

October 15, 2018

Office of the General Counsel
Rules Docket Clerk
US Department of Housing & Urban Development
451 Seventh Street, SW
Room 10276
Washington, DC 20410-0001

Submitted electronically via www.regulations.gov

RE: Docket No. FR-6123-A-01

Dear Madam/Sir:

The National Fair Housing Alliance¹ strongly supports HUD's 2015 Affirmatively Furthering Fair Housing (AFFH) regulation and we urge HUD not to revoke or rewrite it. Rather, HUD should immediately resume implementation of the 2015 rule by taking the following steps: 1. Restore on-line access to the Assessment Tool for Local Governments; 2. Issue a notice informing local jurisdictions of their obligation to conduct an Assessment of Fair Housing (AFH) using that Assessment Tool and to follow the requirements spelled out in the rule; and 3. Resume training and technical assistance for those jurisdictions. It is imperative that HUD take these steps immediately, so that the 950 or so jurisdictions that will be submitting Consolidated Plans in 2019 and 2020 have sufficient time to conduct their AFHs, submit them for HUD to review, and revise them as needed without interfering with the schedule for submission of Consolidated Plans and disbursement of CDBG and other HUD funds.

The 2015 rule represents an extremely important and long overdue effort by HUD to take meaningful steps to implement the affirmatively furthering fair housing provisions of the 1968 Fair Housing Act. It was the result of several years of consultation with many different stakeholders, including program participants of various types, sizes and geographic locations, fair housing organizations and others. It went through the required public comment process, during which HUD received over 1,000 comments.² These included comments from housing

¹ Founded in 1988, the National Fair Housing Alliance is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. Headquartered in Washington, D.C., the National Fair Housing Alliance, through comprehensive education, advocacy and enforcement programs, provides equal access to apartments, houses, mortgage loans and insurance policies for all residents in the nation.

² See Regulations.gov at <https://www.regulations.gov/document?D=HUD-2013-0066-0001>.



providers, trade associations, government jurisdictions and agencies, and fair housing and civil rights advocates. Through this long and deliberate process, HUD was able to strike a fine balance between the real concerns of government entities that would be subject to the rule, as well as their constituencies who are directly impacted by decisions concerning the use of housing and community development dollars in their communities. That rule was extensively vetted internally at HUD, and field tested in 74 jurisdictions through the Sustainable Communities Initiative. It was a careful, inclusive and deliberative rulemaking process that produced a regulation that is flexible enough to accommodate a wide variety of local circumstances, clear and structured enough to provide program participants with the direction and guidance they sought, and rigorous enough to ensure that jurisdictions make meaningful progress in addressing some of the most pressing problems – problems that government had a role in creating and perpetuating – that plague our society. Undertaking another rulemaking process would be an unwise and unnecessary use of HUD's resources. Instead, HUD should move ahead with effective implementation of the 2015 rule.

As we describe in more detail below, government policies were a driving force behind the residential segregation we see today.³ We will not be able to address these discriminatory patterns adequately if the 2015 AFFH rule and Assessment Tool are not fully reinstated. Now more than ever we need increased, vigorous enforcement of our nation's fair housing laws. Each year, there are over 4 million instances of housing discrimination, the lion's share of which go unreported and unaddressed. Over the past several years, there has been an increase in the number of hate crimes committed against people based on their race, national origin, religion and other factors. For years, the FBI has observed that hate crimes are likely to occur at a person's residence, raising fair housing implications. Moreover, U.S. neighborhoods are more racially segregated today than they were 100 years ago, and the homeownership rate for African American households is virtually unchanged from its rate 50 years ago when the Fair Housing Act was passed. Similarly, the homeownership rate for Hispanics is 30 percentage points lower than that of non-Hispanic Whites. In addition, the number of people living in concentrated poverty nearly doubled between 2000 and 2013, from 7.2 million to 13.8 million, reaching the highest level ever. One in four African-Americans and one in six Hispanic Americans live in high-poverty neighborhoods, compared to one in 13 non-Hispanic Whites.⁴ And poor children are more likely to live in high-poverty neighborhoods than poor adults, raising serious concerns about whether they will have access to the opportunities they need to achieve their full potential and contribute all they can to our society. All of these concerns underscore the importance of ensuring that HUD and the cities, counties, states and public housing authorities it funds, do all they can to eliminate housing discrimination and actively

³ See Rothstein, Richard, "The Color of Law: A Forgotten History of How Our Government Segregated America." New York; London. Liveright Publishing Corporation, 2017.

⁴ See Florida, Richard, "America's Biggest Problem is Concentrated Poverty, not Inequality." CityLab, August 10, 2015, citing Paul A. Jargowsky, "Architecture of Segregation: Civil Unrest, the Concentration of Poverty, and Public Policy." The Century Foundation, August 9, 2015.

combat the lingering effects of segregation, so that all neighborhoods offer their residents access to opportunity. This is what Congress intended when it passed the Fair Housing Act in 1968, and this is what the 2015 AFFH regulation was designed to accomplish.

Our comments will discuss the role of HUD and other government agencies in creating and perpetuating segregation, how Congress enacted the Fair Housing Act as a tool to dismantle and overcome the harmful effects of segregation and tasked HUD with the mission to carry out this mandate, the harm that segregation causes to society and the value of the AFFH rule in countering that harm, HUD's long neglect of this important part of its mission, the importance of preserving the 2015 AFFH rule, how HUD has mischaracterized the promising early results of the 2015 rule, and responses to the specific questions posed in the ANPR.

Government played a major role in creating and perpetuating residential segregation

The AFFH provision of the Fair Housing Act is perhaps the most visionary instrument created by Congress to remediate the entrenched residential segregation that this nation continues to face today. At the heart of the Fair Housing Act is a recognition that only intentional integrative policy can undo the history of intentional segregation, and the Act was intended to confront the role of government-engineered policies and practices that cemented segregation throughout the United States. These policies included the disbursement of land grants, or "headrights" as they were known during the Colonial Era, to new settlers willing to establish farms or homes and farm lands were given to them.⁵ Similarly, following the American Revolutionary War, land grants were given to veterans as compensation for their service. In the run up to the American Civil War, President Abraham Lincoln spearheaded the Homestead Act to encourage westward migration and development in newly established states and territories. While Headrights, Land Grants, and Homestead Grants allowed millions of Americans to achieve land ownership and homeownership, these programs nearly exclusively benefitted Whites.⁶ By the end of the Reconstruction Era in 1877, Jim Crow laws began to take root and with them came greater opportunities for Whites that were similarly unavailable to people of color.

