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PRRAC
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Memorandum

TO: Phil Tegeler and Megan Haberle, Poverty & Race Research Action Council

FROM: Henry Korman

DATE: August 7, 2020

SUBJECT: **HUD Repeal of Grantee Duty to Further Fair Housing**

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1. Summary.

You requested a memorandum describing the historical obligation of recipients of grants from the U.S. Department of Housing and Urban Development ("HUD") to affirmatively further fair housing ("AFFH"). Your request is in connection with the issuance of final rules (the "2020 Rule") addressed to the obligation to further fair housing by grantees of HUD's Office of Community Planning and Development ("CPD") and Office of Public and Indian Housing ("PIH"). The rules repeal HUD's regulations for AFFH issued in 2015 at 80 Fed. Reg. 42272 (July 16, 2015) (the "2015 Rule") and HUD's pre-2015 requirements for analyses of impediments to fair housing choice (the "1994 AI Rule").

The 2020 Rule asserts that until "1994, HUD did not define" the AFFH obligation "by regulation." The rule purports to return "to the original understanding of what the statutory AFFH certification was prior to the 1994 regulation: A general commitment that grantees will use the funds to take active steps to promote fair housing." 85 Fed. Reg. 47899, 47900 (August 7, 2020). Under this formulation, the 2020 Rule ends any responsibility of CPD and PIH grantees to engage in fair housing planning or carry out specific activities to further fair housing in connection with the use of HUD funds. Instead, "grantee AFFH certifications will be deemed sufficient provided they took any action during the relevant period rationally related to promoting fair housing, such as helping eliminate housing discrimination." 85 Fed. Reg. 47904.

The claim that the 2020 Rule returns to some "original understanding" of AFFH is false. CPD grantees have been required to engage in some form of affirmative fair housing planning and carry out program activities in ways that further fair housing since the inception of the Community Development Block Grant ("CDBG") program in 1974. The duty to carry out an analysis of impediments to fair housing choice (an "AI") and implement activities to address identified impediments has been a feature of the CDBG program since 1988. These same duties were made part of the HOME Investment Partnership ("HOME") program

rules after Congress imposed an AFFH certification requirement on HOME grantees in the Cranston-Gonzalez National Affordable Housing Act ("NAHA") in 1990. In 1994, HUD elected to knit together the planning requirements for comprehensive affordable housing strategies (the "CHAS"), also mandated by NAHA, with the corresponding certifications associated with the HOME and CDBG programs by issuing the 1994 AI Rule as part of the agency's consolidated plan regulations. These same responsibilities were imposed on public housing agencies ("PHA") by Congress in the Quality Housing and Work Responsibility Act of 1998 and HUD's corresponding public housing implementing regulations.

2. Urban Renewal and Assisted Housing Prior to 1974.

At their origin, public and assisted housing programs were conceived as both housing production efforts and as linchpins of urban renewal, slum clearance and community development activities. *See, e.g.*, the National Industrial Recovery Act of 1933, Pub. L. 73-67, §202 (June 16, 1933), 48 Stat. 201, where the construction of "low cost housing and slum clearance" was viewed as a single activity, and the U.S. Housing Act of 1937, which authorized the financing of "low-rent housing or slum-clearance projects." Pub. L. 75-412, §9 (September 1, 1937), 50 Stat. 891. In the Housing Act of 1954, Congress linked community eligibility for urban renewal and assisted housing funds with comprehensive planning requirements by requiring the submission to HUD's predecessor agency of a "workable program" for "effectively dealing with the problem of urban slums and blight within the community" as a condition of funding. *See,* Pub. L. 83-560, §303 (August 2, 1954).

The workable program requirement applied to slum clearance and assisted housing programs but not "HUD's non-housing grants- for example, those for basic sewer and water, facilities, mass transportation facilities, or open-space land." In reports issued in 1968, the National Commission on Urban Problems and the President's Committee on Urban Housing observed that suburban communities could refuse to adopt a workable program for urban renewal and assisted housing, thereby excluding blacks, and still qualify for other federal funds. Both reports recommended that HUD apply "the workable program requirement to all Federal housing and development aids, including [Federal Housing Administration] and sewer and water grants. Then very few localities would refuse to qualify a workable program; its benefits would be considerably extended; its misuse as a segregation device would be almost eliminated. The logic of the… remedy speaks for itself." *Building the American City: Report of the National Commission on Urban Problems to Congress and to the President of the United States* (December 12, 1968); House. Doc. No. 91-34, pages 62 to 64. *See also, The Report of the President's Committee on Urban Housing: A Decent Home* (December 11, 1968), p. 30 and 144 (to similar effect).

