFFH obligation in the past. HUD should make clear (as ruled on in the Westchester matter) that requests for payment constitute certifications that the jurisdiction has performed its AFFH obligations. Jurisdictions need to recognize that even good faith prospective intentions are not enough: a failure to AFFH deprives one of the right to receive funding (and otherwise subjects one to sanctions) no less than the substitution of an inferior grade material in a building project.

d. Clarify confusing language in the definition of "certification." 24 CFR § 91.5 defines a certification as:

> A written assertion, based on supporting evidence, that must be kept available for inspection by HUD, by the Inspector General of HUD, and by the public. The assertion shall be deemed to be accurate unless HUD determines otherwise, after inspecting the evidence and providing due notice and opportunity for comment.

The definition does not adequately convey the fact that HUD is entitled to *rely* on the certification, and the "deemed to be accurate" language is confusing. A better definition would be:

> A written assertion that must be kept available for inspection by HUD, by the Inspector General of HUD, and by the public. The assertion shall be deemed to be one on which the maker is asking HUD to rely, and one that the maker is representing to be true, complete, and based on supporting evidence. HUD receipt or acceptance of a certification as accurate is not intended to preclude a determination that the certification is in fact false, incomplete, not based on supporting evidence, or otherwise non-compliant with HUD requirements.

e. Develop a better way to use performance standards. The ongoing discussion of what performance standards to implement is a welcome change from previous regimes that were content with no performance so long as lots of paper was shuffled from one place to another. Nevertheless, we are deeply concerned, as alluded to earlier, that measures will be developed that serve to *insulate* recipients from doing as well as they should. There are five key principles that need to be applied:

> i. Keep the burden of proof on the jurisdiction. The easiest method to improve performance is the one that is most often overlooked. Jurisdictions must be required to identify the ways that *they themselves believe* that they have *actually reduced* impediments to fair housing choice *in concrete ways*. The answer to this question has nothing to do with conferences held, posters distributed, groups funded, or money spent. Let each jurisdiction put forward the best case that they actually have achieved results. It will be readily apparent which jurisdictions are merely blowing smoke.

ii. Identify a limited number of core concerns as to which progress is expected. We would think that these would include items like a reduction in segregation indices like isolation and dissimilarity, and reductions in the number of pre-1991 dwellings that are inaccessible to persons with disabilities. We think it is especially important for groups that have traditionally been excluded from part or all of a jurisdiction (or, more neutrally, who have traditionally not resided in part or all of a jurisdiction) to be surveyed to identify the nature, scope, and intensity of any inhibitions they feel about moving into the jurisdiction. This kind of market research is very well established – it just has not been used in the context of a jurisdiction or neighborhood as the "product" in question. [This is probably because there has been insufficient recognition that what are described as "preferences" for neighborhoods can be dynamic, and can change *as external variables change.*] Examining how inhibition levels change over time would be one useful measure of performance.

iii. Don't grade on a pass-fail system. The unintended consequence of identifying a particular number as a measure (at least one hopes it is unintended), is that many jurisdictions will work up to the number and no further. If, by contrast, key areas for improvement are identified, and potential methods of measurement are identified, then HUD will be able to hold jurisdictions more fully accountable while at the same time taking account of local variations. The way to do this is to use *routinely* a sliding scale of sanctions and a sliding scale of enhanced benefits, while retaining the discretion to seek more severe sanctions (including False Claims Act sanctions).

iv. Preclude defenses not articulated in AIs or Action Plans. After the fact or *post hoc* justifications for failure should not be tolerated. Under this regime, jurisdictions would have an incentive to identify actions to meet all obstacles to action that can be anticipated. Where progress has not been made, the failure to have addressed foreseeable problems would be seen as a failure of performance, not a legitimate excuse.

v. Insure that each jurisdiction is engaged in a continuing program of self-monitoring and monitoring of others with AFFH responsibilities. The need for monitoring is hardly a new concept. *See, e.g.,* 24 CFR § 91.230. One of the important lessons learned from the Westchester case is that the defendant jurisdiction never asked its municipal sub-recipients to document AFFH compliance, never assessed their AFFH compliance, never incorporated AFFH tasks in either program applications or reviews, and never cut off or threatened to cut off funding to jurisdictions that failed to AFFH (as it was supposed to do under existing regulation). A jurisdiction cannot succeed if it does not have concrete methods by which to evaluate itself and its partners, and, while this recommendation is more in the nature of a "process" recommendation, it should be incorporated as a performance standard.

