

September 17, 2013

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

RE: Proposed Rule, “Affirmatively Furthering Fair Housing,” 78 Fed. Reg. 43710

Dear colleagues,

These comments are submitted on behalf of the Poverty & Race Research Action Council, and the undersigned civil rights and fair housing organizations. We strongly support HUD’s efforts to clarify the responsibilities and increase the accountability of state and local grantees in compliance with the “affirmatively furthering fair housing” (AFFH) mandate of the Fair Housing Act, and we expect that the new rule will have many positive impacts, including:

- > The new rule will bring all jurisdictions into compliance with AFFH reporting obligations – replacing the current system of delay, widespread non-reporting, and lack of quality control, as noted in the recent GAO report;
- > The enhanced community engagement elements of rule will bring new groups to the table and force an open discussion in thousands of communities about issues of racial segregation, “racially concentrated areas of poverty,” unequal conditions and resources in low income communities, and remedies to segregated housing patterns;
- > The rule will be an exciting platform for community organizing and community engagement around fair housing in areas where some capacity exists or can be developed;
- > The rule improves efficiency by consolidating fair housing planning with the HUD “Consolidated Planning process” (governing jurisdictions receiving CDBG and HOME funds, etc) and the HUD “PHA Plan process” (governing Public Housing Agencies receiving funds for public housing and Section 8 Housing Choice Vouchers, etc); and
- > The rule will push out uniform data to jurisdictions on segregation and access to opportunity, thereby enabling local officials to actually address the substantive issues raised by the Assessment of Fair Housing, rather than focusing on data gathering and analysis.

We are concerned, however, that the rule does not go far enough to ensure compliance, and may weaken existing civil rights standards under the Act, which we assume is not HUD’s intent. We will address these concerns below, also highlighting positive elements

in the proposed rule that should be preserved in any final rule. We include a summary of suggested language changes at the end of this comment letter.

The AFFH legal mandate and HUD's reinterpretation

The primary purposes of the Affirmatively Furthering Fair Housing (AFFH) rule should be to clarify state and local grantees' planning and reporting requirements, and to hold them accountable for measurable progress toward reducing segregation and poverty concentration, and increasing integration and regional housing opportunity.

The substantive contours of the AFFH obligation are defined by the Act, at 42 U.S.C. §3608, as interpreted by the federal courts in a series of landmark decisions which do not need reinterpretation by HUD. The classic formulation of the AFFH duty is set out in *NAACP, Boston Chapter v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 154 (1st Cir. 1987), which held that the Act obligated HUD “[to] do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.” Similarly, in *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1133-34 (2d Cir. 1973), the Court of Appeals defined AFFH as the “obligation to act affirmatively to achieve integration in housing” and described the duty imposed on HUD grantees as follows: “Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.” And in *Shannon v. HUD*, 436 F.2d 809, 821 (3d Cir. 1970), the court stressed the need for an “institutionalized method” for assessing the segregative impacts of housing investments. These basic formulations of the duty to affirmatively further fair housing have been consistently applied by the courts for over 40 years.¹

In the proposed rule, HUD goes further than this traditional definition, expanding the current legal understanding of AFFH to include analysis of access to opportunity and community assets for residents of racially concentrated areas of poverty, and the implementation of steps to enhance equal access to opportunity for residents of these segregated communities: “Affirmatively furthering fair housing means taking proactive steps beyond simply combating discrimination to foster...access to community assets....[and] to address significant disparities in access to community assets.” (§5.152 - Definitions).²

As civil rights advocates, we do not object to HUD's basic premise – that part of the fair housing mandate must include the radical improvement of segregated, higher poverty neighborhoods where many low income families will continue to reside even after strong

¹ See, most recently, *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005); *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 495 F.Supp.2d 375 (S.D.N.Y. 2007); *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, N.Y.*, 668 F.Supp.2d 548 (S.D.N.Y. 2009). See also Florence Wagman Roisman, “Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation,” 42 *Wake Forest L. Rev.* 333 (2007).