During the 1920s, it became increasingly common for White elected officials, developers, lenders, real estate agents and resident associations to establish discriminatory housing and zoning policies designed to maintain the White composition of residential neighborhoods. Associations often referred to as "neighborhood improvement associations" actively sought to influence local government bodies to establish racial zoning restrictions. These associations would threaten to boycott individual real estate agents who were willing to work with African-American homeowners. White residents in communities throughout the nation established

⁵ See http://www.pbs.org/race/000_About/002_04-background-03-02.htm.

⁶ See "The Case for Fair Housing: 2017 Fair Housing Trends Report," National Fair Housing Alliance, page 15. Available at <https://nationalfairhousing.org/wp-content/uploads/2017/07/TRENDS-REPORT-2017-FINAL.pdf>.

contracts amongst themselves known as “restrictive covenants” that legally prohibited White residents from selling or renting their property to prospective residents of color.⁷

In the post-Depression era, federal policies that opened housing opportunities for returning veterans and their families expressly excluded people of color from the benefits of government-supported housing programs. Among these programs were public housing, the Home Owners Loan Corporation (HOLC), and mortgage insurance through the Federal Housing Administration (FHA), each of which is described in more detail below.

The United States Housing Act of 1937 established a federal agency, the United States Housing Authority, responsible for providing financial assistance to local public housing authorities to develop, acquire, and manage public housing projects. Built into the law was a requirement that for every unit of public housing built another unit of slum housing was to be demolished. And under the administration of Harold Lockes, assistance to public housing authorities was premised on the requirement that public housing could not alter the racial characteristics of the neighborhood in which it was located. Not until the Housing Act of 1949 was the issue of residential segregation brought up again. Then a “poison pill” amendment that would have required integration in public housing was added to the bill with the express purpose of making the passage of the bill dependent on the support of Southern Democrats who otherwise supported public housing so long as it remained segregated. As Richard Rothstein has described, “Liberals had to choose either segregated public housing or none at all. Illinois Senator Paul Douglas argued, ‘I am ready to appeal to history and to time that it is in the best interests of the Negro race that we carry through the [segregated] housing program as planned, rather than put in the bill an amendment which will inevitably defeat it.’”⁸ Thus it was federally mandated that public housing investments after World War II preserve existing patterns of residential segregation while creating patterns of segregation where they did not previously exist.

In the wake of the Great Depression, initiatives under New Deal were directly aimed at tackling instability in many economic markets, especially housing. The Home Owners Loan Corporation (HOLC) was created in 1933 with the purpose of stabilizing the housing market and protecting homeownership. The HOLC established the low down payment, long-term, fixed-rate, fully-amortizing mortgage, stabilizing the mortgage market by eliminating its volatility and making mortgages less risky for borrowers. But in the process of attempting to eliminate risk in the market, the HOLC adopted standardized and formalized property appraisal processes that essentially mimicked the view in the private market that the presence of African-Americans,

⁷ In 1948, the Supreme Court held for the first time that enforcement by state courts of racially restrictive covenants violated the Equal Protection Clause of the Fourteenth Amendment. See *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948).

⁸ See Rothstein, Richard, “The Making of Ferguson,” *The American Prospect*, Fall, 2014, available at <http://prospect.org/article/making-ferguson-howdecades-hostile-policy-created-powder-keg>.

certain immigrants and some religious groups directly contributed to neighborhood deterioration and decline in property values.⁹ The HOLC created a neighborhood classification system that rated communities based on a “desirability scale” and was accompanied by Residential Security Maps. On these maps entire neighborhoods could be coded as “hazardous” simply because of the presence of African-American or other “inharmonious” racial or social groups. This neighborhood classification system had enormous influence over the private mortgage market where it was used to constrict mortgage lending in neighborhoods with any level of measurable integration. This began the practice of redlining, or widespread disinvestment from neighborhoods of color and the denial of mortgage credit to their residents.

Following along the path set by the HOLC, the Federal Housing Administration (FHA), which was established one year later in 1934, was created to help stabilize the mortgage market. It did so through discriminatory means. FHA built upon the mortgage model developed by the HOLC to insure loans for the construction and the sale of new homes. By lowering the required down payment from 30% to 10% and offering lower interest rates, FHA allowed more working families to afford homeownership and build wealth. Unfortunately, only White Americans were able to access FHA-insured loans, and the FHA Underwriting Manual furthered existing redlining practices of communities of color. In fact, the FHA Underwriting Manual went further than the HOLC classification system by advocating for the use of deed restrictions. Section 228 of the manual read: “Deed restrictions are apt to prove more effective than a zoning ordinance in providing protection from adverse influences.”¹⁰ In Section 284, the manual goes on to suggest that deed restrictions should include a “[p]rohibition of the occupancy of properties except by the race for which they are intended.”¹¹ FHA also placed limitations on construction loans which required that builders agree not to sell any of those homes to African-American homebuyers, and it provided oft-used model restrictive covenants for builders.¹² Thus, through generations of discriminatory housing and lending policies the American government institutionalized residential segregation and created the foundations upon which modern racial and economic isolation continue.

⁹ The most extensive set of HOLC maps available, many accompanied by the descriptions that explain the classification assigned to each neighborhood, can be found on the website “Mapping Inequality,” at <https://dsl.richmond.edu/panorama/redlining/#loc=4/36.71/-96.93&opacity=0.8>.

¹⁰ 1938 FHA Underwriting Manual, available at <http://www.urbanoasis.org/projects/fha/FHAUnderwritingManualPtII.html#301>.

¹¹ Federal Housing Administration Underwriting Manual, 1938, cited in Abrams, Charles, “The Segregation Threat in Housing,” in Straus, Nathan, “Two-Thirds of a Nation: A Housing Program,” Alfred A. Knopf, New York, 1952.