4. Identify key factors as *per se* or *presumptive* impediments. No set of regulations will be able to itemize every impediment to fair housing choice in every jurisdiction (and you shouldn't try). There are, however, a variety of impediments that you want every jurisdiction addressing.

a. *Per se* impediments. These would certainly include the existence of *de facto* residential segregation, the existence of inaccessible dwellings, and municipal resistance to the construction of affordable housing. Deeming these (and perhaps similar) factors to be *per se* impediments would enable to HUD to get beyond specious arguments about whether certain facts on the ground constitute impediments, and to focus the grantee jurisdiction on causes and prescriptions.

b. *Presumptive* impediments. There are practices that will often act as impediments, but don't automatically do so. High on this list are the various preferences that jurisdictions establish or permit (current resident, workforce, etc.). Very frequently these operate to cause a disparate impact based on protected class status. Each jurisdiction would have to identify and analyze such practices, and could only avoid taking action in respect to them with clear and convincing evidence that the practices did not operate to cause a disparate impact as applied to the jurisdiction.

c. *Disclaimer.* Here and elsewhere in the regulations it will be important to state explicitly that the delineation of one factor or impediment is not intended and should not be interpreted as implying that other factors or circumstances do not constitute impediments (or appropriate actions, etc.).

5. Post AIs and Action Plans on HUD's website. Doing so will leverage HUD's resources, giving the agency the benefit of broad comment from fair housing advocates and others whose know particular communities, and know where and how analysis, planning, and action have failed.

6. Stagger the submission dates of AIs and Action Plans. Excessive paperwork helps neither HUD nor grantee jurisdictions, so the idea should be how to *facilitate effective enforcement.* Among other things, that means being open to both greater and lesser frequently of existing reports. It does seem that slightly increasing the frequency of AIs to once every four years is warranted both because of the increased and increasing frequency of more current and detailed Census information between decennials and because a four-year cycle can tie in well with a reduced frequency of Action Plan submission. If the latter obligation were reduced to a biennial requirement, recipients would essentially incorporate an Action Plan into each AI, and then have only one Action Plan due between AIs. [Naturally, the obligation to update based on changed circumstances should remain, and be made real by the threat of sanctions against those jurisdictions that fail to update appropriately.]

A simple but important part of this process will be to stagger the due dates of AIs across the four-year cycle. With a smaller universe of annual submissions, the Department's ability to conduct audits across a broader range of recipients will be enhanced.

7. Enhance administrative sanctions. There is no reason that the Secretary should not have as much ability to use the entire range of potential sanctions in both a provisional and permanent fashion in respect to AFFH non-compliance as with other forms of non-compliance. We would ask that the regulations be reviewed to insure that this is so. As part of this review, we would ask why it is that neither 24 CFR § 570.912 nor 24 CFR § 570.913 appear to reference the AFFH requirements of 24 CFR § 570.601(a). It is also important to make sure that there is an adequate

disclaimer included that explains that the sanctions set forth are not intended to preclude other available remedies under law or regulation (the existence of lower level sanctions not employed by the Department was argued by Westchester to be a bar to False Claims Act liability and damages).

