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Review of Selected Critical Comments on HUD's Proposed AFFH Rule

Overview:

This document summarizes public comments that were critical of HUD's Proposed Rule on the duty to AFFH. The first, relatively brief, section, summarizes comments from various comparatively small stakeholders. The second section contains synopses of comments submitted by national organizations as well as some large players like New York City and the High-cost Cities Housing Forum. For comments in the second section of this document, one can jump to specific comments by clicking on the links below:

Comments from the Field:

Most commenters who represented organizations or state or local government agencies did not take the approach of declaring their opposition to the rule. Instead, the most common approach was to (1) not express general support for the Proposed Rule, (2) solely include criticism without accompanying praise, and (3) ask that HUD issue an Interim Rule rather than a Final Rule. A letter by the National Association for County Community and Economic Development (NACCED) and the National Community Development Association (NCDA), which was endorsed by the U.S. Conference of Mayors, the National Association of Counties, and the National

Association of Local Housing Finance Agencies, provided the most common talking points that turned up in the comments of states and localities. It is worth noting that the NACCED/NCDA letter – unlike many of the copycats – praised HUD for clarifying the duty to AFFH, but the criticisms in the letter still present the best vehicle for assessing opposition to the Proposed Rule. Prominent points in the letter include:

- The argument that Consolidated Plan programs inherently AFFH;
- The concern that HUD is attempting to impose requirements that go beyond what the Fair Housing Act demands;
- The role of purely private choice in establishing existing residential patterns;
- The concern that the HUD's data driven approach might not work in states where very few people of color reside (e.g., Vermont, Maine, etc.);
- A request for an Interim Rule rather than a Final Rule;
- A request to fully integrate the AFH into the Consolidated Plan;
- Criticism of the requirement to consider data relating to issues other than but still related to housing such as education and transportation;
- The lack of control that program participants may have over barriers to fair housing in their communities (e.g, the inability of the entitlement jurisdiction to control the PHA);
- A call for CPD rather than FHEO to have responsibility for the AFH process;
- A call for the data criteria to be colorblind; and
- The need for more examples of issues, determinants, and goals.

The National Association of Housing & Redevelopment Officials (NAHRO) also submitted a comment letter with critical talking points that many PHAs incorporated into their comments. At this point, I have not been able to find NAHRO's actual letter. Here is a sampling from one of the copycat submissions: the Okolona (MS) Housing Authority commented that the Proposed Rule failed to acknowledge the scarcity of PHA resources, imperiled any future investment in RCAPs, lacked a safe harbor for program participants whose AFHs had accepted, and could make it harder for local development proposals to score well under state QAPs because of higher land acquisition costs in high opportunity areas.

Here is a brief run-down of other critical comments:

- The right-wing Center for Equal Opportunity (Roger Clegg's organization) urged that all AFFH efforts be colorblind.
- The Public Housing Authorities Directors Association commented on HUD's lack of authority under the Fair Housing Act to require program participants to address concentrated poverty and disproportionate housing needs, the risk that the AFH process will undermine the investigation and enforcement of traditional individual discrimination complaints, unrealistic submission timetables that will be costly to comply with, and

potential unintended consequences of compliance (e.g., accelerated gentrification and displacement, fewer total program beneficiaries because of the need to invest in high opportunity areas).

- The City of Seattle asked for clarification that investment in low-income communities of color is acceptable, requested syncing the AFH with the Consolidated Plan, and asked that it be allowed to use locally-generated data.
- The Erie, Pennsylvania Department of Economic and Community Development commented that the AFH submission deadline of 270 days before the Consolidated Plan was unrealistic and would force program participants to hire consultants instead of conducting AFHs in-house.
- The North Bend and Coos-Curry (OR) Housing Authorities commented that small rural PHAs in areas without entitlement jurisdictions do not have the capacity to conduct AFHs.
- The State of Minnesota criticized proposals for PHA-Consolidated Plan coordination, argued that the administrative costs of the Proposed Rule would be high, and argued that states have little to no control over localities.
- The State of North Dakota commented that the Proposed Rule betrayed a lack of understanding of rural housing issues and that the data tool was not relevant to rural areas.
- The Pennsylvania Department of Community & Economic Development commented on the high cost of administrative compliance, the "ineffective" nature of Moving to Opportunity-type programs, and the requirement of consideration of factors that are not mentioned in the Fair Housing Act.
- Pinellas County, Florida expressed concern that a local impediment such as a consortium participant's zoning ordinance would affect the entire consortium's funding and asked that HUD identify impediments or determinants for the program participants since HUD has the data already.

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National Organizations and Other Large Players:

High-cost Cities Housing Forum

Mercedes Marquez, who is the Deputy Mayor for Housing in Los Angeles and was formerly the Assistance Secretary for CPD at HUD, submitted a comment letter on behalf of the High-cost Cities Housing Forum (HCHF) as well as five other large cities. The High Cost Cities Forum represents local housing officials in New York City, Los Angeles, Chicago, San Francisco, Boston, and Seattle. Officials from Houston, San Jose, Denver, Baltimore, and New Orleans also joined the letter. The letter expressed support for HUD's commitment to reforming

the AFFH process but couched that support in terms that may reflect an underlying antipathy to fair housing.