² The definitions section of the rule goes on to define “significant disparities in access to community assets” as “measurable differences in access to education, transportation, economic and other important assets in a community.” (§5.152)

voluntary desegregation efforts. Indeed, this kind of place-based work is a fundamental part of traditional fair housing advocacy.³ However, HUD has created ambiguities in the description of this new obligation that could undermine the primary integrative purpose of §3608.

¶ First, in the preamble and §5.150 of the proposed rule, HUD appears to treat the residential integration goal and the community improvement goal as equally acceptable alternatives for a state or local government to pursue:

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

78 Fed. Reg. at 43716 (emphasis added). This is a distorted reading of the Fair Housing Act, and this language should be changed from “or” to “and” in the final rule.

¶ Second, if HUD’s intent, consistent with the Act, is to create a better balance between housing opportunities in high poverty segregated neighborhoods and low poverty, high opportunity areas, HUD should make it clear that the primary purpose of the “community revitalization” prong of the AFFH rule is to direct *non-housing* economic and community assets into these neighborhoods: assets like enhanced school resources, economic development, job training, improved parks, full service grocery stores, and community policing. With due respect to local context, the rule should also clarify that a jurisdiction’s AFFH obligation will likely not be satisfied if it directs most of its low income housing resources into existing racially or poverty concentrated areas. This was the central lesson of the Westchester case.⁴ Every jurisdiction should be expected to make substantial progress toward reduction of segregation and expanded fair housing choice. We also hope that where jurisdictions identify a need for targeted place-based housing investments, the final rule will encourage them to make these in a careful way – in the context of comprehensive community development, public housing redevelopment consistent with fair housing standards, or where there is clear evidence of gentrification and new or rehabilitated housing is needed to secure the benefits of a changing community for existing residents. Most importantly, the jurisdiction must also be engaging in substantial housing activities that expand choice and integration for low income families in the area.

³ See, e.g., *Walker v. HUD*, 734 F. Supp. 1289, 1307 (N.D. Texas 1989) ([task force] found that “simply rehabilitating the housing units will not solve all the problems...[t]he revitalization strategy must attempt to reverse this perception through provision of not only decent housing but also retail centers, security, and jobs.” See also *Walker v. HUD*, No. 3:85–CV–1210–R., 1997 WL 33177466, at *30 (N.D. Texas Oct. 6, 1997) (public housing neighborhood improvements included as part of desegregation remedy).

⁴ *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 495 F.Supp.2d 375 (S.D.N.Y. 2007); *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, N.Y.*, 668 F.Supp.2d 548, 564-65 (S.D.N.Y. 2009) (“providing more affordable housing for a low income racial minority will improve its housing stock but may do little to change any pattern of discrimination or segregation”).

¶ Third, the definitions of “disproportionate housing needs” and “segregation” at §5.152 need to be more clearly focused on regional housing needs and segregation, rather than conditions “within the jurisdiction.” Our concern here is that, as we learned in Westchester County, dealing with low income housing needs only within specific jurisdictions can exacerbate segregation within the larger region. Where housing markets are regional, 42 U.S.C §3608 creates a regional fair housing obligation,⁵ and this should be clearly reflected in the final rule.

¶ Fourth, because the definitions of “segregation” and “racially concentrated areas of poverty” are not attached to any quantitative measures, the proposed rule leaves open the possibility that HUD, through later iterations of its data tools and guidance accompanying the rule, may over-define these terms to the detriment of fair housing goals. This is not a hypothetical concern, as we have already seen dangerous and limiting definitions in both the Sustainable Community Initiative’s Fair Housing Equity Assessment,⁶ and in the Choice Neighborhoods Initiative.⁷ We understand that AFFH needs to adapt local conditions, but this can and should be done without undermining the goals of the Act. The “data tools” accompanying the AFFH rule are a work in progress, and since they do not have the force of regulation, they could be easily weakened in a subsequent administration. We recommend that the final rule adopt standard numerical definitions of high poverty and racial concentration (drawn from fair housing caselaw and social science literature), with a provision that these standards may need to be adjusted to promote AFFH goals in specific contexts.

