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Submitted via Regulations.gov

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

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

To Whom It May Concern:

Thank you for considering our comments regarding the Affirmatively Furthering Fair Housing Rule. We strongly support the current (2015) rule, and urge HUD to keep it intact and restore its implementation without further delay. The 2015 rule has benefited numerous communities by providing a valuable planning framework, one which aids program participants to better understand their fair housing obligations, provides accountability to ensure that they take meaningful steps to meet those obligations, and enables engagement by community groups.

Our letter emphasizes the importance and benefits of the rule in promoting integration and addressing concentrated poverty, through solutions such as better balance in housing siting and housing mobility programs. These are central elements of the current rule and reflect the importance of residential integration as a primary concern of the Fair Housing Act. In addition, we comment below on the specific questions that the ANPR poses regarding potential changes to significant elements of the current rule.

I. Importance of preserving the current definitions and priorities of the rule (a balanced approach and goal-setting that advances housing choice), and the rule’s viability to advance integration.

The Fair Housing Act’s Focus on Integration

The FHA creates a nonnegotiable “statutory duty to promote fair housing” for HUD.¹ HUD’s discretion “must be exercised within the framework of the national policy . . . in favor of fair housing.”² This policy entails not only the prohibition on housing discrimination, but HUD’s affirmative duties to promote both housing choice and integration. The Rule’s current definition

¹ *Hills v. Gautreaux*, 425 U.S. 284, 302 (1976).

² *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 819 (3d Cir. 1970).

of AFFH embodies this balance. *See* 24 C.F.R. § 5.152 (AFFH 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” and “replacing segregated living patterns with truly integrated and balanced living patterns”)

There is no ambiguity as to whether the FHA includes a focus on integration as a critical component of fair housing. The legislative record makes the FHA’s integration purpose clear,³ and the Supreme Court has long recognized this congressional intent.⁴ The Court has explicitly noted that, with the FHA, “Congress has made a strong national commitment to promote integrated housing.”⁵ And, as recently as 2015, the Court “acknowledge[d] the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”⁶

As a result, courts have long recognized that the duty to affirmatively further fair housing “requires something more of HUD than simply to refrain from discriminating itself or purposely aiding the discrimination of others.”⁷ For example, the First Circuit has held that AFFH requires HUD to “consider the effect [of a HUD grant] on the racial and socio-economic composition of the surrounding area,” that is, its effect on integration.⁸ The Seventh Circuit has relied upon the AFFH provision for the notion that “Congress imposed on HUD a substantive obligation to promote racial and economic integration in administering the section 8 program.”⁹ And the Eighth Circuit has characterized the AFFH provision as motivated by the congressional intent “to cure the widespread problem of segregation” in housing funded by HUD.¹⁰

The ANPRM and its accompanying press release strongly suggest that HUD wishes to remove the current Rule’s inclusion of integration as a component of AFFH,¹¹ but, as demonstrated

³ *See* 114 Cong.Rec. 2274 (statement of Sen. Mondale) (FHA is “an absolutely essential first step” toward reversing the trend toward “two separate Americas constantly at war with one another”); *id.* at 2524 (statement of Sen. Brooke) (“Discrimination in the sale and rental of housing has been the root cause of the widespread patterns of de facto segregation which characterize America’s residential neighborhoods.”); *id.* at 2985 (statement of Sen. Proxmire) (FHA will establish “a policy of dispersal through open housing ... look[ing] to the eventual dissolution of the ghetto and the construction of low and moderate income housing in the suburbs”).

⁴ *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (broad definition of victims of housing discrimination supported by statement of Senator Javits that discrimination harms “the whole community,” 114 Cong.Rec. 2706, and of Senator Mondale that FHA was intended to replace the ghetto “by truly integrated and balanced living patterns.”)

⁵ *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 95, 97 S. Ct. 1614, 1619, 52 L. Ed. 2d 155 (1977)

⁶ *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525–26, 192 L. Ed. 2d 514 (2015)

⁷ *N.A.A.C.P. v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 151, 154 (1st Cir. 1987) (Breyer, J.); *see also Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702, 713 (8th Cir. 2003); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973), *Shannon v. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809 (3d Cir. 1970).
⁸ *N.A.A.C.P.*, 817 F.2d at 156 (alterations in original) (internal citations omitted).

⁹ *Alschuler v. Dep’t of Hous. & Urban Dev.*, 686 F.2d 472, 482 (7th Cir. 1982).