8. Recognize that the effectiveness of AFFH regulations will bear a significant relation to other HUD policies. As important as the process of regulatory enhancement is, the results will be suboptimal unless combined with a series of initiatives to create new fair housing momentum more broadly, and to encourage the adoption of best practices:

a. Step up HUD-initiated enforcement. The link between exclusionary zoning and the perpetuation of segregation is clear. HUD has all the authority it needs to initiate investigations of the existence of such barriers and the extent to which those barriers operate to create a disparate impact to the disadvantage of a protected class in a particular jurisdiction [42 U.S.C. § 3610(a)(i)(A)(iii)]. Where such an impact is found, the Department has the authority and obligation to refer the matter to the Justice Department [42 U.S.C. § 3610(g)(2)(c)], and the Department should coordinate with the Civil Rights Division to make sure that such matters will be prosecuted vigorously pursuant to 42 U.S.C. § 3614(b)(1)(A).

b. Embrace regionalism. Segregation and other barriers to fair housing choice developed and operate regionally; barriers can only be overcome effectively with a regional approach. There needs to be a funding pool that is limited to those metropolitan regions that have agreed to pool housing opportunities across borders, and to locate such housing in a manner that facilitates racial and other forms of integration. The Administration has already adopted this form of encouragement for best practices in the area of education (the more than $4 billion allocated to "Race to the Top"), and there is no reason why such an approach would not work in respect to fostering regional cooperation to promote region-wide housing integration.

c. Make state and local human rights agencies actually *function* if they wish to receive or retain substantial equivalence status. Federal dollars are wasted on the many state and local agencies that do not understand their role to be that of civil rights law enforcers, and do not use their existing authority to investigate and prosecute meritorious complaints vigorously, and who rarely if ever use their authority to initiate their own investigations. HUD should be looking for results from those agencies in law enforcement terms, and not simply determining whether a local law is a carbon copy of the FHA.[2]

d. Encourage private fair housing groups to be more effective. Unless this has changed recently, organizations funded pursuant to the Fair Housing Initiatives Program ("FHIP groups") are obliged to funnel complaints to HUD for filing. Because contracts are based in part on complaints filed, there is an entirely counterproductive incentive to file complaints that are not meritorious, wasting everyone's time. Moreover, why would HUD's interest be in seeing the complaints filed administratively? That only makes sense for bureaucratic bean

[2] Bizarrely, there have been instances of legislation being rejected for lack of substantial equivalence not because the legislation was less protective than the FHA, but because the legislation was *more* protective than the FHA!

counting (the FHIP group gets credit for the complaint; the state or local human rights agency gets credit for "processing" the complaint). The focus should be on obtaining relief and making change on the ground. Contractual requirements and performance measures should be adjusted accordingly, and FHIP groups encouraged to use the venue most suited to maximize the achievement of fair housing objectives (which will often be state or federal court).

e. And then there is Westchester. It is widely agreed that the Settlement Order in that case caused recipients of federal housing and community development funds throughout the country to sit up, take notice, and, perhaps for the first time or the first time in many years, consider that the AFFH obligations are substantive obligations that must be taken seriously. But sitting up and taking notice is not the same as changing long-entrenched patterns of non-compliance. Every recipient will now be looking closely to see whether HUD really means to hold people's feet to the fire. In other words, recipients will or will not modify their conduct depending on whether HUD winds up insisting on all aspects of the Settlement Order – including the obligation for Westchester to use its authority to overcome local zoning barriers – being adhered to. The failure to do so will not only undermine a historic achievement in Westchester. More broadly, we know from long historical experience what it would mean for HUD to acquiesce to an Implementation Plan that winks at the towns and villages most committed to a status quo featuring no affordable housing and high levels of segregation, that adopts a "let's first go for the low hanging fruit in cooperative municipalities" approach, and that does not fulfill the Settlement Order's requirement that housing be developed on the Census Blocks with the lowest percentages of African-Americans and Latinos (an outcome that would undoubtedly require zoning change). Such acquiescence would doom even the best-constructed, toughest-sounding AFFH regulations to irrelevance. Recipients would understand that the regulations constituted no more than a paper tiger.

9. The AI itself. We have deliberately "demoted" the AI to last in our list as a corrective to the fetishistic worship of AIs shared by many in the fair housing world. Beyond the points previously made that would dovetail with requirements, we suggest only that each jurisdiction be required to assess the scope and intensity of each impediment, the relative importance of each impediment in respect to the overall barriers to fair housing choice, and the alternative strategies available to overcome each impediment.

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We hope the foregoing suggestions are useful, and are available to meet about them at any time.

Very truly yours,

Craig Gurian
Executive Director

cc: Bryan Greene (via email)