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PUBLIC ADVOCATES
MAKING RIGHTS REAL

September 17, 2013

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

Via regulations.gov
[http://www.regulations.gov/#!submitComment;D=HUD-2013-0066-0001]

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

Public Advocates Inc. welcomes the opportunity to comment on this proposed rule. Public Advocates is a nonprofit law firm and advocacy organization that challenges the systemic causes of poverty and racial discrimination by strengthening community voices in public policy and achieving tangible legal victories advancing education, housing and transit equity. The subject of the proposed rule directly relates to our work, including our efforts (a) to support compliance with HUD's voluntary compliance agreement in Marin County, (b) to help guide the state of California to adopt an Analysis of Impediments, and (c) in the context of metropolitan efforts to integrate equity and sustainability into regional planning and implementation under HUD's Sustainable Communities Initiative grant program.

We support the proposed improvements to regulations that carry out the Fair Housing Act's requirement to ensure that all federal agencies administer their programs relating to housing and community development in a manner that affirmatively furthers fair housing. We commend HUD for undertaking a multi-year effort to obtain the views of a wide range of stakeholders. The proposed rule changes are an important step forward toward the goal of equal opportunity.

Public Advocates applauds the many proposed regulatory improvements, such as replacing the ambiguous Analysis of Impediments (AI) with an Assessment of Fair Housing (AFH) that will have defined elements and

that will spell out specific fair housing "issues" that fund recipients must identify, prioritize, and take proactive steps to address. Supplanting the prior rule which allowed jurisdictions to draft an AI in a vacuum only to sit on a shelf, Public Advocates welcomes the proposed rule's requirement that a jurisdiction develop the AFH with input from the community and from stakeholder organizations and submit the AFH to HUD for review and acceptance prior to receipt of some HUD program funds. The obligation to affirmatively further fair housing, and related obligations under Title VI, will be strengthened by a clearer and more direct inclusion of affirmatively furthering fair housing considerations and inclusion of the AFH in the Consolidated Plan and PHA Plan processes for establishing fund allocation priorities.

While there are a number of other features of the proposed rule that Public Advocates endorses, we take this opportunity to offer suggestions necessary to strengthen a final rule:

1. HUD should consider that its legal authority to promulgate this rule arises not only under Title VIII of the Civil Rights Act but also, importantly, under Title VI. The Title VI lens is crucial, particularly in connection with issues such as subrecipient compliance and the scope of the programs and activities subject to federal oversight (see comments 8 and 9, below). It also points up the importance of coordinating HUD's regulatory regime with other Title VI compliance efforts, both within HUD and at sister agencies such as U.S. DOT and EPA. (See comment 12, below.)

   Of particular relevance to the requirement to conduct an AFH, the mandate of Title VI extends not only to its prohibition of discrimination, but also to the affirmative duty of recipients to provide compliance reports and other information and analyses. See, e.g., 24 C.F.R., § 1.6 (HUD Title VI regulations). That affirmative duty is incorporated at sister agencies into requirements that are closely related to HUD's proposed AFH. For instance, the Federal Transit Administration, "[i]n order to ensure compliance with DOT's Title VI regulations, … requires … transit providers to monitor the performance of their transit system relative to their system-wide service standards and service policies (i.e., vehicle load, vehicle assignment, transit amenities, etc.) not less than every three years," and to conduct detailed disparate impact analyses of service and fare changes. FTA Circular C 4702.1B (Title VI), Ch. IV and Apps. J & K.

   Additional relevant authority for requiring affirmative analysis and action by recipients to assist HUD in its obligation to "identify and address" disproportionately high adverse impacts of their "programs, policies, and activities on minority populations" is found in Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 1994).

2. There must be a mechanism in the final rule that empowers affected community members and advocates both to file administrative complaints, and to appeal to HUD Headquarters' Office of Fair Housing and Equal Opportunity (FHEO) a decision by the local HUD office to accept an AFH or a certification that a program participant is affirmatively furthering fair housing choice.

3. The proposed rule requires program participants to identify and prioritize fair housing issues; identify the most significant fair housing determinants that cause the fair housing issues; and, then "set and prioritize one or more goal(s)" for mitigating or addressing the determinants. The final rule should not allow program participants to set only one goal. Rather, HUD should require goals and quantified objectives for each determinant or factor that is identified as contributing to any significant fair housing impact.

4. The final rule should require program participants to establish benchmarks in the AFH. For each goal, the AFH must list specific actions that program participants will take toward achieving the goal, together with a timetable and the party responsible for each action. This will permit accountability, while also enabling the public and HUD to measure annual progress toward realizing fair housing goals and to assess the extent to which ConPlan and PHA Plan Annual Action Plans comply with the obligation to affirmatively further fair housing choice.

5. The proposed rule does not modify the Consolidated Plan and PHA Plan performance reporting regulations. The final rule should require annual performance reports to indicate actions carried out to address each of the goals in the AFH, describe the outcomes of those actions, and specify which fair housing issues were impacted and how they were impacted.

6. The proposed rule frequently refers to reducing racial and ethnic concentrations of poverty, as well as reducing disparities in access to community assets. This could be misunderstood to prohibit use of resources in neighborhoods that have such concentrations. Although the opening statement of purpose in the proposed rule offers a minor indication that use of resources in concentrated areas of poverty is permissible, it is far from adequate. The statement reads:

   > "A program participant's strategies and actions may include strategically enhancing neighborhood assets (for example, through targeted investment in neighborhood revitalization or stabilization) ***or*** promoting greater mobility and access to communities offering vital assets such as quality schools, employment, and transportation consistent with fair housing goals."