That antipathy appears in both the letter's procedural and its substantive comments. On the procedural side, most importantly, the letter calls for HUD to release a second proposed rule and to have that rule go through a round of public comment instead of finalizing the current Proposed Rule. The letter makes no mention of suggested timeline for releasing a second proposed rule. Next, the letter encourages greater clarity with respect to which HUD offices will be involved in implementing which aspects of the rule. To the extent that the letter expresses a preference for one office over another, the HCHF would consistently augment the role of CPD and PIH at FHEO's expense. The letter called for an equal role for CPD and PIH, on the one hand, and FHEO on the other in reviewing AFH submissions and the provision of technical assistance.

With respect to alleged violations of the duty to AFFH, the letter asks for a great deal of procedural leeway. The letter proposes that the rule require HUD to send two written letters to a program participant about an alleged violation before taking action and afford program participants an appeals process for when HUD imposes sanctions. In terms of sanctions, the letter argues that HUD should only withhold funds if there is a consistent and sustained pattern of fair housing violations. Even under those extreme circumstances, the letter would confine HUD to withholding funds from the program associated with the violation. As an example, the letter argues that HUD should not withhold ESG funds if a program participant violates the duty to AFFH through its use of HOME funds.

The letter also argues for a narrow interpretation of the scope of the duty to AFFH. With respect to the potential barrier of high land costs, the letter characterizes this obstacle as insurmountable and argues that program participants should not be held responsible for it. The letter also argues that program participants should not be held responsible for activities not involving HUD funds. The letter asks HUD to clarify the rule to reflect that consolidated plan jurisdictions are not responsible for the actions of PHAs and vice versa.

On the subject of the balance between mobility and investment strategies, the letter argues that the cities are striking this balance already and expresses concern that the current Proposed Rule is skewed toward mobility strategies. The letter asks that HUD clarify the rule to reflect that investment-based strategies are consistent with fair housing goals and are means of AFFH. As appendices, the letter includes several case studies of successful investment in low-income communities of color. In light of the conflicting directions in which various requirements can pull grantees, the letter asked that program participants be held harmless if compliance with a HUD program requirement gives rise to an alleged AFFH violation.

The letter proposes several changes to the definitions section of the rule. Several of these changes would undermine important civil rights goals. First, in defining Disproportionate Housing Needs, the letter suggests that a 20%, as opposed to 10%, deviation from the level of need experienced by residents who are not members of protected classes be necessary to establish that group falls into that category. Second, the letter would change the portion of the definition of Fair Housing Choice focusing on persons with disabilities to characterize fair housing in terms of individual choice rather than community integration consistent with *Olmstead*. Third, the letter would remove any reference to either segregation or integration from the definition of Fair Housing Issues. Fourth (and consistent with the prior discussion of the attempt to narrow the scope of the duty), the letter would remove any mention of metropolitan statistical areas from the definition of Integration in light of program participants' limited ability to control other jurisdictions within their regions. Last, the letter would omit any mention of concentrations within a single building from the definition of Segregation and state that segregation of persons with disabilities "may include" rather than "includes" a failure to provide housing in the most integrated setting appropriate to the person's needs.

Data is the last major category on which the letter comments. The letter urges HUD to respect the role of qualitative information and local expertise and asks HUD to clarify that investment decisions do not have to be data driven because available data do not capture all of the considerations involved in those decisions. Additionally, the letter argues that HUD should have to rely on locally generated supplemental data when such data is submitted. The letter criticizes the existing data tool for failing to consider concentrations of members of protected classes other than race and ethnicity, failing to include a sufficiently wide array of community assets, and lacking tabular data and not being downloadable.

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National Association of Housing & Redevelopment Officials

The National Association of Housing & Redevelopment Officials (NAHRO) submitted comments that were fairly scathing at points. Ultimately, the comments called for HUD to issue a second proposed rule rather than to scrap the regulatory process entirely, but the tone of the comments was far more negative than that of HCHF. The letter focuses on the administrative burden threatened by the proposed rule, potential unintended consequences, and alleged errors in the rule.

The letter argues that, despite HUD's protestations to the contrary, the rule would create substantial administrative burdens for PHAs and does not balance those burdens with any new resources. According to the letter, small and rural PHAs will face greater data analysis burdens because they will have to go beyond the data provided by HUD, which is unlikely to be accurate

or relevant in their local context. The letter also suggests that the process of translating data analysis into tangible actions is more complicated than the rule depicts, especially when the data shows a muddled picture rather than a clear one. The letter also takes issue with requirements placed on PHAs with respect to updates to action plans. If PHAs opt to conduct their own AFHs, they will have to update their plans every year as opposed to every five years under the consolidated plan process. In NAHRO's view, this is a coercive attempt to advance the goal of regional collaboration. The letter points out that regional collaboration is more difficult where no entitlement jurisdiction overlaps with a PHA, leaving only the state. The letter urges HUD to clarify which divisions are responsible for the implementation of which portions of the rule and expresses skepticism that FHEO understands the operational context of PHAs.

With respect to possible unintended consequences, the letter warns that small PHAs may opt out of receiving federal funds in order to avoid the burden of compliance. The letter also suggests that – contrary to HUD's claims – the proposed rule would increase the risk of litigation by forcing PHAs to identify fair housing issues (some of which they could presumably be sued for) while not providing the resources to remedy those issues. The letter argues against creating a compliant process or a private right of action to enforce the duty. If HUD does create a complaint process, the letter suggests that it at least be narrowly circumscribed and place the burden on the complainant. The letter argues that there should be a safe harbor for PHAs whose AFHs HUD has accepted. With respect to the Housing Choice Voucher (HCV) program, the letter argues that potential AFFH actions could jeopardize other program goals such as serving as many households as possible. On the subject of the balance between mobility and investment, the letter expresses concern that the rule would restrict capital expenditures in existing developments located in RCAPs and could put PHAs at a disadvantage in receiving LIHTCs under state QAPs because of increased land costs and an inability to build in QCTs.