¹² Abrams, op. cit. p. 220.

Congress enacted the Fair Housing Act as a tool to dismantle segregation

The collective impact of these government policies designed to create and sustain segregation ultimately forced Congress to reverse direction and, through the AFFH provision of the Fair Housing Act, take steps to end segregation and undo the harm it caused to society. The combined effect of the HOLC and FHA neighborhood rating systems and underwriting policies drastically limited choice for people of color, leaving no other option than to live in a segregated housing, both public and private. At the same time, these policies facilitated White homeownership and migration to the suburbs, or “White flight.” These patterns of widespread segregation persisted into the 1960s, when residents in segregated communities which had been subject to blight, disinvestment, and the poor provision of public services began to actively resist these conditions.

In the summer of 1967, people of color in over 150 cities took to the streets in violent and nonviolent uprisings that forced the federal government to confront the origins of this very public frustration. In response to these uprisings, President Lyndon B. Johnson established the Kerner Commission, which was tasked with determining the causes of this public outrage and how to prevent it from occurring again. The Commission found that “Our Nation is moving toward two separate societies, one black, one white – separate and unequal.”¹³ Among its recommendations were the enactment of a law that explicitly prohibited racial discrimination in housing, a wide expansion of federally-sponsored affordable rental housing, and a change in federal housing programs to provide housing choice for people of color in communities that had been previously barred from accessing federal housing programs. The latter recommendation became embodied in the AFFH provision of the Fair Housing Act. The Act’s explicit recognition and proposed remediation of the government’s role in socially engineering residential segregation cannot be overstated.

HUD’s mission includes eliminating housing discrimination and dismantling segregation

In tasking HUD with implementation of the Fair Housing Act, Congress deliberately authorized the agency to actively leverage the federal resources it administers toward the goal of remediating past, discriminatory, government policies and practices. Not only is HUD’s mission to ensure that housing discrimination does not persist and is addressed, but it is also responsible for overseeing its own housing and community development programs to ensure that they do not further perpetuate residential segregation. As the administrator of resources for the public housing authorities throughout the nation, HUD has the responsibility to reverse the decades of racial and economic isolation that it previously required PHAs to undertake. Similarly, HUD is responsible for ensuring the FHA underwriting guidelines do the utmost to provide access to affordable and quality credit to all borrowers, regardless of their

¹³ Report of the U.S. National Advisory Commission on Civil Disorders (Kerner Commission), p. 1.

identification with a federally protected class. Ultimately, HUD's overarching mission is to ensure that communities throughout the nation have the resources and support they need to provide stable, safe, and affordable housing choices for their residents. This mission cannot be achieved without fully addressing the persistent residential segregation and economic isolation that HUD and other federal agencies created. The AFFH rule is a significant step in the right direction.

The Harm that Segregation Causes and the Value of the AFFH Rule

The segregated nature of many U.S. neighborhoods has been shaped by government policies over many decades and is perpetuated by a combination of housing discrimination and market forces that were shaped by federal guidance and policy. The AFFH rule establishes a critically important framework to support local communities in accounting for how segregation and discrimination disrupt the health and welfare of communities and identifying local solutions to entrenched segregation and discrimination in their housing markets.

Where one lives matters. It determines the kinds of opportunities one will have throughout life. Not only does residential segregation isolate people from one another, but it creates adverse outcomes for people of color and people with disabilities in educational attainment, access to transportation, health and well-being, and one's ability to build wealth over a lifetime. A great deal of research has been conducted on the harms of residential segregation on nearly all key aspects of our society.

It has been well-documented that poor families with children are most likely to live in areas with underperforming schools, and the impact on African-American and Hispanic or Latino households is of particular concern. For example, children in poor African-American and Hispanic or Latino households have been found to live near schools with median math and reading scores in the 17th and 27th percentiles, respectively, while the median test scores for schools closest to poor White families are in the 47th percentile.¹⁴ These disparities spill over into high school and college education. In 2014, 72.5 percent of African-American students and 76 percent of Hispanic or Latino students graduated from high school, compared to 87.2 percent of White students,¹⁵ and among adults age 25 and older, 33 percent of White adults held a bachelor's degree compared to 14 percent of Hispanic or Latino adults and 19 percent of African-American adults.¹⁶

¹⁴ Ellen, Ingrid Gould and Keren Mertens Horn, "do federally assisted households have access to high performing public schools?" Poverty & Race Research Action Council, November 2012. Available online at: <http://furmancenter.org/files/publications/PRRACHousingLocationSchools.pdf>.

¹⁵ <https://www.ed.gov/news/press-releases/us-high-school-graduation-rate-hits-new-record-high-0>.

¹⁶ <https://www.health.harvard.edu/heart-health/race-and-ethnicity-clues-to-your-heart-disease-risk>,

Where one lives is a significant determinant of one's overall health. People of color are more likely to be exposed to substandard housing conditions, areas with poor environmental quality, including exposure to waste, lead, and unsafe water. For example, a report from the Michigan Department of Civil Rights found that systemic racism was a primary factor in the disparate health outcomes people of color faced as a result of the Flint Water Crisis.¹⁷ Additionally, more than half of the people who live within 2 miles of waste facilities are people of color. Residential segregation also limits access to healthy food and community assets, such as green space, that help people lead healthy lives. For example, nationwide predominantly African-American neighborhoods have half as many chain supermarkets compared to predominantly White neighborhoods, and Hispanic or Latino communities have one-third as many.¹⁸ And an analysis of the 2010 Census data shows that African-Americans are less likely to live in walkable communities, even in the 20 most walkable cities in the country. Considering these and other disparities, it is no wonder that African-American and Hispanic or Latino adult obesity rates are 47.8 and 42.5 percent respectively, while that rate for White adults is 32.6 percent.¹⁹

