

October 15, 2018

**Submitted via Regulations.gov**

Office of General Counsel  
Rules Docket Clerk  
Department of Housing and Urban Development  
451 Seventh Street SW, Room 10276  
Washington, D.C. 20410-0001

Re: Docket No. FR-6123-A-01: Affirmatively Furthering Fair Housing: Streamlining and Enhancements

Dear Office of General Counsel:

This letter is written on behalf of the National Housing Law Project (NHLP) in response to HUD's Advance Notice of Proposed Rulemaking (ANPR), "Affirmatively Furthering Fair Housing: Streamlining and Enhancements," dated August 16, 2018. NHLP is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income tenants and homeowners; and increasing housing opportunities for those groups protected by civil rights statutes, including the Fair Housing Act. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide.

We write to urge HUD to maintain the existing AFFH Rule, and to express strong opposition to any significant changes to the Rule that would lessen its effectiveness, or significantly scale back the fair housing analysis and goal-setting that the Rule requires. Instead of investing time and resources in changing the existing Rule, HUD should focus on taking steps to ensure successful implementation of the Rule.

Making yet another change to the required fair housing analysis at this stage, after the Rule has been in effect for over three years, will create confusion for both grantees and the general public. HUD resources could be better used, and program participants and the public would be better served, by the agency focusing on successful implementation of the existing rule. Currently, numerous entitlement jurisdictions, public housing agencies (PHAs), and states are operating

without the benefit of the AFFH Rule's fair housing planning framework. Starting over with a new rule would further compound these delays.

We also offer the following comments in response to specific questions included in the ANPR. As we note throughout these comments, the existing AFFH Rule and the Assessment of Fair Housing (AFH) process already address many of the questions posed by HUD.

**Question 1: Fair-Housing Specific Community Participation and Consultation Requirements are Crucial**

Community participation and consultation related to the AFH fair housing analysis must be distinct from (while still informing) the existing Consolidated Plan and PHA Plan processes. Separate community participation and consultation processes centered specifically on examining fair housing issues such as segregation, disparities in access to opportunity, and disproportionate housing needs for the purposes of the AFH are crucial to ensuring that those issues are adequately considered before funding decisions are made. Under the existing AFH framework, the analysis and resulting goals are developed to inform the subsequent Consolidated Plan and PHA Plan. Combining the AFH community participation process with other planning processes will result in insufficient focus on policies that create or perpetuate discriminatory housing practices. Of course, fair housing issues or goals resulting from the AFH process should be discussed in the public participation process surrounding the Consolidated Plan or PHA Plan. However, the AFH's community participation and consultation processes must precede the Consolidated Plan and PHA Plan.

The Consolidated Plan and the PHA Plan serve a broader set of purposes than evaluating fair housing issues. Given the differences in focus between the Consolidated Plan/PHA Plan and the AFH, it makes sense to have separate community participation and consultation processes specific to fair housing planning.

**Question 2: Data Requirements Must be Retained**

HUD has invested considerable time and resources into developing the AFFH Data and Mapping Tool with uniform, national-level data. Analysis of uniform, national data (that are regularly updated) must remain a required component of HUD program participants' fair housing assessments. The availability of uniform data for all program participants provides an important starting point for analysis and community-based discussion. However, just as importantly, the existing AFFH Rule provides for the inclusion of relevant local data and local knowledge to supplement the national-level data. The Rule states "Program participants will use HUD-provided data...and supplement the HUD-provided data, as needed, with local data and local

knowledge, as guided by the Assessment Tool.”<sup>1</sup> Supplementing HUD-provided data with local data and local knowledge affords program participants the necessary flexibility to provide a fuller, more accurate account of the realities that exist in local communities – especially when local data provide a more nuanced or precise view than, or even contradict, the HUD-provided national data.

Program participants should not be allowed to rely only on their individual experiences, as this would make evaluating fair housing compliance subjective and potentially arbitrary. The AFFH Rule’s combination of HUD-provided data, local data, and local knowledge provides the appropriate balance between having objective data to guide the analysis, while allowing for additional data or information to supplement, contextualize, or even contradict the HUD-provided data.