In sum, the AFFH mandate in the Act is currently the primary counterweight to the continuing tendency of federal and state housing programs to steer families to higher poverty, segregated neighborhoods.⁸ Along with the disparate impact standard, AFFH helps to ensure a minimal amount of geographic balance in HUD’s housing development and tenant based programs – yet we have not yet achieved anything close to a geographically balanced low income housing development policy. Thus, if HUD’s goal

⁵ See, e.g., *Hills v Gautreaux*, 425 U.S. 284, 301-302 (1976) (“An order directing HUD to use its discretion under the various federal housing programs to foster projects located in white areas of the Chicago housing market would be consistent with and supportive of well-established federal housing policy.....Title VIII of the Civil Rights Act of 1968 expressly directed the Secretary of HUD to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further” the Act’s fair housing policy.”) (citations omitted); see also *Thompson v. HUD*, 348 F. Supp. 2d 398, 409, 443 (D. Md. 2005) (“HUD failed to consider regionally-oriented desegregation and integration policies”).

⁶ For example, the Sustainable Communities Initiative’s Fair Housing Equity Assessment narrowly limits the definition of “racially concentrated areas of poverty” to extreme poverty neighborhoods with over 40% poverty (or over 300% of area poverty rates).

⁷ For example, the 2010 NOFA for the Choice Neighborhoods program expressly permitted PHAs to locate off-site replacement public housing, without limitation, in high poverty neighborhoods, in a manner that would increase racial concentration and segregation in the metro area: “Replacement housing outside the target neighborhood shall be located neither in areas of minority concentration (defined as areas where the neighborhood’s total percentage of minority persons is at least 20 percentage points higher than the total percentage of all minorities for the MSA as a whole) nor in areas with a poverty rate above 40 percent.” 75 Fed. Reg. 53324 (August 31, 2010).

⁸ See Ingrid Gould Ellen and Keren Mertens Horn, *Do Federally Assisted Households Have Access to High Performing Public Schools?* (PRRAC, November 2012), available at www.prrac.org/pdf/PRRACHousingLocation&Schools.pdf.

is to ensure both community revitalization “and” regional housing opportunity, the new HUD rule should strengthen the AFFH obligation, not water it down.

Strengthening implementation of AFFH in local plans

The proposed rule takes a hands-off approach to prescribing specific local plans to ameliorate segregation and unequal access to community assets, falling short of HUD’s obligation to guide and oversee these aspects of federal housing program administration. For example, the preamble’s “Executive Summary” states that “[t]he proposed rule does not mandate specific outcomes for the planning process” (p. 43711) and the “Summary of Regulatory Impact Analysis” emphasizes that “specific actions...that would generate benefits for protected classes are not prescribed, obligated, or enforced by the proposed rule” (p. 43726). The language of the proposed rule further limits HUD oversight by allowing jurisdictions to “prioritize one or more goals” to address the fair housing determinants identified in the AFH.

We understand the merits of allowing local jurisdictions to adapt their fair housing planning to the unique challenges and demographics of their regions, and we also appreciate the benefits of performance-driven approaches to public policy that encourage local innovation. However, the proposed rule takes this approach too far. By expressly permitting grantees to ignore selected fair housing issues in their regions, and exempting them from clear expectations and measurable benchmarks for progress over time, HUD is elevating process over actual progress. We recommend, at a minimum, that the final rule:

- > Require that jurisdictions identify specific goals and timetables for reduction of segregation, racial concentrated areas of poverty, and measurable goals for neighborhood improvements and access to community wide resources for residents of low income communities.
- > Require that jurisdictions develop concrete plans to address *each* of the fair housing impediments identified in the AFH.
- > Include more specific examples and best practices of policy approaches that might be undertaken to address fair housing barriers in a region.⁹