¹⁰ *Clients’ Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir. 1983)

¹¹ For example, the preamble to the ANPR states that “the current regulations are inadequate in addressing the lack of adequate housing supply,” and that “the positive outcomes of policies focused on deconcentrating poverty are likely limited to certain age and demographic groups and are difficult to implement at scale without disrupting local decisionmaking,” and in the HUD press release announcing the release of the ANPR, the HUD Secretary is quoted as saying, without any support, that “[i]t is ironic that the current AFFH rule, which was designed to expand affordable housing choices, is actually suffocating investment in some of our most distressed neighborhoods that

above, defining fair housing for AFFH purposes to exclude integration would violate the FHA and thus the Administrative Procedure Act. HUD's apparent view that deconcentrating poverty has limited benefits and would be too difficult to "implement at scale and without disrupting local decision making," 83 Fed. Reg. 40714, does not trump congressional intent and decades of jurisprudence. Moreover, implementing a Rule that obscured the statutorily-required focus on integration would, far from creating clarity or reducing uncertainty, leave program participants stuck between a rock and a hard place, as compliance with the Rule would not be sufficient to protect against liability under the statute's more expansive definition of fair housing.

The current Rule's statement of purpose and its definition of AFFH reflect a "balanced approach" – a broad consensus in the fair housing and community development field that fair housing must address both the causes and consequences of segregation, by both expanding housing choice and promoting reinvestment in poor communities:

A program participant's strategies and actions must affirmatively further fair housing and may include various activities, such as developing affordable housing, and removing barriers to the development of such housing, in areas of high opportunity; strategically enhancing access to opportunity, including through: targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation. (24 CFR §5.150)

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. (24 CFR §5.152)

The current rule's "balanced approach," which includes strategies to address racial and poverty concentration, helped communities succeed in committing to both important mobility- and place-based (eg, anti-displacement and community investments) goals during its period of implementation (from 2015 through its suspension).¹²

need our investment the most. We do not have to abandon communities in need. Instead we believe that we can craft a new, fairer rule that creates choices for quality housing across all communities."

https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_079

¹² See, e.g., *NFHA, et al. v. Carson* case materials: affidavit of Justin Steil (describing goals issuing from the AFH process), available at https://pryac.org/pdf/37-1_Supplemental_Declaration_of_Justin_Steil.pdf; amicus brief of the State of Maryland, et al.; affidavits accompanying the amicus brief of the State of New York; affidavits of Maxwell Ciardullo (New Orleans), Daniel Urevick-Ackelsburg (Philadelphia), Frank Lenk (Kansas City), available at

The importance and benefits of maintaining strong anti-segregation elements in the AFFH rule's goals and definitions, and the intergenerational social costs of concentrated poverty

Over the past several decades, increasingly compelling social science research has documented the harms faced by low income families, particularly children, who grow up in high poverty, segregated neighborhoods.¹³ These include health impacts such as heightened risk of severe asthma, increased exposure to lead and airborne toxic chemicals, increased exposure to neighborhood violence, fears for personal safety, and other triggers of toxic stress.¹⁴ Children in high poverty neighborhoods are more likely to attend an under-resourced and under-performing school that also has a disproportionate concentration of low income children, which further hampers learning.¹⁵ Economic segregation is also related to income and wealth inequality, and

<https://prrac.org/national-fair-housing-alliance-et-al-v-carson-2018/> and <https://prrac.org/national-fair-housing-alliance-et-al-v-carson-plaintiffs-preliminary-injunction-motion-and-attachments/>.