### **Question 3: HUD Should Retain the AFFH Rule’s Reporting Requirements**

HUD should maintain the AFFH Rule’s analysis and reporting requirements, including with respect to depth of analysis and frequency. AFHs must continue to be submitted to HUD for review on a regular basis, and, at minimum, in accordance with the time requirements of the existing AFFH Rule. HUD should reinstate the Assessment Tool for Local Governments and continue implementation around the Assessment Tools for both PHAs and States/Insular Areas, as these Tools offer guidance and instructions for meaningful fair housing analysis.

Program participants should not be permitted to simply summarize their goals without providing HUD and the public with the underlying fair housing analysis; doing so would make it very difficult to understand how these goals were arrived at. Summarizing only the resulting goals without including the accompanying context makes evaluating progress toward achieving fair housing milestones very difficult.

One of HUD’s questions in the ANPR highlights an important gap that exists in the absence of the AFFH Rule’s implementation: how will PHAs systematically evaluate their compliance with their obligation to affirmatively further fair housing in the absence of the AFH process? Instead of exploring ways to replace the role of the AFH with respect to PHAs, HUD should instead focus on implementing the existing AFFH Rule, along with the Assessment Tool for PHAs (including completion of the required data to accompany the PHA Tool). HUD should also provide additional assistance to PHAs on how to effectively collaborate with entitlement jurisdictions on AFH submissions.

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<sup>1</sup> 24 C.F.R. § 5.154(c).

#### **Question 4: HUD Should Retain the AFFH Rule’s Approach to Identifying Fair Housing Obstacles**

The AFFH Rule provides a required structure, but does not prescribe the analysis itself or dictate specific outcomes. HUD should retain this approach of requiring a specific structure (and series of questions for program participants to complete) while leaving program participants with the flexibility to identify fair housing barriers and goals to address them. The AFH Assessment Tools strike the appropriate balance between offering a detailed list of possible contributing factors that a program participant may identify as part of its fair housing analysis, and affording program participants adequate flexibility to select some (or none) of the listed contributing factors. Program participants can also identify contributing factors not listed in the Assessment Tool. HUD developed the contributing factor lists in the Assessment Tools with public input; these lists provide wide-ranging examples of the types of obstacles that program participants may consider addressing through fair housing goals. HUD should retain a similar list of contributing factors within the Assessment Tool.

In asking how a jurisdiction can determine if it is materially free of obstacles, the ANPR misunderstands the gradual nature of the AFH process. While a specific obstacle may be addressed through a particular action (e.g., a certain local policy is changed or repealed by a city), there will likely be additional obstacles to consider that may impact the same or additional protected classes. Taking one action will not resolve all of the fair housing issues in the jurisdiction or region.

#### **Question 5: Deference to Jurisdictions Under the AFFH Rule is Sufficient**

The AFFH Rule balances the need to establish a uniform, meaningful planning process with affording flexibility to jurisdictions to complete their fair housing analyses in a way that reflects local conditions and circumstances. Under the existing AFH framework, jurisdictions are afforded significant deference to formulate their fair housing goals, and to set metrics and milestones for achieving those goals.

This flexibility is consistent with HUD’s discussion in the Final Rule’s preamble: “In this rule, despite many commenters’ concerns to the contrary as discussed in this preamble, it is not HUD’s intention to dictate to program participants the decisions that they make based on local conditions.”<sup>2</sup> The preamble further explains, “recognizing the importance of local decisionmaking, the new AFH process establishes basic parameters and helps guide public sector housing and community development planning and investment decisions to fulfill the obligation

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<sup>2</sup> Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,271, 42,288 (July 16, 2015).

to affirmatively further fair housing.”<sup>3</sup> This statement in particular captures what the AFFH Rule sets out to do – provide basic parameters and a uniform analytical framework to help guide local decisionmaking, not dictate it. This differs from HUD’s ANPR characterization of the AFFH Rule as containing “highly prescriptive” regulations that do not offer adequate autonomy to program participants developing fair housing goals.

Instead of making changes to the Rule to provide discretion at the local level that the existing Rule already provides, HUD should instead devote resources to increasing understanding among program participants and members of the public alike about what the Rule actually requires, and where localities have considerable discretion (e.g., identifying contributing factors, setting goals, etc.). Doing so may help dispel misconceptions about the Rule’s requirements.