The Reach of the Affirmative Furthering Obligation

Recalcitrant jurisdictions may take the (unfounded) view that the AFFH obligation extends no further than particular HUD-funded activities. Section 3608 does not permit jurisdictions to violate fair housing standards with non-HUD resources and at the same time certify compliance with AFFH obligations by analyzing only activities using HUD

⁹ The proposed rule’s “Summary of Regulatory Impact Analysis” at p. 43726 lists four very general types of actions program participants might pursue including “modifying local regulations and codes, constructing new developments, creating new amenities, and facilitating the movement of people.” HUD has an obligation, either in the final regulation or in later guidance implementing the rule, to offer substantially more concrete and detailed suggestions than those listed here.

money. If a city's zoning division is enforcing a zoning code (using all local funds) that has been found to discriminate and yet is using CDBG funds in unobjectionable ways, HUD should not accept a CDBG AFFH certification that fails to address a plan to remedy the zoning problem. This is well established law but should be made explicit in the final rule and mechanisms should be included to address this issue.

Improving enforceability and empowering local advocates

The new rule will be helpful in jurisdictions where change from within the government is possible – but what about those places that have no intention of meeting their fair housing responsibilities? The proposed rule has no procedure for local advocates to challenge a city or town's fair housing plan at HUD (except through a formal fair housing complaint addressing specific local actions or policies). Without the ultimate threat of enforcement to ensure compliance with the AFFH rule, the role of community based organizations and advocates in the planning process will be less meaningful. The final rule should have an explicit provision for submission of comments and objections to HUD after the jurisdiction's submission of the AFH to HUD, and an ongoing complaint mechanism to trigger compliance reviews by HUD where local jurisdictions are alleged to be violating their AFFH certification, or failing to follow their AFH plans.

Enhancing the community engagement process

There are very positive provisions for community involvement in the planning process but no support for capacity building identified in the rule itself. The effectiveness of community engagement will depend on existing community capacity, unless additional support is included in 2015 budget.

Also, as noted above, §5.158 of the proposed rule does not provide participants in the community engagement process with a procedure to object to an AFH plan submitted to HUD. It would strengthen the community engagement process immeasurably to spell out such a procedure (see "summary of suggested language changes," below).

Similarly, to maximize community participation and engagement, copies of all HUD data provided to the jurisdiction and all documentation by the jurisdiction should be freely available to the public, and the proposed and final AFH should be posted online.

Data transparency, publication and notification.

As with other aspects of the proposed rule, the provisions requiring jurisdictions to make information available to the public are correct in their direction. We believe, however, that it is crucial to expand both their scope and depth. One of the primary stated improvements is the proposed rule's provisions for "community participation as an integral part of [] AFHs."¹⁰ Sections 91.100 through 91.115 provide that non-HUD

¹⁰ "The rule promotes these objectives and responds to the GAO's observations by...Bringing people historically excluded because of characteristics protected by the Fair Housing Act into full and fair participation in decisions about the appropriate uses of HUD funds and other investments, through a requirement to conduct community participation as an integral part of program participants' AFHs;" 78 Fed. Reg. 43711.

provided information made public by the participants would be limited to information a participant elects to incorporate into its AFH. This directive potentially excludes from public view a vast array of data and information, notwithstanding that such data or information is relevant or even critical to a respectful and responsible collaborative process. Secondly, these sections provide that the ‘publishing’ requirement may be met by providing a summary of each document in one general circulation newspaper and hard copies of such summaries in specified public places.

The proposed forms of publication continue to be necessary to reach many interested people. However, in an age of virtually unlimited internet capacity, the final rule should, in addition, require that documents related to the AFH, the Consolidated Plan and all Performance Reports, including addenda, attachments and all supporting or explanatory data and information from which the document is derived, be posted, in full length, in searchable format, on a dedicated webpage directly accessible from such jurisdiction’s home page, sufficiently in advance of public hearing, comment periods and submission dates to allow proper review and analysis by the public. Historically, it has often been hard to get access to many jurisdictions’ AIs; in order to fulfill the proposed rule’s laudable goal of increased citizen participation, that barrier must be removed.