The letter alleges that HUD made a series of errors in devising the proposed rule. First, the letter argues that HUD's understanding of protected class, especially in the context of disproportionate housing needs, is in accurate. According to NAHRO, except with respect to disability status, all people are members of protected classes with respect to race, sex, etc. Next, the argues that the proposed rule focuses too much on race to the exclusion of other protected bases and that, in focusing on RCAPs, the rule elevates economic status to the level of a protected class despite the lack of statutory authority for doing so. Additionally, the letter observes that the proposed rule fails to account for individual choice and other determinants that are outside of the control of PHAs. The letter argues that it is unfair to hold PHAs responsible for achieving predetermined goals when purely private choice could undermine the realization of those goals. Lastly, the letter points out flaws in HUD's fair market rent data.

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National Association of Home Builders

In its comment letter, the National Association of Home Builders (NAHB) asks HUD to withdraw the proposed rule and return to the drawing table to seek additional input from the development community. The letter primarily notes that the proposed rule fails to address the primary concern of the GAO report, enforcement, will increase costs for program participants, and does not reflect a balanced approach to investment and mobility strategies. These added costs, in turn, will lead to unintended consequences.

With respect to enforcement, the letter points that it is unclear how HUD will determine whether a program participant is in compliance with the duty to AFFH and what enforcement actions HUD will take in the face of violations. NAHB explicitly supports withholding funds from non-compliant program participants.

On the subject of cost, the letter argues that the AFH will be costly to draft and time consuming to review. In the absence of funding for the AFH process, that cost will come out of program funds that would have otherwise gone to the construction of housing. Thus, the letter suggests that decreased housing affordability will be an unintended consequence of the rule. Another potential cause of increased housing costs under the rule is the difficulty in measuring results with respect to AFFH. The letter argues that program participants will become cautious and indecisive in the face of uncertainty thus making them less effective partners for developers and, in turn, decreasing housing production.

As to the question of balance between investment and mobility strategies, NAHB urges a both/and approach and suggests that the proposed rule is skewed toward mobility strategies. The letter points out the intersection between AFFH and LIHTC and the CRA and warns against compromising LIHTC rehabilitation efforts and investments made by financial institutions in CRA assessment areas.

On the subject of zoning, the letter criticizes a perceived over-emphasis on inclusionary zoning and offers a menu of alternatives instead. Those options include land assembly and land banking, overlay zoning districts, and streamlines local regulations. In NAHB's view, inclusionary zoning can increase housing costs by decreasing total production. Additionally, mandatory inclusionary zoning may be illegal under some states' laws.

The last important note in summarizing NAHB's comment is that the letter argued that HUD should have conducted a regulatory flexibility analysis because, in NAHB's view, the proposed rule will have a significant economic impact on a significant number of units of local government, which qualify as small entities.

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National Council of State Housing Agencies

The comment letter submitted by the National Council of State Housing Agencies (NCSHA) praised a few of HUD's stated goals for the Proposed Rule but was uniformly critical with respect to the specifics that it discussed. NCSHA did not take a stance on whether HUD should abandon the rulemaking process, issue a second proposed rule, or finalize the current Proposed Rule with revisions based on the public comments. NCSHA praised HUD's intent to improve compliance with the duty to AFFH and to reduce the risk of litigation. Priorities for the final rule include an acknowledgment that the duty affects states different, flexibility in implementation, and a minimal burden of implementation.

NCSHA expressed a need for clarity on several subjects. First, the letter pointed out that it was not clear which office within HUD would be responsible for reviewing AFH submissions. The letter did not come right out and say that CPD should be in charge but did suggest that experienced staff with strong program knowledge review the documents. Second, NCSHA expressed confusion as to whether the rule is intended to apply to voucher-only PHAs. The reference to PHAs' development-related activities brought about this confusion. The letter suggested that the rule should not apply to voucher-only PHAs because of the fiscal constraints under which they are currently operating. As an example, the letter stated that innovations such as setting higher payment standards in expensive suburban areas are no longer feasible. If the Proposed Rule will apply to voucher-only PHAs, the letter asked that HUD provide examples of what steps such an entity could take to AFFH. Third, the letter sought clarity on the balance issue. NCSHA asked HUD to specify that investments in RCAPs that have the purpose of preserving or rehabilitating affordable housing or revitalizing the community are consistent with the duty to AFFH. The letter took a somewhat different tack from most organizations with respect to the balance issue. It effectively suggested an and/or approach.