#### **Question 6: Evaluation of Program Participants is a Vital Component of Furthering Fair Housing**

The AFFH Rule, specifically 24 C.F.R. § 5.162, outlines a framework by which HUD evaluates AFHs, and that approach should be maintained. The key aspect of this framework, and what distinguishes this framework from the largely ineffective Analysis of Impediments process, is meaningful HUD review of the AFHs.

Offering program participants the opportunity to revise and resubmit non-accepted assessments is a specific feature of the existing AFFH Rule that should be maintained. The fact that submissions were referred back to program participants for revisions and resubmission to HUD demonstrates that the AFFH Rule was working. The revise-and-resubmit process is an appropriate intermediate step between the extremes of taking no action to address deficiencies within the AFH process, and withholding HUD funds.

HUD can complement its review of program participants’ AFHs by stepping up its compliance review efforts regarding program participants’ actions to affirmatively further fair housing beyond the fair housing planning process.

#### **Question 7: The Establishment of Safe Harbors is Inappropriate in the AFFH Context**

NHLP ardently opposes the adoption of any “safe harbors” by HUD regarding compliance with the duty to affirmatively further fair housing. It is difficult to see how a safe harbor would work in the AFFH context, in light of deeply entrenched policies and practices that reinforce and perpetuate past discriminatory housing policies. The successful completion of a fair housing planning process, while an important step, cannot be seen as the full extent of fair housing

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<sup>3</sup> *Id.*

compliance.

As HUD correctly explained in the AFFH Rule preamble, the “preparation and submission of an AFH that is accepted by HUD *does not* fulfill a program participant’s obligation to affirmatively further fair housing, rather it is a first step towards that duty...Whether a program participant, in fact, affirmatively furthers fair housing depends upon the actions the program participant takes, not the actions a program participant states that it plans to take in its AFH.”<sup>4</sup> HUD also stated in the AFFH Rule preamble, “HUD believes it would be inappropriate to create the perception of a safe harbor or limit a private right of action under the Fair Housing Act based on an [‘]approval[’] of an AFH. For this reason, HUD has decided to limit its review to acceptance or nonacceptance.”<sup>5</sup> HUD should retain this position.

Adopting a safe harbor for successful completion of the AFH process would be contrary to two of HUD’s own stated objectives in the ANPR. By outlining a series of actions that would create a safe harbor, program participants would likely prioritize performing those specific tasks, rather than engaging in a holistic fair housing analysis that fosters local decisionmaking based on local needs. Doing so would surely deemphasize “accomplishing positive results” by instead emphasizing doing what is necessary to fall within the safe harbor. Furthermore, creating a safe harbor when certain actions are taken would actually stifle innovation at the local level and would run the risk of becoming a de facto “one-size-fits-all” approach, as, again, the emphasis by many program participants would be ensuring actions fit within the safe harbor, as opposed to identifying challenges and potential solutions from a community-based perspective. A safe harbor would likely disincentivize program participants from thinking about creative approaches to addressing and overcoming fair housing barriers – and instead value uniformity of analysis and actions over effectiveness.

#### **Question 8: HUD Should Retain the Existing AFFH Rule**

NHLP reiterates our support for HUD’s existing AFFH Rule and oppose attempts to scale back the AFH’s required fair housing analysis and goal-setting. The Rule provides HUD program participants with much-needed guidance and direction. HUD must ensure that meaningful fair housing analysis—informed by data and community participation—as well as the goal-setting resulting from that analysis, continue. Instead of focusing HUD resources on amending the existing Rule, the agency should instead resume full implementation of the existing AFFH Rule.

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<sup>4</sup> *Id.* at 42,316 (emphasis added) (also stating that “HUD’s acceptance of an AFH only means that the program participant has met the planning requirement described in the rule, but does not mean that HUD has determined that a program participant has complied with its obligation to affirmatively further fair housing under the Fair Housing Act, or with other civil rights statutes and regulations”).

<sup>5</sup> *Id.* at 42,315.

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Thank you for the opportunity to submit comments; please contact [rwilliams@nhlp.org](mailto:rwilliams@nhlp.org) if you have any questions.

Sincerely,

/s/

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