We propose that equivalent publication requirements be incorporated into rules governing the development and implementation of Strategic Plans and Action Plans under Section 91.200 et seq. The requirement in the most recent CDBG-DR notice that jurisdictions implement “[p]rocedures to maintain comprehensive Web sites,” 78 Fed. Reg. 14336-37, provide a basic template for such a requirement.

Removing routine HUD review of the AFH process

The proposed rule suggests that HUD will review all AFHs submitted by local jurisdiction within 60 days or the AFH will be “deemed accepted.” HUD does not have the capacity to undertake such reviews, and such a process will not be meaningful without adequate budget or staffing. In spite of HUD disclaimers to the contrary, routine approval will create the impression of a “safe harbor” for jurisdictions that may be violating the Act on an ongoing basis.

The final rule should remove routine HUD review of the plans and substitute an audit-based and complaint-triggered review process more consistent with HUD capacity and practice.

If HUD review is maintained in the final rule, we recommend that

- > The HUD review period be extended to 90 days;
- > If HUD fails to review a plan within the review period, rather than “deem” the AFH approved, it should be designated as “unreviewed,” permitting the receipt of HUD funding;
- > Recognizing that HUD FHEO is unlikely to receive the funding it needs to adequately review all AFH’s submitted, include a regular audit-style review of

state and local AFHs in response to local complaints, or triggered by metrics to be developed by HUD;

> More guidance should be provided in the rule itself on what constitutes an acceptable AFH and what would an unacceptable AFH look like; and

> A procedure should be created to permit local advocates to object to HUD's approval of an AFH.

Incorporation of AFFH into Disaster Recovery Action Plans

We concur with the comments submitted by advocacy organizations from disaster impacted areas (Fair Share Housing Center et al).

AFFH and the PHA Plan process

We concur with the comments submitted by the Center on Budget & Policy Priorities on this section of the proposed rule.

Responses to specific questions raised in the rule:

(Question 8) Are there other planning efforts.... that should be coordinated with the fair housing planning effort: Several other sets of plans and programs should be coordinated with the fair housing planning effort contemplated by the proposed rule: The Low Income Housing Tax Credit (LIHTC) Qualified Allocation Plan and Department of Transportation's (DOT's) Metropolitan Transportation Plan (MTP) and/or Transportation Improvement Plan (TIP). In addition, the Rehabilitation Act of 1973 Transition plan and the ADA transition plan should be coordinated with the AFH, and incentives to coordinate state and local housing and education planning should be incorporated into the rule:¹¹

> Treasury Department: Given the size of the LIHTC program and studies indicating LIHTC-financed projects are often located in areas of concentrated racial and ethnic poverty (and low performing schools),¹² the LIHTC program and its Qualified Allocation Plan (QAP) process should be expressly included in the AFH analysis and AFFH certification consideration.¹³

¹¹ The Fair Housing Act orders all federal departments to administer their programs and activities relating to housing and community development in a manner to affirmatively further the purposes of the Act, and orders all federal departments to cooperate with the HUD Secretary. Also note that, in addition to the text of 42 U.S.C. §3608, Executive Order 12892 "Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing," expressly incorporates "programs and activities operated, administered, or undertaken by the Federal Government; grants; loans; contracts; insurance; guarantees; and Federal supervision or exercise of regulatory responsibility (including regulatory or supervisory authority over financial institutions)."

¹² See, e.g., Ingrid Gould Ellen and Keren Mertens Horn, *Do Federally Assisted Households Have Access to High Performing Public Schools?* (PRRAC, November 2012).

¹³ See Jill Khadduri, *Creating Balance in the Locations of LIHTC Developments: The Role of Qualified Allocation Plans* (Abt Associates and PRRAC, February 2013).