NCSHA also attacked some of the underlying premises of the Proposed Rule. First, the letter expressed concern that the practice of identifying communities as RCAPs or ECAPs could exacerbate NIMBYism (there was no elaboration as to how it would do so) and complicate attempts to provide housing choice to members of protected classes. As an example, the letter pointed out that adding just a few assisted units to a non-concentrated area could flip a census tract and make it an RCAP or ECAP. The letter also suggested that the RCAP and ECAP labels were often inappropriate in rural areas, particularly those in Indian Country and those with large farmworker populations. The letter recommended that the Proposed Rule exempt activities on reservations and tribal lands. Second, NCSHA questioned the use of poverty in the analysis of fair housing issues. The letter observed that HUD seemed to be treating low-income persons as a

protected class. In NCSHA's view, HUD exceeded its statutory authority in adopting this focus. The letter recognized that there are often correlations between protected class status and income but urged HUD to wait until the resolution of the *Mt. Holly* case before finalizing the rule. The letter also criticized HUD's focus on access to amenities as being beyond the scope of the department's statutory authority. Third, the letter argued that states should not be held accountable for the actions of entities to which they pass through funds because states lack both the resources to monitor those entities and the authority to control their conduct. As an example, the letter stated that state housing finance agencies have no power to control local zoning. Fourth, the letter expressed concern that placing requirements on entities involved in other planning and development activities, including transportation and LIHTC, would exceed HUD's authority. NCSHA claimed that the current LIHTC planning process provides greater opportunities for public engagement because it is annual rather than every five years. Lastly, the letter criticized the data tool both for containing errors and for not working well on a statewide level.

The letter urged that HUD allow greater flexibility with respect to a number of features of implementation. Concerning public participation, the letter criticized detailed newspaper publication requirements, arguing that such outreach is an inefficient way of obtaining the public's input. Instead, the letter suggested that HUD allow program participants to primarily publicize their AFHs on their websites and recommended that HUD create a section on its own website with a searchable database of AFH documents nationwide. As regards compliance determinations, the letter pled for HUD to be flexible in applying the materially inconsistent standard in light of the lack of clarity as to what it means to AFFH. The letter also asked for guidance about the potential consequences of a HUD determination that a program participant has failed to AFFH. With respect to the content of the AFH, the letter expressed confusion as to whether the requirement to identify patterns of integration and segregation only applies in the case of regional AFHs or whether it applies to all submissions. The letter urged that it only apply to regional AFHs. In the case of regional AFHs, the letter suggested that the region be defined to solely include the jurisdictions of the collaborating program participants. In the event that HUD decides that the requirement applies to all program participants, the letter asked that HUD clarify the scope of the region or regions that states should analyze. The question is whether the region contains surrounding states or simply the regions within the state. With respect to disparities in access to community assets, the letter expressed confusion over whether the quality of the asset was a factor in that analysis and argued that it should not be. Thus, in NCSHA's view, a school – rather than a good school – is a community asset.

In a few places, the letter asked HUD to reduce the burden placed on program participants. First, the letter claimed that the analysis required to identify fair housing determinants is too difficult. Instead, the letter suggested that such time would be better spent

devising strategies to address fair housing issues. Second, the letter urged flexibility with respect to state collaboration with PHAs on AFHs. The letter argued that states should be able to set a deadline for PHAs to declare their intent to collaborate. Additionally, the letter asked that HUD clarify that collaboration does not transfer responsibility for the attainment of one collaborating entity's goals to the other entities. In the event that a collaborating entity dissents, the letter argued that the entity that is responsible for ultimately submitting the AFH should have the final say to resolve the disagreement. With respect to collaboration with entitlement jurisdictions, the letter argued that such collaboration must be purely voluntary, and, in the absence of such collaboration, state AFHs need only address non-entitlement areas within state boundaries. Lastly, the letter contained several quick points including: (1) that any performance benchmarks should be guideposts rather than mandates, (2) that HUD should waive the AFH requirement for any program participant that recently completed a comprehensive AI, and (3) that program participants should have maximum flexibility when operating in the disaster recovery context.

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National Multi Housing Council, the National Apartment Association, and the National Leased Housing Association

The National Multi Housing Council, the National Apartment Association, and the National Leased Housing Association submitted comments focusing on some potential unintended consequences of the Proposed Rule. Their letter stated that there was consensus that the current process was not working and expressed strong opposition to exclusionary zoning before launching into its list of concerns. Those concerns include the increased resource burden that the rule would place on local planning agencies, the possibility that HUD would second guess site approvals, the lack of evidence about the likely effect of relying on the data points that HUD has prioritized in making development decisions, and the need for clarification that the rule does not apply to private parties. Absent clarification that private parties do not have obligations under the Proposed Rule, the letter asked that HUD not finalize the rule. The letter also suggested that HUD might consider how to better enforce the current rule instead.

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U.S. Commission on Civil Rights

Abigail Thernstrom, Peter Kirsanow, and Todd Gaziano, three conservative members of the U.S. Commission on Civil Rights, submitted comments on the Proposed Rule. They attacked the rhetoric, legal authority, and underlying empirical justification for the Proposed Rule. The

letter began by observing that residential racial imbalance is not the same as segregation and is not inherently invidious. By calling such imbalance segregation, the letter argues that the Proposed Rule trivializes the history of *de jure* segregation. Next, the letter claims that, despite the recent HUD rule, disparate impact claims are not cognizable under the FHA. In the writers' view, the entire edifice of the Proposed Rule is based on the mistaken notion that the FHA covers disparate impact. The rule then purportedly engages in disparate treatment in order to remedy disparate impact. The letter claims that this conduct is tantamount to that which the Supreme Court struck down in *Ricci*. The commenters expressed hope that the Court would soon clarify that avoiding effectuating a disparate impact can never justify disparate treatment. In the meanwhile, the letter urged HUD to respect the limits of its statutory authority in order to avoid raising a constitutional issue.

