

February 4, 2022

Ms. Demetria McCain
Principal Deputy Assistant Secretary
Office of Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development
451 7th Street, S.W.
Washington, D.C. 20410

Dear FHEO Principal Deputy Assistant Secretary McCain,

On behalf of the undersigned members of the Fair Housing/Fair Lending Task Force of the Leadership Conference on Civil and Human Rights and several allied fair housing organizations, we write following HUD's recent round of listening sessions on Affirmatively Furthering Fair Housing (AFFH) to share some additional thoughts about necessary elements of a revised AFFH regulation. We applaud HUD's decision to seek stakeholder input during the regulation drafting process, but also recognize the limitations of the listening session format for providing detailed, substantive input. Nor do such sessions allow stakeholders to respond to the points raised by others. Speakers at the sessions proposed a number of recommendations that we believe are contrary to the statutory mandate of AFFH and, if adopted, would undermine the effectiveness of the rule and raise questions about HUD's compliance with that mandate. We detail these below.

We have limited our comments in this letter to issues raised during HUD's stakeholder listening process, but have attached our previous comments, which are based on our extensive collective experience with the various approaches that HUD has taken over the years to implementation of the AFFH provisions of the Fair Housing Act, including the 2015 regulation as well as the preceding and succeeding regulatory frameworks. We are available to discuss these and other AFFH-related issues in more detail and answer any questions you may have now or at any time during the rulemaking process.

Safe harbors would undermine the AFFH rule. At one of the listening sessions, one speaker suggested a "safe harbor" for grantees that make a good effort, whether that be an effort at public participation, drafting their fair housing plans, or implementing those plans. While HUD's oversight of its grantees' compliance with their AFFH obligations should certainly acknowledge the efforts they have made, the definition of AFFH calls for "meaningful actions to address significant disparities in housing needs and access to opportunity, replace segregated living patterns with truly integrated and balanced living patterns, transform racially or ethnically concentrated areas of poverty into areas of opportunity, and foster and maintain compliance

with civil rights and fair housing laws.” Good faith efforts, however defined, that fail to result in meaningful actions to achieve the goals of the Fair Housing Act, are insufficient. While it may be reasonable to expect that grantees of different sizes and resource levels may take different actions, all must be able to point to actions that are meaningful in the context of the Act, the rule, and local fair housing conditions.¹

Do not exempt small grantees. Some stakeholders suggested that small grantees should be exempted from any requirement to conduct an Assessment of Fair Housing and instead be allowed to do an AI (Analysis of Impediments to Fair Housing Choice). While it may be appropriate for HUD to tailor fair housing planning requirements to grantees of different types and sizes, there are no exemptions from the statutory obligation to affirmatively further fair housing. Experience has shown that a standardized approach is necessary.

Further, the undefined process and lack of structure of an AI make it an ineffective mechanism for a grantee to use to address its AFFH obligations, as determined by GAO and by HUD’s own analysis. Some grantees may view the minimal nature of the AI requirements as an avenue for avoiding their AFFH obligations. However, the lack of a clear planning process may also lead to substantive failures in compliance. To be effective, an AI would require essentially the same analysis as required for the 2015 rule’s Assessment of Fair Housing (AFH), and under the 1995 AFFH rule, grantees were required to take “appropriate actions” to address impediments identified in the AI.² Grantees that do take the fair housing planning process seriously but used the AI model would be reliant on a less defined and well-guided process, even though their compliance should be subject to the same level of scrutiny and enforcement as grantees that used the AFH model. Meanwhile, grantees that seek to skirt their fair housing obligations will be more easily able to do so without an effective, standardized oversight mechanism such as the AFH. Fair housing groups would also lack a clear, publicly available framework to aid their activities in furtherance of fair housing compliance. We recommend that HUD not create such carve-outs. Instead, to address capacity concerns that smaller grantees and those with fewer resources may have, we recommend that HUD provide grantees the ability to participate in a joint fair housing planning process with other grantees, as it did in the 2015 rule. Not only does this enable grantees to share in some of the overhead costs associated with any planning process, it also facilitates regional fair housing planning, an approach that has many other benefits and that we support.