¹³ For reviews of these studies, see Duncan, Greg J. and Stephen W. Raudenbush. 1999. "Assessing the Effects of Context in Studies of Child and Youth Development." *Educational Psychologist* 34(1):29–41; Durlauf, Steven N. 2004. "Neighborhood Effects." *Handbook of Regional and Urban Economics* 4:2173–2242; Ellen, Ingrid Gould and Margery Austin Turner. 1997. "Does Neighborhood Matter? Assessing Recent Evidence." *Housing Policy Debate* 8(4):833–66; Jencks, Christopher and Susan E. Mayer. 1990. "The Social Consequences of Growing Up in a Poor Neighborhood." Pp. 111–86 in *Inner-City Poverty in the United States*, edited by L. E. Lynne and M. G. H. McGreary. Washington, DC: National Academy Press; Leventhal, Tama and Jeanne Brooks-Gunn. 2000. "The Neighborhoods They Live in: The Effects of Neighborhood Residence on Child and Adolescent Outcomes." *Psychological Bulletin* 126:309–37; Mayer, Susan E. and Christopher Jencks. 1989. "Growing up in Poor Neighborhoods: How Much Does It Matter?" *Science* 143:1441–45; Pebley, Anne R. and Narayan Sastry. 2004. "Neighborhoods, Poverty, and Children's Well-Being." Pp. 119–45 in *Social Inequality*, edited by K. M. Neckerman. New York: Russell Sage Foundation; Sampson, Robert J., Jeffrey D. Morenoff, and Thomas GannonRowley. 2002. "Assessing 'Neighborhood Effects': Social Processes and New Directions in Research." *Annual Review of Sociology* 28:443–78; Sharkey, Patrick and Jacob W. Faber. 2014. "Where, When, Why, and for Whom Do Residential Contexts Matter? Moving Away from the Dichotomous Understanding of Neighborhood Effects." *Annual Review of Sociology* 40:559–79; Hahn, Robert A., "Racial and Ethnic Residential Segregation as a Root Social Determinant of Public Health and Health Inequity: A Persistent Public Health Challenge in the United States," *Poverty & Race* (April-June 2017), available at <http://www.prrac.org/newsletters/aprmayjun2017.pdf>.

¹⁴ Sampson, Robert J. and Alix S. Winter. 2016. "The Racial Ecology of Lead Poisoning: Toxic Inequality in Chicago Neighborhoods, 1995-2013." *Du Bois Review* 13(2):261-283; Winter, Alix S. and Robert J. Sampson. 2017. "From Lead Exposure in Early Childhood to Adolescent Health: A Chicago Birth Cohort." *American Journal of Public Health* 107(9):1496-1501; Sharkey, Patrick. 2010. "The Acute Effect of Local Homicides on Children's Cognitive Performance." *Proceedings of the National Academy of Sciences of the United States of America* 107(26):11733–38; See generally David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 *Pub. Health Reps.* 404, 409 (2001), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC1497358/pdf/12042604.pdf; see also Hahn, Robert A., *Ibid.*

¹⁵ Mickelson, R. A. (2008). Twenty-first century social science research on school diversity and educational outcomes. *Ohio State Law Journal*, 69, 1173–1228; Schwartz, Heather (2010), "Housing Policy is School Policy," *The Century Foundation*, [Journal of Planning Education and Research 27:20–35; Horn, Keren Mertens, Ingrid Gould Ellen, and Amy Ellen Schwartz. 2014. "Do Housing Choice Voucher Holders Live Near Good Schools?" *Journal of Housing Economics* 23:28–40; DeLuca, Stefanie and Peter Rosenblatt. 2011. "Increasing Access to High Performing Schools in an Assisted Housing Voucher Program." Pp. 35–43 in *Finding Common Ground: Coordinating Housing and Education Policy to Promote Integration*, edited by P. Tegeler. Washington, DC: Poverty & Race Research Action Council \(2011\).](http://www.tcf.org/assets/downloads/tcf-Schwartz; Deng, Lan. 2007.)

constraints on upward social mobility.¹⁶ The cumulative effects of exposure to high poverty environments are intergenerational, passing on inherited disadvantage from parent to child.¹⁷ The AFFH rule helps local jurisdictions address these ongoing harms through a step by step analysis that leads to meaningful goals for both community reinvestment and housing integration.

Concerns about racial isolation, and the disproportionate exposure of families of color to concentrated poverty, are not hypothetical, or limited to rare neighborhoods. These patterns of extreme segregation are prevalent throughout the United States, and they are expanding. In his 2015 report, “The Architecture of Segregation,” Paul Jargowsky documents, from 2000 to 2013, a substantial expansion of the number of concentrated poverty census tracts (tracts with a neighborhood poverty rate above 40%), and a rapid growth in the number of persons living in those areas, almost doubling from 7.2 million to 13.8 million people. One in four African Americans, and one in six Latino Americans lived in such concentrated poverty neighborhood in 2013.¹⁸ These concentration totals have declined slightly since 2013, from 13.8 to 12.7 million people, as the country continues its recovery from the great recession,¹⁹ but they continue to be extreme, and continue to affect low income people of color to a harsher degree. In addition, the number of Americans living in “high poverty” (>30%) neighborhoods has also increased dramatically, from 19.9 million persons in 2000 to 34.4 million persons in the most recent (2016) count.²⁰

Assessing the needs of these communities, and addressing the factors that perpetuate and expand them, is one of the main areas of focus of the AFFH obligation.