The letter elaborated a bit on the ways in which the rule allegedly violates the equal protection component of the Due Process Clause of the Fifth Amendment. First, the commissioners suggested that, in order to provide data involving race, the department would have to impermissibly classify people on the basis of race. Second, they argued that HUD would be bestowing benefits and burdens on the basis of race if it (or its grantees) attempted to address disparities in access to community assets. The letter observed that the only way to reduce residential racial concentration is to either encourage or to require people to live somewhere else on the basis of their race. In the commissioners' view, this sort of action resembles that which the Court struck down in *Parents Involved*.

Lastly, the letter addressed some of the underlying assumptions behind the Proposed Rule. The letter claimed that the rule betrayed a mindless preference for racial balancing and disrespect for individual preference and choice. The letter acknowledged that many people would rather not live in areas of concentrated poverty but argued that race is irrelevant to this wish, stating that rural Appalachia is every bit as undesirable of a place to live as a very poor majority African American inner city community. The letter suggested that, though HUD intends the Proposed Rule to benefit non-whites, the rule will injure both whites and non-whites. It went on to speculate that non-whites might be harmed even more because their choices will be subject to the whims of bureaucrats to a greater extent. The letter argued that the Proposed Rule relied on an outdated black-white binary view of race. Lastly, with respect to schools, the letter criticized the Proposed Rule for ignoring the role of illegitimacy, which it claimed was the most significant cause of the racial achievement act, and suggested that HUD encourage DOJ to drop its law suit against the state of Louisiana's school voucher program.

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Council of Large Public Housing Authorities and Reno & Cavanaugh

The Council of Large Public Housing Authorities and the law firm of Reno & Cavanaugh, which represents PHAs, submitted a comment letter that ultimately called for the publication of a second proposed rule prior to finalization. The letter praised HUD's commitment to fair housing and the department's efforts to clarify the obligation to AFFH but expressed concern that the Proposed Rule sends mixed messages about current PHA operations, contains inadequate protections for PHAs that strive to meet their obligations, and constitutes an unfunded mandate handed down during tough budgetary times.

On the subject of mixed messages, the letter urged HUD to clarify that investment in RCAPs AFFH when they are tied to neighborhood preservation or restoration strategies or take place in areas that are undergoing revitalization. The letter suggested that HUD continue to use its existing site selection standards to guide what areas are appropriate for development. According to the letter, investments that are consistent with those standards should be permissible regardless of their effect on racial or ethnic concentration. More generally, the letter criticized the Proposed Rule for failing to adequate account for the interplay between the role and other constraints on PHA operations such as the permitted uses of capital funds and operating subsidies, site and neighborhood standards, the Faircloth Amendment limiting how many units a PHA may own or operate, and HUD application decisions regarding demolition or disposition. With respect to persons with disabilities, the letter observed that the directive to address the concentration of persons with disabilities within developments is inconsistent with the existence of HUD programs that subsidize the creation of dedicated housing for persons with disabilities and the elderly. The letter asked that HUD clarify that such targeted housing is acceptable and create a safe harbor based on compliance with other HUD program requirements. Additionally, the letter expressed concern that targeted developments, such as some supportive housing, might be construed as being institutional in light of the Proposed Rule's reference to *Olmstead*. The letter emphasized the limits of *Olmstead* with respect to appropriate placements, resident choice, and reasonable accommodation. As regards the LIHTC program, the letter urged HUD to clarify that investments in QCTs under LIHTC are consistent with AFFH.

The letter contains much more detail about ways in which HUD could protect PHAs from the risk of litigation. First, the letter urged greater clarity in key definitions – including integration, segregation, and significant disparities in access to community assets – as a means of making it easier for PHAs to know what is expected of them. The letter suggested that HUD identify thresholds for problematic levels of segregation and disparities in access to community assets before finalizing the rule. Second, the letter recommended that compliance with AFFH be defined as making reasonable efforts to achieve goals and not taking materially inconsistent actions. The reasonable efforts standard is obviously a rather forgiving one. Third, with respect to vouchers, the letter proposed that a PHA should be considered in compliance with AFFH if it recruits landlords in high opportunity areas to participate in the voucher program, cooperates

with a regional HUD-funded mobility program, and markets high opportunity areas to its tenants. Lastly, the letter offered up several more potential safe harbors including that the following are consistent with AFFH: (1) any investment in an existing PHA site; (2) all developments owned by PHAs with fewer than 100 units; (3) developments that only house persons with disabilities, the elderly, or both; (4) developments undertaken by PHAs that only own one general occupancy family development; (5) developments approved for demolition or conversion to project or tenant-based assistance; (6) developments including units operated in accordance with a HUD-approved mixed finance plan; (7) and large redevelopment efforts intended to revitalize neighborhoods and reduce poverty.

With respect to the risk of liability under laws, the letter makes a few points. First, the letter argues that HUD should exempt PHAs from submitting certifications if they are operating under a consent decree or have received a SEMAP deconcentration bonus. Second, the letter points out that PHAs operate under geographical constraints in terms of where they can operate due to state enabling statutes. Third, the letter interprets the portion of the Proposed Rule addressing tenant selection and admission to require the abandonment of color-blind selection procedures in favor of preferences for white applicants in the event that developments are characterized by concentrations of non-white tenants. This corrective action might violate the FHA and the Fourteenth Amendment. The letter asks for clarity about how to make tenant selection and admission policies consistent with both the rule and other sources of law.