> Department of Transportation (DOT): The Metropolitan Transportation Plan (MTP) is a planning document that considers goals, strategies, and projects with a 20-year time horizon; it is updated every five years. The Transportation Improvement Plan (TIP) is a statement of proposed transportation investments that is updated every four years. Metropolitan Planning Organizations, which have a comprehensive public participation process, are responsible for these planning endeavors, which should be aligned with the AFH. Transit oriented development (TOD)¹⁴ and environmental justice¹⁵ are key areas of HUD-DOT coordination that could be informed by coordination of AFH and MPO planning, along with HUD's Office of Sustainable Communities.

> The Rehabilitation Act of 1973 Transition plan and the ADA transition plan should also be coordinated with the AFH. Safe accessible sidewalks and buildings people with disabilities can access are essential to promote fair housing. Segregated, racially concentrated communities tend to be the last ones to get sidewalks or to have them well maintained.

> State and local education planning has a direct impact on residential patterns of segregation and opportunity,¹⁶ and the AFH rule should encourage cross-sector discussions on the state agency level, and within county and municipal housing and school departments.¹⁷

In addition to the cross-agency coordination discussed above, the final rule should clarify that all programs within HUD (including HUD's multifamily programs) have the duty to affirmatively further fair housing and that non-inclusion in the rule's planning requirements at this time does not exempt those programs from the AFFH obligation.

(Question 9) Disproportionate Housing Need in ConPlan and AFH: We agree with the National Low Income Housing Coalition and others that the disproportionate housing

¹⁴ Transit oriented development is a key element in regional housing and transportation planning, and presents an important opportunity to create affordable housing in new areas – but careful AFFH planning is also needed to avoid reconcentration of low income housing in higher poverty areas served by transit, that are unlikely to experience market based redevelopment.

¹⁵ Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (February 11, 1994) states "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." DOT Order 5610.2 (February 3, 1997) implements EO 12898 by summarizing and expanding upon it, describing the process for incorporating environmental justice principles in all DOT programs, policies, and activities. The EO's term "adverse human health or environmental effects" is explicitly expanded to include interrelated social and economic effects, including increased isolation, exclusion or separation of minority or low income individuals within a given community or from the broader community. Environmental Justice principles are rooted in Title VI of the Civil Rights Act of 1964.

¹⁶ For a summary of the "reciprocal relationship" between housing and school integration, see "Brief of Housing Scholars and Research and Advocacy Organizations," in *Parents Involved in Community Schools v. Seattle School District #1* (October 2006), available at www.prrac.org/pdf/HousingScholarsBrief.pdf.

¹⁷ See *Finding Common Ground: Coordinating Housing and Education Policy to Promote Integration* (PRRAC and the National Coalition on School Diversity, October 2011) available at www.prrac.org/pdf/HousingEducationReport-October2011.pdf.

need analysis should be included in both the AFH and the Consolidated Plan (ConPlan) process, because the ConPlan regulation calls for the analysis to be based on the income categories of extremely low income, low income, moderate income, and middle income. Given the overwhelming gap in housing affordable to extremely low income households, without an analysis in the ConPlan, it would be even easier for jurisdictions to set ConPlan priorities that do not address the crucial need for housing programs and policies that serve extremely low income people. As discussed earlier, it is also crucial that the disproportionate housing need analysis be regional in scope, to encompass the entire housing market, so that the solutions developed are not primarily focused on providing housing where the majority of low-income families already live.

(Question 10) Indicators of effectiveness: As noted above, the primary indicators of effectiveness of the rule, in a jurisdiction and its region, are changes, over time, in the rates of segregation and percentage of families of color living in high poverty neighborhoods, and the comparative distribution of government assisted housing resources by neighborhood poverty rates and levels of racial concentration.