Public health officials see efforts to dismantle segregation and neighborhoods of concentrated poverty and to provide greater equity in access to opportunity as imperative for eliminating the most pressing health disparities facing our society. As Dr. Eldrin Lewis, a cardiologist at the Harvard-affiliated Brigham and Women's hospital puts it, when it comes to health and well-being, "your ZIP code is more important than your genetic code."²⁰ Life expectancy, as a result of all of these factors, is intrinsically linked to place. In 2013, The Robert Wood Johnson Foundation's Commission to Build a Healthier America mapped the life expectancy data for a number of cities and found variations based on where individuals lived. For example, in the predominantly White Lakeview neighborhood of New Orleans, residents were expected to live approximately 80 years, while in the Tremé neighborhood of New Orleans which is 87 percent African-American, the average life expectancy was only 54.5 years.²¹

Segregated neighborhoods also suffer from poor access to transportation, directly affecting access to opportunity. Non-White individuals are four times more likely than White individuals to rely on public transportation to get to and from work,²² yet they often live in neighborhoods that are underserved by public transportation. And a lack of access to effective public transportation options is an especially isolating factor for people with disabilities: 31 percent of

¹⁷ https://www.michigan.gov/documents/mdcr/mdcr_Flint_Water_Crisis_Report_552190_7.pdf.

¹⁸ "The Grocery Gap: Who Has Access to Healthy Food and Why it Matters," PolicyLink, 2010, available at http://thefoodtrust.org/uploads/media_items/grocerygap.original.pdf.

¹⁹ <http://www.health.harvard.edu/heart-health/race-and-ethnicity-clues-to-your-heart-disease-risk>.

²⁰ <https://www.health.harvard.edu/heart-health/race-and-ethnicity-clues-to-your-heart-disease-risk>.

²¹ Robert Wood Johnson Foundation, "Metro Map: New Orleans, Louisiana," June 19, 2013. Available online at: <http://www.rwjf.org/en/library/infographics/new-orleans-map.html>.

²² <http://www.protectcivilrights.org/pdf/docs/transportation/52846576-Where-We-Need-to-Go-A-Civil-Rights-Roadmap-for-Transportation-Equity.pdf>.

people with disabilities report that they have insufficient access to transportation, well above the reported rate for the general public.²³ Gentrification in cities across the nation is only exacerbating this problem. For example, in Washington, DC, African-American residents are being displaced throughout the city but data show that this displacement is occurring more rapidly in areas within a half-mile of a train station.²⁴ And as gentrification has increased, people of color and low-income people are increasingly priced out of urban centers and moving toward suburban neighborhoods where housing is more affordable, despite those neighborhoods' often-poor public transportation infrastructure which frequently necessitates owning a car.

Beyond the educational, transportation, and health disparities that residential segregation reinforces, people of color in segregated communities experience inequities in employment, homeownership, and the opportunity to build wealth. Recent data from the Economic Policy Institute shows that in the first quarter of 2017, 14.8 percent of African-Americans were underemployed as compared to only 7.5 percent of their White counterparts.²⁵ Since the Colonial Era, our country's dual credit market has created wealth-building opportunity for White Americans through safe, affordable mainstream credit, while it has simultaneously relegated people of color to the use of costly financial services such as payday lenders, pawnshops, and subprime loans.

For example, as we have discussed, during most of the 20th century, White Americans could access government-backed mortgage credit through FHA and other federal programs while people of color were systematically prevented from accessing those same programs. Homeownership has been a primary means of wealth-attainment in the United States, so it is no surprise that because White families have had several more generations to accumulate wealth than families of color, the racial and ethnic wealth gap has grown. In a recent study, the Urban Institute found that, "In 1963, the average wealth of White families was \$117,000 higher than the average wealth of non[W]hite families. By 2013, the average wealth of White families (\$677,658) was over \$500,000 higher than the average wealth of African American families (\$95,000) and of Latino families (\$112,000)."²⁶

As our understanding of the negative consequences for society of persistent segregation and concentrated poverty has increased, we have also learned a lot about the positive impact of increasing access to opportunity. Raj Chetty and his colleagues have demonstrated the benefits

²³ <http://www.civilrightsdocs.info/pdf/transportation/final-transportation-equity-disability.pdf>.

²⁴ https://www.washingtonpost.com/news/wonk/wp/2015/12/18/what-people-who-live-near-metro-stops-increasingly-have-in-common/?utm_term=.0b5e11e6df33.

²⁵ Economic Policy Institute, "All races hurt by recession, racial and ethnic disparities exist," available online at: <http://www.stateofworkingamerica.org/charts/underemployment-by-race-and-ethnicity/>.

²⁶ Urban Institute, "Nine Charts about Wealth Inequality in America," available online at: <http://datatools.urban.org/Features/wealth-inequality-charts>.

that children experience when they have the chance to move at a young age out of poor neighborhoods into lower poverty communities.²⁷ Compared to their counterparts who remained in areas of concentrated poverty, these children had higher levels of educational attainment, earned higher incomes (and therefore paid higher taxes), were less likely to have children without being married, and lived in lower poverty neighborhoods as adults. Other research demonstrates the benefits of diversity in schools, in the workplace, and on the ability of regions to achieve robust and sustained economic growth.

HUD has long neglected this important part of its mission

Despite its active role in creating residential segregation and its resulting harms to society, HUD has failed to implement the AFFH goals of the Fair Housing Act. As Nikole Hannah-Jones details in her extensive investigative journalism on residential segregation in the United States, both Republican and Democratic administrations have lacked the will to fully execute this critical component of the Fair Housing Act. Writing for ProPublica, Hannah-Jones was able to find only two occasions since the passage of the Fair housing Act on which HUD withheld money from communities for violating the Act.²⁸ Fair housing and civil rights advocates have known for decades that HUD's system for ensuring jurisdictions' compliance with the AFFH provision of the Fair Housing Act was highly flawed and ineffective, but in 2010, the Government Accountability Office (GAO) issued a comprehensive study on the subject. After reviewing 441 Analyses of Impediments (AIs), GAO found that the AIs of 29 percent of all CDBG and HOME grantees were outdated, and of the current AIs, the vast majority did not include timelines for implementing recommendations or have executive approval, indicating that they were not used as planning documents. Overall, GAO found that HUD's limited regulatory requirements and oversight resulted in weak compliance by jurisdictions, and it specifically noted that HUD required no standard format, regular updates, or submission of the AIs to the department for review. GAO recommended that HUD promulgate new regulations to address these critical flaws in fair housing oversight.²⁹ HUD has once again directed grantees to follow this same, deeply flawed AI system, despite the GAO's findings.