Continuing lack of balance in affordable housing location – and feasible solutions

The patterns of racial and economic segregation created by the U.S. government in the mid-20th century²¹ continue to be perpetuated – and even exacerbated – by present day government action. For example, our four major federal housing programs essentially steer low income children to lower performing, higher poverty schools than their peers²² – and even the Housing Choice Voucher program, a program that was intended to provide individual choice in the private

¹⁶ Reardon, Sean F. and Kendra Bischoff. 2011. “Income Inequality and Income Segregation.” *American Journal of Sociology* 116(4):1092-1153; Chetty, Raj, Nathaniel Hendren, Patrick Kline, and Emmanuel Saez. 2014. “Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States.” *The Quarterly Journal of Economics* 129(4):1553-1623; Raj Chetty, Nathaniel Hendren, and Lawrence F. Katz, “The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment,” *The Equality of Opportunity Project* (2014), www.equality-of-opportunity.org/images/mto_paper.pdf.

¹⁷ Sharkey, Patrick and Felix Elwert. 2011. “The Legacy of Disadvantage: Multigenerational Neighborhood Effects on Cognitive Ability” *American Journal of Sociology* 116(6):1934-1981; Sharkey, Patrick, *Stuck in Place* (2013).

¹⁸ Paul Jargowsky, *The Architecture of Segregation* (Century Foundation 2015).

¹⁹ Paul Jargowsky, “Spatial Context and the Path to Permanent Inequality,” (forthcoming, *Pathways* 2018)

²⁰ *Id.*

²¹ See generally, Rothstein, *The Color of Law* (2017)

²² See, e.g., Ingrid Ellen and Keren Horn, *Housing and Educational Opportunity: Characteristics of Local Schools Near Families with Federal Housing Assistance* (PRRAC 2018)

<https://www.prrac.org/pdf/HousingLocationSchools2018.pdf>.

market, fails to deliver meaningful choice to recipients, and as a result the program is extremely concentrated in most metropolitan areas.²³

And contrary to HUD's unfounded assertion, it is possible to administer a balanced housing policy that gives plentiful options to low income families of color outside of segregated areas. For example, several states are now administering their Low Income Housing Tax Credit programs to incentivize more development for families with children in higher opportunity areas;²⁴ the state of New Jersey has demonstrated the feasibility of overcoming local zoning barriers to develop housing across a wide range of neighborhood types;²⁵ and several "housing mobility programs" – notably the fully funded programs in Baltimore, Chicago, and Dallas – have shown the feasibility of bringing to scale true metropolitan choice for families with Housing Choice Vouchers.²⁶

In contrast, simply increasing the production of affordable housing, without deliberate strategies to ensure balance and housing choice in areas outside of racial and poverty concentration, will perpetuate segregation and run counter to the AFFH mandate.

II. Responses to Other Questions Posed in the ANPR

(1) Community participation & consultation – what type is appropriate? And can these be merged into Consolidated Plan/PHA Plan?

The current rule establishes a floor (with additional recommendations in guidance) that can be improved upon in practice, but it has successfully increased public participation, including by fair housing groups, public housing authority residents, and others who offer important perspectives that may be overlooked in a process that is not specifically focused on fair housing. For this and other reasons, the AFFH process would be less effective if merged into the Con Plan; as HUD determined in issuing the 2015 rule, a separate fair housing analyses provides enables the participant to give fair housing issues due attention and weight, and ensures that they address the full scope of issues that impact fair housing.

(2) Data – need it be uniform; can participants provide qualitative experience instead?

Uniform data is needed for several reasons: it eases the burden on participants, enabling them to spend time on community participation and goal formulation; it ensures that community groups have access to key information about their localities, enabling them to participate effectively;

²³ A. Mazzara and B. Knudsen, "Where Families with Children Use Housing Vouchers: A Comparative Look at the 50 Largest Metropolitan Areas" (Center on Budget & Policy Priorities and the Poverty & Race Research Action Council (forthcoming).

²⁴ See *Effect of QAP Incentives on the Location of LIHTC Properties* (U.S. Department of Housing and Urban Development, April 2015); https://www.novoco.com/sites/default/files/atoms/files/pdr_qap_incentive_location_lihtc_properties_050615.pdf.

²⁵ See D. Massey, *Finding Mount Laurel* (2016)

²⁶ See *Housing Mobility Programs in the U.S 2018* (PRRAC, October 2018). See also *New Homes, New Neighborhoods, New Schools: A Progress Report on the Baltimore Mobility Initiative* (PRRAC, 2009) <https://prrac.org/pdf/BaltimoreMobilityReport.pdf>

and, importantly, it enables review by HUD and fair housing groups to ensure that goals are informed by and sufficiently respond to the local facts. “Local data and knowledge” are also important parts of the current process that allow for localized input, including qualitative input.