¹ We note that other HUD programs that have required only “good faith efforts”, for example Section 3, have not resulted in substantive compliance.

² 24 C.F.R. § 570.601(a)(2) and 24 CFR § 91.225(a)

Do not create a “sliding scale” of AFFH requirements, based on the amount of funding received. This approach was implied in the comments made by some speakers that their AFFH requirements should be tied to the amount of assistance they receive from HUD. The statute does not provide for, nor does it allow, such an interpretation. Once a jurisdiction accepts funding from HUD, regardless of the amount of such funding, it must affirmatively further fair housing. Nor does this obligation extend only to HUD funding. The AFFH definition that HUD has adopted clearly states, “The duty to affirmatively further fair housing applies to all of a program participant’s activities and programs relating to housing and urban development.”³

Do not rely on grantees’ self-attestations about their progress. HUD’s own statutory AFFH obligation requires that it take affirmative steps to ensure that its programs operate in a manner that furthers the purposes of the Fair Housing Act. This requires HUD to conduct the necessary oversight to determine how and how well its grantees are fulfilling their AFFH obligations. It cannot do this by simply taking their word that they are making meaningful progress; HUD must make that determination itself. HUD has historically relied on self-attestation by grantees - in the form of certifications - which has not produced meaningful compliance with the obligation to affirmatively further fair housing.

HUD oversight is particularly important now, since HUD has never had an effective AFFH regulation in place for any length of time and most grantees have never operated within an AFFH regulatory framework that would provide them with the tools and oversight to chart a meaningful path for AFFH compliance and then implement their goals. 49 grantees conducted Assessments of Fair Housing under the short-lived 2015 rule, but no on-going oversight was conducted to ensure that they met their goals. Even if self-attestation were a reasonable approach to enforcement of regulatory obligations - which it is not - HUD cannot have confidence that its grantees have a firm enough grasp of how to fulfill their AFFH obligations to rely on their attestations.

Non-compliance must have consequences and HUD should use all of its tools to enforce AFFH, including withholding funding if necessary. In the nearly 54 years since the Fair Housing Act was passed, HUD has held its grantees accountable for violations of their AFFH obligations on only a handful of occasions. This regulatory neglect has led grantees to expect few, if any, consequences for non-compliance, and our country has failed to make the progress toward ending segregation and overcoming its harmful impacts that Congress intended. This cannot continue, not only if we are to achieve the society that Congress envisioned in 1968, but also if we are to accomplish the goals the Biden-Harris administration has set out for fair housing and racial equity. Achieving those goals will require a multi-faceted effort, including promulgation

³ 24 C.F.R. § 5.151 Affirmatively Further Fair Housing: Definitions.

and implementation of an effective new AFFH regulation; training, technical assistance and other resources; and strong enforcement actions. In addition, it will be critical for HUD to ensure its grantees recognize that the agency is serious with regard to AFFH and their own efforts must be serious as well. While HUD has many other tools that it can and should bring to bear before withholding funds from recalcitrant grantees, it must be willing to take that step when needed.

Grantees should identify and describe issues outside their control that pose significant challenges to their AFFH efforts. Grantees cannot make informed decisions, even about their own AFFH efforts, if they do not identify and understand preexisting conditions of racial segregation and the full range of factors and policies that inhibit access to opportunity for members of protected classes. External constraints may in fact be major barriers to grantees' efforts to AFFH, and those barriers must be identified and acknowledged, even if grantees lack authority to address them. Identifying these barriers may also influence other actors to address barriers, or inform HUD of constraints that it can play a role in removing.

Do not subsume fair housing planning into other planning processes. Several stakeholders requested that HUD give grantees the option to do either a separate fair housing plan or include fair housing planning in their ConPlan or PHA plan. We strongly disagree with the notion that a fair housing plan can be folded into another planning process effectively. Neither the ConPlan nor the PHA plan process is designed to elicit fair housing issues or identify strategies for addressing them. The needs, requirements and goals of fair housing planning are separate and distinct and are likely to be minimized or lost altogether if subsumed into either of these existing processes.