HUD Should Preserve the 2015 Rule, Which Provides Both Clarity and Flexibility

One of the very important aspects of the 2015 rule is its definition of "affirmatively furthering fair housing." Previously, HUD's definition of AFFH was tied to the AI, which itself lacked definition, structure and standards. This left program participants with tremendous uncertainty

²⁷ <http://www.equality-of-opportunity.org/>.

²⁸ See "Living Apart: How the Government Betrayed a Landmark Civil Rights Law," Nikole Hannah-Jones, *ProPublica*, June 25, 2015, available online at: <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>.

²⁹ "HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans," Government Accountability Office, GAO-10-905.

about how to ensure that they were fulfilling their AFFH obligations and in compliance with the law. The definition in the 2015 rule eliminates that uncertainty, replacing it with the clarity that program participants sought, stating:

Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development.³⁰

This definition clearly states that AFFH requires program participants to go beyond just making plans; they must take meaningful steps to implement those plans. It lays out the necessary balance between the need to take action to dismantle the barriers of segregation by expanding access to housing in high opportunity areas and *also* by uplifting disinvested neighborhoods to ensure that their residents have equitable access to opportunity. The definition also clarifies the scope of the AFFH obligation, noting that it is not limited to the expenditure of federal funds, a point that is underscored in the section of the regulations that addresses certification requirements. Additionally, the definition requires program participants to engage in activities that promote compliance with fair housing and civil rights laws, including working with stakeholders to combat illegal discrimination.

Further, the sections of regulation that deal with certification requirements note the comprehensive nature of the AFFH obligation. A program participant cannot fulfill that obligation if it takes appropriate actions in some of its programs or policies while taking other actions that are inconsistent with its obligations under the Fair Housing Act. In other words, it cannot give with one hand and take away with the other. Those sections state, "Each jurisdiction is required to submit a certification that it will affirmatively further fair housing, which means that it will take meaningful actions to further the goals identified in the AFH conducted in accordance with the requirements of 24 CFR §5.150 through 5.180, and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing."³¹ This definition, in combination with other provisions of the rule and the Assessment Tool, provides program participants the clarity they need to understand their AFFH

³⁰ See 24 CFR §5.152.

³¹ See 24 CFR §91.225; also §91.324 and §91.425

obligations and take meaningful steps to fulfill them. Such clarity was lacking in the AI process, which created confusion about what program participants should do to fulfill their AFFH obligations. As the result of that confusion, and their subsequent failure to take effective steps to affirmatively further fair housing, some jurisdictions found themselves subject to various sorts of enforcement actions under the Fair Housing Act and other laws. The clarity provided in the 2015 rule is reinforced by the requirement that AFHs be submitted to HUD for review and acceptance, and the provision for HUD to reject initial submissions that it deems unacceptable while also offering specific guidance about revisions jurisdictions can make to correct those shortcomings. These are critical components of the rule and must be preserved.

While the rule provides clarity and direction, it does not take a “one size fits all” approach. It establishes a robust process through which community input must be solicited and considered, so that the AFH reflects local concerns. Based on that input, jurisdictions then identify their most pressing fair housing problems, set their own goals and priorities, and design their own strategies for achieving those goals. Nowhere does the rule state that program participants must address any particular fair housing issue, set any particular goal or number of goals, or take any particular action to overcome barriers to fair housing choice. The rule combines the structure that program participants need to analyze fair housing issues effectively, with the flexibility that is also needed to accommodate a diversity of local conditions.

HUD Has Mischaracterized the Early Results of the 2015 Rule, Which Were Promising

The early results under the 2015 rule were extremely promising, contrary to HUD’s erroneous and unfounded characterization of them as, “highly prescriptive regulations [that] give participants inadequate autonomy in developing fair housing goals as suggested by the principles of federalism.”³² In fact, there were a number of extremely positive aspects of the AFH process conducted by the initial cohorts. For example, they undertook more robust community engagement efforts, offering more opportunities for public input and involving a larger number and wider range of stakeholders than was typical under the AI process.³³ Jurisdictions analyzed residential patterns and trends through a focused, fair housing lens, assessing the extent to which members of protected classes have equitable access to important community assets, resources and opportunities. They set priorities for addressing their particular local (and in some cases, regional) fair housing problems, and adopted concrete goals, with metrics and milestones to measure their progress toward achieving those goals.³⁴

³² See HUD’s ANPR on the AFFH rule at 83 FR 40713.

³³ See Been, Vicki and Katherine O’Regan, “The Potential Costs to Public Engagement of HUD’s Assessment of Fair Housing Delay,” NYU Furman Center, March 9, 2018.

³⁴ See, for example, the research of Justin Steil and Nicholas Kelly, “The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance,” Working Paper for the Future of Housing Policy in the U.S. Conference, University of Pennsylvania, September 15, 2017.

These initial AFHs were a substantial improvement over the Analyses of Impediments to Fair Housing (AIs) which preceded them, and to which HUD has now returned. As the Government Accountability Office found, and as HUD itself determined, the AI process was not an effective means for HUD to fulfill its own statutory obligation to affirmatively further fair housing or for HUD to ensure that its program participants were fulfilling their AFFH obligations.³⁵ Too often, AIs were done without input from fair housing organizations, members of protected classes, or other stakeholders. They lacked a consistent format and often lacked a fair housing focus. Many failed to consider the barriers facing members of key protected classes under the Fair Housing Act, including people of particular races and ethnicities, families with children, and people with disabilities. Most did not contain concrete goals for addressing local barriers to fair housing, nor did they include specific steps to be taken, timelines for taking those steps, or metrics for assessing progress. Without a clear timeframe for conducting AIs, many were out of date. Without a requirement that they be updated when there is a material change in local conditions, such as the two hurricanes that have devastated large parts of the Southeast United States within the last few months, some were irrelevant. Without a direct link to the jurisdiction's Consolidated Plan, they had little, if any, impact on decisions about how to use housing and community development resources. Because they were not required to be submitted to HUD for review, HUD had no way to ensure their timeliness, monitor their content, or assess their impact. In sum, the AI process was a failure that the AFFH rule had intentionally set out to correct with extensive input from stakeholders and program participants.