   In the final rule, the "or" must be an "and."

   Furthermore, the final rule must clearly reinforce the acceptability of the first option throughout the text of the final rule, including in the definition of "affirmatively furthering fair housing," the definition of "fair housing choice," and in the opening subsection pertaining to the Assessment of Fair Housing. The final rule must recognize that affirmatively furthering fair housing entails devoting resources to benefit the residents of areas of concentrated racial and ethnic poverty by creating, preserving and improving affordable housing, <u>while simultaneously</u> implementing investment policies that augment access to essential community assets for protected class residents who wish to remain in their communities, thereby protecting them from the forces of displacement.

7. Displacement is an especially important fair housing impact of some forms of investment and development. Without proper safeguards, development can result in the loss of affordable unsubsidized housing and the economic displacement of low-income and minority communities. While the proposed rule requires PHAs to analyze the impacts of the demolition and disposition of public housing, it does not impose a parallel requirement on non-PHA program participants. In our experience, the displacement of low-income and minority households by new development or changing uses is widespread throughout California, in particular in California's more expensive cities and regions. Regional efforts to reduce sprawl development, if they do not protect existing low-income families in the urban core, can have the perverse effect of exacerbating displacement pressures that are already very severe in places like the San Francisco Bay Area. The rule should require program participants to analyze the fair housing implications of the displacement of historically minority communities within their jurisdictions, and to explore, adopt and implement actions to mitigate displacement.

8. The final rule should be far more explicit that all of a program participant's housing and community development resources, as well as its policies, practices, and procedures (such as zoning which inhibits development of permanent supportive housing or multifamily housing) must be assessed in the AFH and in any certification that it is affirmatively furthering fair housing. As written, the proposed rule could be misunderstood to require that analysis only in programs implemented with the use of HUD funds. In fact, Title VI prohibits all recipients of federal financial assistance from discriminating in <u>any</u> of their programs or activities, regardless whether those programs or activities are federally supported.

   HUD may wish to look to U.S. DOT guidance, which provides better clarity on this issue. See, for instance, the Federal Transit Administration's recently-updated Title VI Circular, which provides, in conformity with statutory amendments, that "Title VI prohibits recipients of Federal financial assistance (e.g., states, local governments, transit providers) from discriminating on the basis of race, color, or national origin in their programs or activities, and it obligates Federal funding agencies to enforce compliance."

9. While it is the responsibility of the direct recipient of federal funds to monitor its subrecipients' compliance with AFFH and Title VI obligations, the final rule should also provide – as U.S. DOT guidance does – that subrecipients are directly accountable to HUD for their failures to comply with their obligations. HUD, in fact, in the exercise of its authority under 42 U.S.C. §3535(d) and 24 C.F.R. §570.307, has explicitly instructed Urban Counties that each and every "cooperating unit of general local government" has an obligation to "affirmatively further fair housing within its own jurisdiction." Yet, when a local government fails to take actions necessary to address factors that contribute to, e.g., the exclusion of protected class members from residing in its jurisdiction, HUD has made insufficient use of its power and obligation to ensure compliance. While the direct recipient should, of course, be responsible in the first instance for making all efforts within its power to ensure compliance by its subrecipients, it is often the case that those powers are not sufficient to the task, as has been demonstrated in both Westchester County and Marin County.

10. Public participation, especially by members of protected classes, should be more strongly emphasized. The AFH should be developed by way of an iterative community process so that community members have the opportunity to respond at each stage of the development of the data and action plan, rather than only to a fully-baked plan. In addition, in those places that have a disproportionately low share of protected class members as compared to surrounding cities or counties, the final rule should incorporate a requirement to conduct outreach to protected class members who live in those other places (e.g., those who commute to jobs from those other places). Finally, the draft and final AFH, as well as related information used to create the AFH, should be posted on a readily accessible webpage of the program participant.

11. The definitions of "disproportionate housing needs" and "segregation" at §5.152 should be more clearly focused on regional housing needs and segregation, rather than solely conditions "within the jurisdiction." As we learned in Westchester County, dealing with low income housing needs only within specific jurisdictions can exacerbate segregation within the larger region. Where housing markets are regional, 42 U.S.C §3608 creates a regional fair housing obligation (see, e.g., *Hills v Gautreaux*, 425 U.S. 284, 301-302 (1976)), and this should be clearly reflected in the final rule.

12. HUD should work with DOT to identify ways to align consolidated plans with long-range regional transportation plans as well as to incorporate the data and findings of FHWA/FTA-required equity analyses. This can include alignment of timing, capacity building exercises, more explicit guidance about how future transportation investments should take into account demographics, land use, housing, and jobs patterns. It should also include ensuring that HUD's AFFH guidance is more consistent with DOT Title VI and Environmental Justice guidance. Finally, HUD should also avail itself of the opportunity to get DOT's assistance with data, such as data on infrastructure investments and transit service levels.

Thank you again for the opportunity to comment on this important rule.

Very truly yours,

Richard A. Marcantonio
Managing Attorney