Subsuming fair housing planning into the ConPlan also reinforces the erroneous idea that the obligation to AFFH is limited to specific programs funded with HUD funds, and that the only entities with a responsibility to carry out the AFFH obligation are the agencies administering these funds. CDBG grantees are political jurisdictions, and the obligation to AFFH applies to all of the housing and urban development programs and activities of the grantee jurisdiction; not, for example, a city's housing department and community development department alone.

Further, the fair housing plan must precede and drive the ConPlan and PHA plan. It must establish the status of fair housing in the jurisdiction so that the ConPlan and PHA plan can address impediments and deficiencies.

HUD should consider ways to restructure the Con Plan and PHA (or MTW) Plan documents to more fully reflect and emphasize fair housing considerations raised by the fair housing plan, but the fair housing plan should itself stand as a separate process for the reasons stated above.

Analysis of segregation, as well as access to opportunity, must be mandatory. Some stakeholders expressed a desire to avoid any requirement to consider segregation in their communities, focusing only on access to opportunity. However, both elements are important to achieving the goals of this aspect of the Fair Housing Act, as noted in the definition of AFFH incorporated in the 2015 regulation and reinstated by HUD earlier this year, “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.” Access to opportunity cannot be separated from segregation. Further, redressing segregation is a core purpose of the Fair Housing Act.

Limited funding does not justify ignoring AFFH obligations. Some stakeholders noted that there is no specific funding allocated for fair housing planning, and that this itself is an impediment to fair housing. The implication seemed to be that in the absence of targeted funding to support this activity, it should not be required. We disagree. It is entirely reasonable for HUD to require that grantees submit plans showing how they intend to spend their CDBG and other program funds, even though there is no separate allocation of funds for that planning, in order to ensure that grantees will adhere to program guidelines and requirements. The same is true here. The Fair Housing Act’s AFFH provisions require that grantees affirmatively further fair housing. The only way for HUD to be sure that its grantees will comply with that obligation is to require grantees to indicate – through a plan – how they intend to do so. This type of planning is every bit as important as consolidated planning. And like the ConPlan, fair housing planning is both a necessary and an allowable use of administrative funds under CDBG.

All of the suggestions addressed above to dilute the AFFH obligation are inconsistent with HUD’s definition of affirmatively furthering fair housing and if adopted, would undermine the effectiveness of the new rule. In combination, they would severely hamper HUD’s ability to ensure that its grantees are meeting their statutory obligations under the Fair Housing Act, as well as its own. We urge you not to include these suggestions in the AFFH rule that is currently under development.

We will be happy to answer any questions you may have about our recommendations, and hope to share with you our collective expertise and practical experience with AFFH as the Department proceeds through the rulemaking process and into the implementation phase. In addition to the rule itself, the guidance, training and technical assistance that the Department provides to its grantees and other stakeholders will be critical to successful implementation of HUD’s AFFH mandate. Please let us know how we can be of assistance in thinking through these other components of the AFFH framework. We appreciate your attention to the matters we

have raised here, as well as the work that you and your colleagues at HUD are doing to reinstate a meaningful AFFH regulation. If you have questions or would like to follow up on any of the issues we have raised, please contact Debby Goldberg, at the National Fair Housing Alliance (dgoldberg@nationalfairhousing.org) or Megan Haberle, at the NAACP Legal Defense Fund (mhaberle@naacpldf.org).

Sincerely,

Fair Share Housing Center (NJ)
Louisiana Fair Housing Action Center
NAACP Legal Defense and Educational Fund, Inc.
National Fair Housing Alliance
National Housing Law Project
National Low Income Housing Coalition
Poverty and Race Research Action Council
Texas Appleseed
Texas Housers (Texas Low Income Housing Information Service)

Attachment: Recommendations for a Renewed Affirmatively Furthering Fair Housing Regulation (8.27.21)

Cc: Damon Smith, General Counsel