(3) Reporting and analysis. What kind of reporting, and how often? Is an analysis really needed too, or just goals? Can planning and results be integrated into the Con Plan/other existing plans?

Participants must currently report on progress in their next AFH and annually (alongside other issues) in their CAPER. As noted above, the fair housing analysis and planning process should be separate and focused on the fair housing issues identified in rule and Assessment Tools. This enables adequate scoping, public engagement and review, and accountability for fair housing issues, specifically. In addition to the goals themselves, an analysis is needed in order to ensure that the goals reflect on the ground facts and respond meaningfully to local problems; and so that local groups and HUD can engage in oversight if this is not the case.

(4) Identification of obstacles to fair housing - should the rule specify these, or should participants have leeway to identify these themselves? Collaborations (regional and PHA/jurisdiction) - should these be incentivized?

Participants are currently able to identify localized obstacles – these are not prescribed by HUD, although HUD’s list of Contributing Factors is helpful guidance in aiding participants to understand the range of potential issues they should address. For the rule to be effective in furthering fair housing, it is critical that participants be given clarity and oversight around the need to commit to goals that advance the core purposes of the Fair Housing Act (and that are not inconsistent with AFFH obligations). The use of the standardized template currently provided by the AFH (requiring participants to identify contributing factors to fair housing issues including segregation, R/ECAPs, disparities in access to opportunity, and disproportionate housing needs) responds directly to the GAO report’s recommendation for HUD and provides clarity for participants, community stakeholders, and HUD. This also helps to ensure that specific issues of importance to many communities are addressed.

Collaborations should be incentivized, and a regional analysis should still be required. The AFFH requirement is a regional one. As a factual and policy matter, issues cross borders and regional solutions are often best at advancing fair housing (or necessary to do so). PHAs are extremely fragmented regionally and their constituents benefit when they work together to address barriers to regional housing choice. PHAs also benefit from collaboration with jurisdictions, in order to further ease burden and position them to better provide input to shape jurisdiction’s analysis and goals.

(5) Goals/metrics: how much deference should jurisdictions receive?

Participants currently are able to identify their own goals and metrics as makes sense for AFFH in their localities. Localities have significant discretion in choosing goals that reflect local conditions and are realistic commitments. However, they also must provide explanations and support for the goals they identify, and be responsive to input by fair housing and other groups. It

is important to retain these aspects of the rule in order for it to be effective in actually furthering fair housing, such that goals respond fully and effectively to local conditions. Further, it is critical that there be clarity and accountability around the requirement to commit to specific goals that are consistent with core AFFH obligations (and to give high priority to goals that address lack of choice, mobility, and housing imbalance, along with other key issues, within the balanced approach designated by the rule).

The current rule's implementation has demonstrated the need for both a clear template and for a robust review process with regard to goal-setting. HUD guidance and TA, and the HUD pass-back process, were helpful mechanisms that yielded a range of meaningful goals and metrics for communities.²⁷ The requirement that jurisdictions commit to "meaningful actions" should be retained, as it is consistent with civil rights law and responds to documented inadequacies of the AI regime.

(6) How should HUD evaluate AFFH efforts? What should be required of jurisdictions and PHAs with unacceptable efforts?

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. If the assessment is not acceptable on those bases, the participation 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.

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 progress. HUD should also provide for a complaint process to enable fair housing & community organizations to engage in oversight.²⁸

(7) Safe harbors – should certain levels of effort on specific actions be deemed in compliance?

No. Local conditions are variable, and safe harbors would not accurately reflect whether a participant is fulfilling its AFFH obligations

(8) Other revisions - to advance the FHA, add clarity, reduce burden, etc?

We again urge HUD to promptly reinstate implementation of the 2015 rule. The rule was in the early implementation phase when suspended, and restoring it would enable HUD and

²⁷ See Steil affidavit, *supra*.

²⁸ See recommendations submitted in 2013 by the Lawyers' Committee for Civil Rights, <https://lawyerscommittee.org/wp-content/uploads/2015/06/LCCRUL-AFFH-Comment-Letter.pdf> (at pp. 3-4).

participants to build on early successes and to learn what additional or adjusted guidance, if any, would be helpful in advancing HUD's mission.

Best regards,

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