The letter argues that the financial burden of compliance will be much greater than HUD estimates. CLPHA estimates that the cost of producing AFHs will run to a minimum of $30 million over and above current AI expenditures. The letter also suggests that the number will be even higher if PHAs are unable to participate in regional AFHs and end up having to hire consultants. The letter points out that the Proposed Rule does not speculate as to the cost of actions to achieve goals identified in the AFH. Additionally, with respect to updating the AFH, the letter argues that PHAs are held to a harsher standard than are consolidated plan jurisdictions. A PHA that submits its own AFH has to update that document an annual basis instead of every five years. The letter suggests that PHAs should only have to update their AFHs every five years, as well.

The letter also expresses concern about how HUD will determine compliance. The commenters recommended that the rule explain the mechanics of the review process, the standards for determining compliance, and potential sanctions.

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The Financial Services Roundtable, the Housing Policy Council, the Independent Community Bankers of American, and the Consumer Mortgage Coalition

The Financial Services Roundtable, the Housing Policy Council, the Independent Community Bankers of American, and the Consumer Mortgage Coalition collaborated on a simple and direct letter in opposition to the Proposed Rule. The letter expresses the view that the FHA only prohibits intentional discrimination, not disparate impact, and that the whole purpose of the Proposed Rule is to use the planning process to avoid the adoption of policies that have a disparate impact, not to reduce disparate treatment. Consequently, the commenters believe that HUD is outside of its statutory authority. As a side point, the letter conveys the fear that the Proposed Rule could have the effect of restricting access to credit in communities of color.

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Ballard Spahr

The law firm of Ballard Spahr submitted comments that were critical of the Proposed Rule and urged HUD to extend the public comment period and engage in additional dialogue with stakeholders. The letter criticizes the definition of AFFH for exceeding the scope of HUD's statutory authority through both its focus on poverty, which is not a protected class, and its attention to community assets that do not involve housing. With respect to enforcement, the letter urges HUD to make public its guidelines for enforcement activities, including a grantee's right to appeal. The letter recommends a safe harbor for grantees with respect to the AFH if HUD approves the document and with respect to implementation if the grantees make reasonable efforts. The letter criticizes the provision placing the burden of demonstrating compliance on a PHA rather than having HUD bear the burden of proving non-compliance. With respect to the content of an AFH, the letter suggests that there be some reasonable limitation on the scope of the fair housing issues that program participants must identify. As currently drafted, a PHA must identify "any" issue. Like CLPHA, Ballard Spahr finds that the Proposed Rule places an unfair burden PHAs by requiring annual updates as opposed to the requirement that consolidated plan jurisdictions merely update their AFHs every five years. On the question of data, the letter stresses the importance of HUD ensuring that its data is updated and accurate and requests that HUD defer to program participants about their choice of supplementary data. Lastly, the letter invites HUD to remember that both the department and its grantees are operating in an adverse fiscal climate.

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City of New York

The City of New York, which signed onto the HCHF letter, also submitted its own comments. In the letter, the city did not adopt a position about the advisability of the Proposed

Rule. The letter is organized into three sections with the first containing general comments, the second focusing on PHAs, and the last focusing on specific provisions within the Proposed Rule.

The city hit upon several issues in its general comments. First, the letter recommends revising the Proposed Rule to clarify the broad scope of sources of governmental authority – including federal, state, and local – that a program participant can draw upon in AFFH. Second, the letter raises the concern that the Proposed Rule is not attuned to the needs of majority-minority localities and asks that HUD clarify that investments in financially feasible developments in RCAPs that are located very close to communities of opportunity where it would be too expensive to build do not violate the duty to AFFH. With respect to potential costs, the letter points out that the Proposed Rule increases public participation requirements without providing any money to cover that increase. To the extent that HUD expects program participants to use non-HUD funds to pay for outreach, the letter argues that the Proposed Rule constitutes an unfunded mandate. In the event that program participants are allowed to use HUD funds to that end, the letter requests that those increased public participation costs not be subject to the Public Services or Planning and Administration Expenditures Caps. Additionally, the letter predicts that the level of expertise necessary to conduct the necessary data analysis will require either technical assistance or the use of consultants, both of which would cost money. The letter also asks that HUD post the alternative data that commenters include in their submissions in order to allow other program participants to see what is out there to use when HUD's data is inapt. Lastly, on the subject of compliance, the letter asks HUD not to hold program participants accountable for a failure to achieve quantifiable goals when factors beyond their control are to blame. Also on that note, the letter suggests that HUD not take any action against compliant programs when the department finds a program participant to be noncompliant with respect to another program.

On the subject of public housing and the voucher program, the letter criticizes the rule for not appreciating the current operational context of PHAs, potentially increasing the risk of liability, and including requirements that are redundant in light of other HUD regulations. On the first subject, the letter asks that HUD consider the role of the Faircloth Amendment's restriction on new units, alleges that HUD significantly underestimated the cost of compliance with the Proposed Rule, and envisions an unrealistic role for the HCV program. The letter points out that NYCHA's HCV waiting list has been closed for six years, NYCHA has not issued new incremental vouchers in four years, and HUD just announced a plan to decrease FMR levels in New York City. Under these circumstances, the letter suggests that it will be difficult to convince landlords in high opportunity areas to accept voucher holders as tenants. With respect to potential sources of liability, the letter expresses concern that HUD's directive to consider tenant selection and assignment policies in light of their potential segregative effect could open PHAs up to disparate treatment liability under the FHA. Lastly, the letter argues that the Proposed Rule's focus on de-concentration of poverty is redundant in light of SEMAP and annual plan

de-concentration statements. The letter suggests that there may be a safe harbor for PHAs that have received a SEMAP bonus or have acceptable annual plan de-concentration statements.