Responses to HUD Affirmatively Furthering Fair Housing ANPR Questions.

The Notice seeks public comment on eight specific questions, addressed in turn below.

(1) What type of community participation and consultation should program participants undertake in fulfilling their AFFH obligations? Do the issues under consideration in affirmatively furthering fair housing merit separate, or additional, public participation and consultation procedures than those already required of program participants in preparing their annual plans for housing and community development (i.e., the Consolidated Plan, Annual Action Plan, or PHA Plan)? Conversely, should public input on AFFH be included as part of the Consolidated Plan/PHA Plan public involvement process?

The 2015 AFFH rule creates a process for more robust and meaningful community engagement and participation in fair housing planning. It directs program participants to give the public reasonable opportunities for involvement in the development of the AFH and in its incorporation into the Consolidated Plan or PHA plan, and to use communications designed to

³⁵ See GAO-10-905, *Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans*, October 14, 2010.

reach the broadest possible audience to inform the public of those opportunities.³⁶ Further, it requires program participants to consult with a wide range of stakeholders. These include not only fair housing groups, but also organizations that represent members of protected classes, public and private agencies that provide assisted housing, health services, and social services.³⁷ It requires program participants to make their draft AFHs available for public review, to hold at least one public hearing to get feedback on the plan, to summarize the comments received, and if the program participant decides not to accept a comment, to explain why. In sum, it ensures that community members have a seat at the table and their voices are heard. The heightened level of community engagement and participation fosters a more inclusive and effective fair housing planning process. This, in turn, increases the likelihood that fair housing barriers will be identified. This process also incorporates more effectively the expertise of stakeholders who can offer meaningful solutions to the problems identified in the process. It also greatly increases the chance for effective implementation of proposed solutions, since most meaningful solutions require community input and engagement. When the community is a robust part of the fair housing planning process, community stakeholders will take ownership of the result.

The rule also requires that community engagement and planning process to take place prior to the development of the Consolidated Plan or PHA Plan. This was a deliberate and sensible decision on HUD's part, since the AFH process and the ConPlan/PHA plan process have two distinct purposes. The former is aimed at identifying, prioritizing and setting goals to overcome barriers to fair housing. The latter is designed to make decisions about how to spend HUD funds. The fair housing planning requires a different set of inputs, both in terms of data and knowledge as well as feedback from the community, and it must be done first in order for its results to inform the decisions embodied in the ConPlan or PHA plan. Combining them into a single process is unworkable.

In fact, this combined approach too often imbued the less effective AI process. It does not work, as both the GAO and HUD have already pointed out with their separate analyses of the failures of the AI process. Communities and program participants must be able to distinctly focus on fair housing barriers, develop solutions to those barriers and devise a plan for implementing those solutions.

(2) How should the rule weigh the costs and benefits of data collection and analysis? Should the proposed rule allow program participants to develop or use the data of their choice? Alternatively, should HUD require the use of a uniform data set by all program participants in complying with their AFFH obligation? Should it vary by the nature of the program participant? Instead of a data-centric approach, should jurisdictions be permitted to rely

³⁶ See §5.158(a))

³⁷ See, for example, §91.100

upon their own experiences? If the latter, how should HUD assess this more qualitative approach?

The ANPR asks whether the fair housing planning process should be data-driven, or should allow program participants to plan based on their local experiences. We strongly oppose the notion that fair housing planning should be based solely on a jurisdiction's characterization of its own experiences, rather than strategic, focused data analysis. Such an approach would send a signal that program participants do not need to assess the extent to which their own policies and programs may be at odds with their obligation to affirmatively further fair housing, or to consider changes to existing policies and practices that would do a better job of ensuring that all community residents, regardless of the neighborhood in which they live, have equitable access to opportunity. It would endorse a "business as usual" approach to housing and community development, an approach that would perpetuate the problems facing so many communities.

Qualitative and quantitative data are equally valuable and both are needed for a proper, holistic assessment of any problem a community faces. However, before the creation of HUD's AFFH data and mapping tool, many communities did not have access or adequate knowledge to access quantitative data tools. This is precisely why the uniform, national-level quantitative data tool provided by HUD is so important. It gives program participants a strong starting point to which they can add in necessary local quantitative and qualitative data. The way the AFFH process is structured under the current rule allows for the combination of national data and local knowledge and context. HUD should only work to strengthen the data components and not take away or limit these precious resources.

The 2015 rule strikes an appropriate balance with respect to the use of data. It provides for the use of qualitative information, as well as a mechanism for members of the community to bring such information to the attention of the program participant. It sets a baseline for the information to be considered in the fair housing planning process with the uniform national data, along with the data and mapping tool and the structured questions incorporated into the Assessment Tool. At the same time, it not only allows but expressly encourages program participants to seek out and use relevant local data that can inform and enrich the fair housing planning process. This multi-faceted approach to data is flexible, offers valuable tools for program participants with limited capacity for data analysis, and ensures that the process is well-informed and comprehensive.

(3) How should PHAs report their AFFH plans and progress? Should jurisdictions be required to provide a detailed report of the analysis performed or only summarize the goals? How often should program participants be required to report on their AFFH efforts? Should the proposed rule retain or revise the current timeframes for required AFFH submissions? Should program participants continue reporting annually on their AFFH actions and results in their

program plans and annual performance reports or, given the long-term nature of many AFFH goals, should the reporting period be longer? Should planning and/or results be integrated into existing report structures, such as Consolidated Plans and Consolidated Annual Performance and Evaluation Reports (CAPERs), or utilize an alternative structure?

Program participants must currently report their progress on the goals set out in their AFH in their subsequent AFH and annually (alongside other issues) in their CAPER. Participants should be reporting annually on each goal identified in the fair housing plan. This reporting should include a full analysis of the progress participants have made. This will enable participants, HUD and the community to monitor progress effectively and identify areas for adjustment in a timely manner. This modest framework is essential for ensuring that jurisdictions are taking concrete steps to address fair housing problems, and for holding them accountable to implementation of goals. It also helps community stakeholders identify areas where their resources and/or expertise can be best leveraged to help achieve fair housing goals.