(Question 12) How should the rule be adapted for states (and counties): States have a particularly important role in enforcing the AFFH obligation in communities that do not receive direct HUD funding. This principle also applies to large entitlement jurisdictions, like counties, that include non-entitlement jurisdictions within them. Assertions of local autonomy should not be permitted to be invoked by communities within a HUD entitlement jurisdiction to avoid fair housing obligations just because they themselves receive no CDBG or other federal funding through the larger jurisdiction. It is not uncommon to find that some of the highest opportunity and most exclusionary municipalities in a metro area are the ones that do not participate in HUD programs. As a result, these communities, particularly those that are opportunity areas, may not perceive themselves as subject to fair housing goals. HUD should clarify the responsibility of states (and counties) to actively engage with these jurisdictions on issues like exclusionary zoning, affirmative marketing, and affordable housing development. We also support the recommendation of Public Advocates, Inc., to include a provision in the rule to ensure that sub-recipients are directly accountable to HUD for their failure to affirmatively further fair housing.¹⁸

¹⁸ Public Advocates' comment letter states, in relevant part, "[w]hile it is the responsibility of the direct recipient of federal funds to monitor its subrecipients' compliance with AFFH and Title VI obligations, the final rule should also provide – as U.S. DOT guidance does – that subrecipients are directly accountable to HUD for their failures to comply with their obligations. HUD, in fact, in the exercise of its authority under 42 U.S.C. §3535(d) and 24 C.F.R. §570.307, has explicitly instructed Urban Counties that each and every 'cooperating unit of general local government' has an obligation to 'affirmatively further fair housing within its own jurisdiction.' Yet, when a local government fails to take actions necessary to address factors that contribute to, e.g., the exclusion of protected class members from residing in its jurisdiction, HUD has made insufficient use of its power and obligation to ensure compliance. While the direct recipient should, of course, be responsible in the first instance for making all efforts within its power to do so, it is often the case that those powers are not sufficient to the task, as has been demonstrated in both Westchester County and Marin County."

Conclusion

“Affirmatively Furthering Fair Housing” is not just another housing policy rule – it is the implementation of a fundamental principle of our civil rights laws, written into the Fair Housing Act of 1968 to ensure that government takes proactive steps not just to prohibit discrimination, but to affirmatively reverse patterns of residential segregation – both in the implementation of its own programs and in the state and local policies and structures that continue to define metropolitan racial and economic segregation.

The Department of Housing & Urban Development was prompted to develop the present regulation by landmark litigation filed in 2006 in Westchester County, New York, where advocates successfully claimed that the County was failing in its obligation to address patterns of racial segregation in its affordable housing programs and policies, and falsely certifying to HUD its compliance with the AFFH obligation. The Westchester case, in turn, was based on decades of federal court interpretation of the Fair Housing Act’s AFFH provisions (summarized above).

In sorting through the hundreds of comments that are likely to be submitted in response to the proposed rule, HUD needs to remember that this is a civil rights law that it is expounding, and that the goal of the rulemaking should be to strengthen the Act’s implementation, and to stay true to the principles of integration that the “Affirmatively Furthering Fair Housing” principle is based on.

Respectfully submitted,



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**APPENDIX: Selection of recommended language changes
(does not include all changes necessary to address comments above)**

PROPOSED CHANGES TO LANGUAGE OF THE PREAMBLE

> Page 43711:

The proposed rule does not mandate specific outcomes for the planning process. Instead, recognizing the importance of local decision-making, it establishes basic parameters and helps guide public sector housing and community development planning and investment decisions to fulfill their obligation to affirmatively further fair housing, **and it requires jurisdictions to make measurable progress over time.**

> page 43716:

“A program participant’s strategies and actions may include strategically enhancing neighborhood assets...~~or~~ **and** promoting greater mobility and access to communities offering vital assets such as quality schools, employment, and transportation consistent with fair housing goals.”