The remaining comments in the city's letter lack a common thematic thread; they are summarized below:

- The letter recommends that HUD make the underlying data from the data tool exportable to a spreadsheet or database software.
- The letter recommends that HUD fully integrate the AFH into the Consolidated Plan and suggests that CPD, PIH, and other HUD program offices lead the review process. If HUD does not integrate the AFH into the Consolidated Plan, the letter recommends that AFH review conclude at least one year before the start of the Consolidated Plan period.
- The letter recommends that the definitions of integration, segregation, and RCAPs be refined to make the concentrations that would pose problems explicit.
- The letter requests guidance on the evaluation standards that HUD will use for AFH approval.
- The letter argues that the Proposed Rule's provisions regionalism are inconsistent insofar as regional AFHs are option but regional consultation is mandatory. The letter suggests that consultation should be optional because it may not be practical or financial feasible.
- The letter recommends that HUD clarify its submission schedule to provide that updates to the AFH occur every five years and not annually. The letter also suggests that program participants submit their initial AFHs 180 to 210 days before the start of the program period instead of 270 days before 270 days before the program year is a busy time with respect to CAPERs submissions.
- The letter asks for clarification in the provision about revising AFHs as to what a significant change in circumstances or a significant policy change could be.

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Westchester County

Westchester County submitted negative comments that reflected both the county's dissatisfaction with HUD's behavior in enforcing the consent decree and concerns about the content of the Proposed Rule. With respect to the rule itself, the letter expresses doubt that the rule will actually reduce litigation risk because HUD's acceptance of an AFH will not give program participants access to a safe harbor. The letter argues that the rule raises federalism concerns, inaccurately defines segregation as being equivalent with racial imbalance, ignores the role of individual choice, and relies on disparate impact theory at a time when it is premature to

do so in light of the pending *Mt. Holly* case. In prioritizing racial balance, the county argues that HUD implicitly ignores legal authorities that disapprove of racial quotas in housing. With respect to post-disaster situations, the letter criticizes HUD for attempting to leverage Sandy to get concessions from the county and states the belief that AFFH should not be a top priority during such crises. The letter also criticizes HUD for not having accurately determined the cost of compliance, including the cost of major components such as public participation. Lastly, the letter argues that the submitting program participants should have the final say over the content of their AFHs and HUD should not have the power to approve or reject the documents nor should the department be able to claim that a program participant is violating federal law (thus justifying the withholding of funds).

The letter also contains a few more minor points about the Proposed Rule, which are listed below:

- With respect to data, the letter argues that poverty and housing needs are color blind so HUD should not attempt to assess them in relation to protected class membership. The letter also asks HUD for clarification as to how to categorize multiracial people.
- The letter expresses the view that it is inappropriate for HUD to consider community assets as it is not the federal government's role to decide what characterizes a perfect community.
- The letter argues that the role of CPD programs is to address poverty in a colorblind way.
- The letter encourages HUD to provide program participants with templates of all of the required components of an AFH.
- The letter urges HUD to clarify how many goals a program participant will be expected to set.
- The letter predicts that program participants will not collaborate on regional AFHs unless there is a financial incentive for doing so. Similarly, the letter contends that coordination with other federal agencies is not a realistic goal.
- The letter recommends that HUD pair submission of the AFH and the consolidated plan rather than requiring that an AFH be approved before accepting a consolidated plan. The county believes that this would expedite the flow of money.
- The letter recommends that program participants that have submitted an AI within four years of the effective date of the rule not have to submit an AFH.

The county has a number of complaints with respect to HUD's handling of the litigation. The letter claims that HUD has rejected the county's AI submissions on the grounds that the county has failed to find that exclusionary zoning is an impediment to fair housing. The department has repeatedly gone back to the county and directed it to conduct zoning analyses, but the county claims that its analyses continue to show that there is no exclusionary zoning. In

the county's view, this means that HUD is ordering analyses and assessments with a pre-determined outcome in mind, regardless of the facts on the ground. The letter claims that HUD has wasted the county's time by requiring these analyses and that HUD has failed to acknowledge that the county has no control over local zoning. It is the county's view that HUD wants the county to sue its towns and villages.

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National Association of Realtors

The National Association of Realtors submitted brief and somewhat critical comments. The organization did not take a stance on the question of finalization of the Proposed Rule. Their letter praises HUD for providing additional guidance about how jurisdictions may AFFH. The letter's criticism focuses on data, the need for flexibility, the need for real estate industry input in the public participation process, and the possibility of unintended consequences with respect to the cost of housing. The letter recommends that program participants have the flexibility to use their own data and devise their own solutions to local problems.