(4) Should the proposed rule specify the types of obstacles to fair housing that program participants must address as part of their AFFH efforts, or should program participants be able to determine the number and types of obstacles to address? Should HUD incentivize program participants to collaborate regionally to identify and address obstacles to affirmatively furthering fair housing, without holding localities accountable for areas outside of their control? Should HUD incentivize grantees and PHAs to collaborate in the jurisdiction and the region to remove fair housing obstacles? What are examples of obstacles that the AFFH regulations should seek to address? How might a jurisdiction accurately determine itself to be free of material obstacles?

The 2015 rule gives program participants the latitude to identify the obstacles to fair housing that are most relevant in their communities and develop local solutions to address these barriers. It also promotes regional collaboration in the fair housing planning process. These provisions should remain. HUD lacks the resources, capacity and detailed, on the ground knowledge to do this for each and every one of its program participants. However, HUD's list of Contributing Factors is extremely useful in helping participants understand the types of fair housing barriers that might exist and HUD should expand this guidance, building on the lessons learned in jurisdictions that conduct AFHs.

The standardized AFH template which requires participants to identify factors that contribute to fair housing barriers correlates to the recommendations issued by the GAO which found that jurisdictions often did not adequately identify fair housing barriers in the AIs they had previously submitted. The template helps provide clarity and needed guidance for participants and community stakeholders and ensures that specific issues of importance to many communities are addressed.

HUD should continue to encourage and incentivize regional collaborations in the AFFH process. Fair housing issues are rarely confined within jurisdictional borders. For example, zoning issues, occupancy standards and affordability goals often require regional partnerships if they are to be sufficiently addressed. Further, the opportunity indicators incorporated into the rule – access to job centers, environmental concerns, transportation needs and the like - are regional in nature and can be addressed most effectively and efficiently at the regional level. Moreover, some public housing authorities have service areas that cross municipal boundaries and many PHAs have found that regional collaborations are necessary for them to implement policies and achieve efficiencies.

(5) How much deference should jurisdictions be provided in establishing objectives to address obstacles to identified fair housing goals, and associated metrics and milestones for measuring progress?

The ANPR asks how much deference HUD should give jurisdictions in setting fair housing goals, accompanied by metrics and milestones for measuring progress. The 2015 rule gives jurisdictions tremendous deference. While it requires jurisdictions to set goals to overcome the contributing factors they identify, as well as metrics and milestones by which to measure progress toward achieving those goals, it does not dictate what those goals should be, how many goals must be identified, or what metrics and milestones must be used. Nonetheless, this modest framework is essential for ensuring that jurisdictions actually take concrete steps to address fair housing problems, and for holding them accountable for implementing those steps. Too often, jurisdictions' AIs lacked any such concrete plans or accountability measures. At the same time, the AFH review and acceptance process ensures that the goals identified are appropriate, based on the analysis the program participant has done, and that the metrics and milestones will result in meaningful progress.

(6) How should HUD evaluate the AFFH efforts of program participants? What types of elements should distinguish acceptable efforts from those that should be deemed unacceptable? What should be required of, or imposed upon, jurisdictions with unacceptable efforts (other than potential statutory loss of Community Development Block Grant, HOME, or similar funding sources)? How should HUD address PHAs whose efforts to AFFH are unacceptable?

HUD has quite a bit of experience upon which it can draw in evaluating program participants for compliance with programs that the agency oversees. For example, HUD regularly determines whether or not jurisdictions are in compliance with Consolidated Plan requirements. The agency regularly reviews entities for Section 504 compliance and conducts many other assessments of participant compliance on a range of programs. The AFFH rule was designed to enable HUD to draw on that expertise to help inform it about the AFH process. There are a range of options HUD has employed when participants are found to be out of compliance and

those options vary based on the severity of the non-compliance. They can include onsite reviews, rejecting plans, providing technical assistance, requiring training, implementing corrective plans of action, withdrawing funding and more.

The current requirements and review process have been significantly successful in advancing fair housing, in a way that responds to local conditions and enables engagement by fair housing organizations and other public stakeholders. HUD should continue to review a program participant's assessment/analysis for consistency with fair housing and civil rights laws and determine if the assessment/analysis is substantially complete and consistent with fair housing principles. HUD should continue to provide technical assistance, guidance and education to participants. If the assessment/analysis is not acceptable, the participant should be required to revise it in order to be eligible for block grant funds. This accountability mechanism is needed in order to overcome longtime inertia on fair housing, which has been damaging to many communities. It is also necessary to level the playing field so that jurisdictions who do not engage in a sincere, meaningful effort are not treated the same as jurisdictions who do.

In addition, HUD should continue to require that Consolidated Plans and related reports, as well as PHA plans, include AFFH goals and metrics (by incorporating those developed in the AFH, as required by the 2015 rule), and that participants report annually on their progress.

(7) Should the rule specify certain levels of effort on specific actions that will be deemed to be in compliance with the obligation to affirmatively further the purposes and policies of the Fair Housing Act (i.e., "safe harbors"), and if so, what should they be?

HUD asks whether it should create "safe harbors" for jurisdictions by specifying certain levels of effort on specific actions that would be deemed to be in compliance with the obligation to affirmatively further fair housing. NFHA strongly opposes this idea. Given the wide variations in its program participants in terms of size, local conditions, priorities and resources, it is difficult to see how HUD could determine the range of activities or level of effort that would be appropriate for each. Further, even if it were possible to say that a particular jurisdiction had fulfilled its AFFH obligations at a particular moment in time – something that is difficult to envision in the near future given the segregation that characterizes our communities – local circumstances are dynamic and change over time. This means that jurisdictions must continually assess the extent to which fair housing problems may exist, the nature of those problems and the solutions needed to address them. Just as the need for other forms of planning and the implementation of those plans must be on-going, so the obligation to affirmatively further fair housing, which is rooted in statute, must be on-going, as well.