PROPOSED CHANGES TO THE RULE LANGUAGE

> §5.150

A program participant’s strategies and actions may include strategically enhancing neighborhood assets (e.g., through targeted investment in neighborhood revitalization or stabilization) ~~or~~ **and** promoting greater mobility and access to areas offering vital assets such as quality schools, employment, and transportation, consistent with fair housing goals

> §5.152

Disproportionate housing needs exists when the percentage of extremely low- income, low-income, moderate-income, and middle-income families in a category of housing need who are members of a protected class **in the regional housing market area** is at least 10 percent higher than the percentage of persons in the category as a whole.

...each program participant must: (1) Identify the primary determinants influencing conditions of segregation; concentrations of poverty; disparities in access to community assets; and disproportionate housing needs based on protected class; and the most significant determinants of these disparities; (2) identify fair housing priorities and general goals and articulate a justification for the chosen prioritization; and (3) set ~~one or more~~ **concrete** goal(s) for mitigating or addressing **each of** the determinants.

> § 5.154(d) (2) – new paragraph “v” should read:

(NEW) v. Identify the existence and status of all current complaints relating to housing-related civil rights or fair housing claims against the jurisdiction and its

subdivisions as well as any findings, settlements, Voluntary Compliance Agreements (VCAs) and judgments relating to the jurisdiction and its subdivisions in the past 10 years. The assessment must identify specific actions that the jurisdiction has taken to remedy each finding, settlement, judgment or VCA in a timely manner and provide an assessment of its progress in achieving full compliance. This required analysis is applicable to housing-related civil rights claims in any administrative or court actions and to all the jurisdiction's functions, whether or not that function is federally funded.

> § 5.162

(a) General. (1) HUD's review of an AFH is to determine whether the program participant has met the requirements for providing its analysis, assessment, and goal setting as set forth in § 5.154(d). The AFH will be deemed accepted **"not reviewed by HUD"** ~~60~~ **90** calendar days after the date that HUD receives the AFH, unless before that date HUD has provided notification that HUD does not accept the AFH. In its notification, HUD must inform the program participant in writing of the reasons why HUD has not accepted the AFH and the actions that the jurisdiction may take to address these reasons.

> § 5.162

(NEW) (b)(3) An assessment that fails to identify claims of fair housing violations or fails to identify and demonstrate adequate remedial actions responding to any fair housing or housing-related civil rights findings, settlements, Voluntary Compliance Agreements (VCAs) and judgments as required pursuant to 5.154(d)(2)(v).

(NEW) (d) When the AFH is submitted to HUD, the program participant will simultaneously transmit the AFH to all participants in the community engagement process, and post the AFH on its public website. Any party may object to HUD approval of the AFH within 30 days of submission, and HUD will consider such objections before reviewing the plan.

(NEW) (e) Community members or advocates may file a request to HUD to review a jurisdiction's AFH or its fair housing certification for compliance with any procedural or substantive requirements, and HUD shall investigate any non-frivolous requests. In appropriate circumstances, HUD may rescind its approval of the jurisdiction's AFH.

> Suggested language for a single section approach to address transparency issues in one section:

(NEW) "§91.120 Transparency. In addition to any other methods of public notice and publication, with respect to any actions taken pursuant to subpart B of Part 91, any jurisdiction subject to Part 91 shall provide notice of any public meetings or hearings, by posting the date, time, place and agenda of such meeting or hearing, together with the complete draft or final document or documents to be addressed by such meeting or hearing and the supporting or explanatory data and information

from which the document is derived, on a conspicuous, AFH / Consolidated Plan dedicated webpage directly accessible from such jurisdiction's home page, no later than fifteen (15) days before the meeting or hearing is to be held. With regard to any permitted or required consultation and opportunity for public comment, the jurisdiction shall post complete copies of all documents submitted for consultation or comment, together with all supporting or explanatory data and information from which the document is derived no later than five (5) days before the beginning of any consultation or comment period."

> § 91.225 (Certifications)

(a) * * *

(1) Affirmatively furthering fair housing. 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 5.154, and that it will take no actions, **whether using federal funds or not,** that is **are** materially inconsistent with its obligation to affirmatively further fair housing.

(Same certification change should be made in § 91.325 and § 91.425)