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Public Housing Authorities Directors Association

The Public Housing Authorities Directors Association (PHADA) submitted a comment letter that was critical of the Proposed Rule and ultimately called for HUD to release a second proposed rule for additional public comment rather than finalizing the current Proposed Rule. The letter takes HUD to task for allowing sixty days of public comment while HUD spent six years (according to the letter) drafting the Proposed Rule. In PHADA's view, the rule is long and dense, and stakeholders needed more time to fully digest it. The letter also argues that the Proposed Rule is unresponsive to the critiques leveled at HUD in the GAO report. The letter characterizes the GAO report as emphasizing the need for HUD to tweak and implement the existing AI enforcement process rather than provide a sweeping new rule. The letter criticizes HUD for unveiling a new regulatory scheme when the department still has not demonstrated the capacity to enforce the AI requirement. From there, the letter delves into a critique of the assumptions underlying the substantive components of the Proposed Rule.

The letter argues that HUD exceeded the scope of its discretion in defining the duty to AFFH. In particular, the letter suggests that HUD elevates poverty to a protected class status, treats low-income racial minorities differently from low-income members of other protected classes without justification, considers community assets and disproportionate housing needs which are irrelevant to the FHA, relies on disparate impact theory (which the letter called

contested but did not say was invalid), applies disparate impact theory without sufficient rigor (by not comparing similar situated protected class members instead of protected class members generally), and ignores the roles of market forces and individual choice. As HUD perpetuates all of these purported missteps, the letter claims that the side effect will be a failure to use the AI or AFH process to root out intentional discrimination, which the letter contends is the primary purpose of the FHA. PHADA's critique of HUD's data is closely related to these issues. Essentially, the letter goes through every novel data point that HUD has emphasized and argues that the department has not demonstrated the validity of the data or of the thresholds for significance assigned to the data.

Aside from the failure to focus on intentional discrimination, the letter argues that the Proposed Rule could have several other unintended consequences that would be to the disadvantage of members of protected classes. First, smaller entitlement jurisdictions may decide that the administrative burden of going through the AFH process is not worth the potential reward of federal housing and community development funds. Those grantees would stop participating in the programs, and members of protected classes in the geographic areas that they serve would be harmed. Second, compliance with the Proposed Rule could result in disinvestment from communities with large populations of protected class members. Third, the Proposed Rule could stimulate gentrification and revive the perception that urban renewal is a means of displacing people of color. Fourth, program participants would have to serve fewer total beneficiaries since housing people in communities of opportunity is more expensive than in low-income neighborhoods. Fifth, PHAs might be at a disadvantage in applying for LIHTC funds since their site acquisition costs would be higher. Lastly, the Proposed Rule might stimulate white flight in the form of middle class people leaving entitlement jurisdictions for non-entitlement jurisdictions and former entitlement jurisdictions that have rejected HUD funds. That phenomenon could accelerate disinvestment from inner ring suburbs.

The letter recommends that HUD clarify several provisions in the Proposed Rule. First, the letter asks HUD to define the relevant geographic area for assessing integration and segregation. The letter recommends that program participants not have to assess regional segregation unless they have opted to participant in a regional AFH. Second, the letter asks that HUD clarify the standards by which the department will evaluate fair housing outcomes. To this end, the letter recommends that program participants only be held accountable for taking the actions that they have outlined in their AFH submissions and not for broader metrics that may be substantially influenced by phenomena that are beyond their control. Third, the letter expresses confusion with respect to the various AFH options available to PHAs. In particular, PHADA is unclear as to whether all PHAs can choose to participate in a state AFH (since all PHAs in states exist under authority granted by states and state agencies) and whether PHAs genuinely have the option of conducting their own AFHs if they will be bound by state AFHs regardless.

The letter makes several points with respect to the potential administrative burden of compliance with the Proposed Rule. The letter recognizes that the added burden of compliance will vary in relation to whether program participants are on top of the current AI process. For grantees that have thorough AIs, the letter predicts that the Proposed Rule will result in a moderate increase in paperwork. For grantees that are not, there will be a large increase. For grantees that have been conducting AIs every five years but would have to submit updates every year under the Proposed Rule, there would also be a large increase. The letter recommends that program participants that have recently completed AIs that comply with HUD guidance be exempt from the AFH requirement until they would naturally have to submit again on the five year cycle. The letter is harshly critical of the requirement that PHAs that choose to conduct their own AFHs must update the documents on a yearly basis. The letter urges HUD to eliminate this discrepancy between the requirements for PHAs and consolidated plan jurisdictions and, if it fails to eliminate it entirely, at least to eliminate for small PHAs which have less budgetary capacity. With respect to the timing of submissions, the letter recommends that requirements be softened to allow program participants to be more agile in responding to emerging situations. As an example, the letter states that, if the Proposed Rule were in place at the time, Las Vegas would have hard to start its data analysis for the 2009 program year in the second quarter of 2007 and submit its AFH in the first quarter of 2008. Under those circumstances, the AFH could not have addressed the impact of the foreclosure crisis, and the grantee might have had to have revised its AFH. In PHADA's view, that would have been a significant waste of resources. On the subject of AFH revisions, the letter recommends that HUD give program participants wide discretion in determining when revisions are necessary and contends that revising an AFH is not and should not be a priority in the wake of a disaster.

The letter makes a few points that are less closely linked to its overarching themes. First, the letter recommends that HUD promulgate regulations with respect regional PHA consortia under the statutory authority provided to the department through the QHWRA. Second, the letter expresses opposition to the provision placing the burden of demonstrating the acceptability of an AFH on the grantee. Third, the letter argues that PHAs should have the discretion to choose which local governments they collaborate with regardless of where the majority of their hard units are located. Lastly, PHADA strongly opposes the idea of creating either or both a complaint process and/or a private right of action to enforce the duty to AFFH.

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