(8) Are there any other revisions to the current AFFH regulations that could help further the policies of the Fair Housing Act, add clarity, reduce uncertainty, decrease regulatory burden, or otherwise assist program participants in meeting their AFFH obligations?

As our comments have stressed, we do not believe that it would be prudent for HUD to reopen the 2015 AFFH regulation. However, should HUD decide to do so, there are two changes that we would recommend. Both would increase efficiency, accessibility and accountability in the fair housing planning process, and ensure that fair housing plans respond effectively to the concerns that local community residents have identified as their most pressing fair housing needs.

First, HUD should require that final AFHs be made available to the public, preferably by posting on a public website. The regulation does not currently contain this requirement, and a number of jurisdictions have failed to post the final AFH in a timely manner. This prevents members of the public from having access to the final version in order to see any changes from the initial draft. It also makes it impossible for them to verify that the jurisdiction has cited their comments accurately, to determine whether or not the jurisdiction has accepted their comments, and if not, to understand why. It also prevents them from having access to the AFH with its goals, metrics and milestones in order to provide timely input into the subsequent Consolidated Plan or PHA plan. Thus, incorporating in the regulation a requirement that program participants publicly post their AFHs immediately upon acceptance by HUD would be an important accountability measure.

Second, HUD should amend the regulation to provide a process by which the public can file a complaint about a program participant's AFH. There currently is no administrative complaint process that community stakeholders can utilize to object to a local government's compliance with the duty to affirmatively further fair housing, whether by complaining to HUD or to the jurisdiction itself. Rectifying this omission would allow community stakeholders to flag, in a timely manner, AFHs that they believe fail to meet the standards for acceptance by HUD. This might occur in a number of circumstances. For example, it might be because the program participant failed to comply with the public participation requirements of the regulation, including taking appropriate steps to ensure that all members of the public have a chance to participate (i.e., by making documents accessible and holding meetings and hearings in locations that are accessible to people with disabilities, by conducting outreach and providing relevant documents available in appropriate languages other than English, by holding meetings and hearings at times and in locations that are convenient for community residents, etc.). It might be because the program participant failed to develop goals, metrics and milestones that correlate appropriately with the fair housing issues that were identified as the community's highest priorities or that will result in meaningful progress. There could be other circumstances, as well, that might lead the community to believe that the program participant had failed to meet the standards set out in the 2015 regulation and that HUD should require

the program participant to amend its initial AFH submission. Providing an avenue by which the public can file a complaint or otherwise flag a deficient AFH for further review would increase the effectiveness and efficiency of the HUD review process by allowing the public, with its greater knowledge of local issues, to assist HUD with AFFH monitoring and oversight. This, in turn, would enable HUD to target its limited oversight resources to those AFHs where further review is most needed. It would also help ensure that program participants are truly accountable to their communities in the fair housing planning process.

Conclusion

For all the reasons cited above, the AFH process laid out in the 2015 AFFH regulation is far better than the AI system as a means for HUD to ensure that its program participants are fulfilling their AFFH obligations and taking meaningful steps, designed by them and tailored to local conditions, to address the fair housing problems identified by local stakeholders. It would be a mistake and a waste of resources to either rely on AIs for this purpose, or to go back to the drawing board and try to create an entirely new regulation. HUD acted on an extensive record when instituting the AFFH regulation, including prior case law on the scope of its mandate under the Fair Housing Act and an extensive administrative record. To disregard this record and retreat from the regulation now may be deemed arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act.

In a recent interview with the Wall Street Journal, HUD Secretary Ben Carson suggested that the best way for the country to solve its housing discrimination problems is to build more affordable housing and to eliminate zoning barriers that impede such development.³⁸ There is no question that America's housing market is becoming more and more out of reach for families, working people, the elderly and people with disabilities. Today, as the supply of affordable housing continues to decline, nearly 11 million families spend over 50 percent of their income on housing. Our supply of affordable housing – available to only one out of four households who qualify for assisted housing – is woefully inadequate. Increasing numbers of families are experiencing eviction, and a disproportionate percentage of these are people of color and single, female-headed households. We wholeheartedly endorse an increase in housing subsidy dollars. And there may be cases in which local zoning ordinances create unnecessary barriers to affordable housing development. The AFH process laid out in the 2015 regulation provides a good opportunity for jurisdictions to identify such situations and take steps to address them. However, simply expanding the supply of affordable housing in the absence of a comprehensive fair housing planning process, like the one spelled out in the AFFH rule, will not solve our nation's housing discrimination and segregation problems. Instead, it will recreate them. Unless we take deliberate steps to identify and eliminate policies and

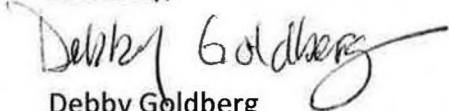
³⁸ See Kusisto, Laura, "HUD Moves to Shake Up Fair-Housing Enforcement." The Wall Street Journal, August 13, 2018.

practices that perpetuate these problems, there is no guarantee that new affordable housing will be available to those who often need it most – people of color, families with children, people with disabilities, or other members of protected classes under the Fair Housing Act. There is no guarantee that the new units will be built in neighborhoods that offer their residents fair and equitable access to essential community assets and resources, such as quality schools, living wage jobs, affordable and reliable transportation and the like. And not all housing discrimination problems are a function of housing affordability. People at all income levels may face discriminatory barriers that limit their ability to live in the community of their choice.

Housing discrimination and segregation remain intractable problems in large part because the entities that helped create and perpetuate discrimination have not stepped up to be a meaningful part of the solution. The AFFH rule provided the first real roadmap for participants to understand both what it means to affirmatively further fair housing and their role in achieving that goal. Weakening the rule would result in millions of families and individuals suffering from unnecessary discrimination. It would stifle opportunity and undermine our prosperity. Rather than pursuing this course, we urge HUD to preserve the existing AFFH regulation and use its resources to ensure effective implementation, oversight and enforcement of that regulation.

Thank you for the opportunity to submit these comments. We will be happy to answer any questions you may have.

Sincerely,

A handwritten signature in dark ink, appearing to read "Debby Goldberg", with a stylized, flowing script.

Debby Goldberg

Vice President, Housing Policy
National Fair Housing Alliance