3. The Housing and Community Development Act of 1974 and the CDBG Program.

(a) Housing Assistance Plans and Fair Housing. Congress addressed some of the issues raised by these reports in the consolidation of multiple community development programs in the Housing and Community Development Act of 1974, which established the CDBG program. Pub. L. 93-383 (August 22, 1974); 88 Stat. 633 (the "1974 HCDA"). Among the objectives of the CDBG program (which remain a feature of the statute to the present day) are "the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of

deteriorating or deteriorated neighborhoods." Pub. L. 93-383, §101(c)(6), 88 Stat. 634, enacting 42 U.S.C. §5301(b)(6). Under the statute as enacted, this objective and others were to be accomplished through the adoption by participating jurisdictions of a "housing assistance plan." Housing assistance plans were required by the 1974 HCDA to indicate:

> (4) …the general locations of proposed housing for lower-income persons, with the objective of (i) furthering the revitalization of the community, including the restoration and rehabilitation of stable neighborhoods to the maximum extent possible, (ii) promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons, and (iii) assuring the availability of public facilities and services adequate to serve proposed housing projects; and (5) provid[ing] satisfactory assurances that the program will be conducted and administered in conformity with [Title VI of the 1964 Civil Rights Act and the Fair Housing Act]. Pub. L. 93-383, §104(a)(3)(C); 88 Stat. 638.

The obligation of participating jurisdictions to comply with Title VI of the 1964 Civil Rights Act ("Title VI") and the Fair Housing Act (also, "Title VIII") was reinforced in the 1974 HCDA by Section 109, which said that no "person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available" through the CDBG program. Pub. L. 93-383, §109(a); 88 Stat. 649 ("Section 109").[1]

(b) HUD Implementation of the Housing Assistance Plan and Section 109. HUD's initial implementation of the CDBG program reinforced the duty under the 1974 HCDA to link the housing assistance plan to equal opportunity. Under the regulations issued for the program, a participating jurisdiction was required to adopt a "community development plan summary" and housing assistance plan which took into account "any special needs found to exist in any identifiable segment of the total group of lower income persons in the community." An "identifiable segment" was defined to include "women and members of a minority group, which includes Negroes, Spanish-Americans, Orientals, American Indians and other groups normally identified by race, color or national origin." The housing assistance plan was required to state the anticipated location of assisted housing consistent with HUD's site and neighborhood standards for other forms of HUD assistance. The rule was clear that the objective of these requirements was to promote "greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons." *See,* 39 Fed. Reg. 40136, 40138 (November 13, 1974) (promulgating 24 C.F.R. §570.3(j); definition of "identifiable segment of the total group of lower income persons in the community"); and 39 Fed. Reg. 40144 (24 C.F.R. §570.303; components of housing assistance plan).

The obligation to develop written documentation reflecting affirmative fair housing duties was reinforced by the new rule's performance review standards for equal opportunity. Participating jurisdictions were

[1] The housing assistance plan requirements were later recodified to Section 104(c) of the 1974 HCDA by Pub. L. 97-35, §302(a) (August 13, 1981), 95 Stat. 357. Age, disability and religion were added to the protected characteristics in Section 109 by Pub. L. 94-35, §306 (August 13, 1981), 95 Stat. 392 (age and disability) and Pub. L. 101-625, §911 and §912(a) November 28, 1990), 104 Stat. 4392 (religion).

required to maintain documentation of civil rights activities, including a description of program administrative criteria intended to assure that no discrimination was practiced; site selection criteria designed to carry out the deconcentration requirements for "identifiable segments of the total group of lower income persons in the community;" evidence of actions taken to "encourage the development and enforcement of fair housing laws;" documentation of actions to prevent discrimination in housing and related facilities; and records of activities that promote greater housing choice within the area of the housing assistance plan. 39 Fed. Reg. 40159-50 (24 C.F.R. §570.900(c); equal opportunity review criteria).

The performance standards also assessed a participating jurisdiction's obligations under Section 109. The CDBG program's Section 109 requirements closely tracked HUD's Title VI rules. In circumstances where "the recipient has previously discriminated against persons on the ground of race, color, national origin or sex, the recipient must take affirmative action to overcome the effects of prior discrimination." And, in "the absence of such prior discrimination, a recipient in administering a program or activity funded in whole or in part with community development block grant funds should take affirmative action to overcome the effects of conditions which would otherwise result in limiting participation by persons of a particular race, color, national origin or sex." 39 Fed. Reg. 40147 (promulgating 24 C.F.R. §570.601(b)(4)); *compare,* 24 C.F.R. §1.4(b)(6) (Title VI rules; to same effect).

(c) The Housing and Urban-Rural Recovery Act of 1983 and the Analysis of Impediments. During the late 1970s and early 1980s Congress grew dissatisfied with HUD's administration of the CDBG program. Among the concerns was HUD's failure to require participating jurisdictions to "affirmatively further fair housing opportunities." Unhappy that HUD was "intransigent" in this and other matters, Congress amended the CDBG statute to require participating jurisdictions to certify in annual applications for funding not only to compliance with Title VI and Title VIII, but also that "the grantee will affirmatively further fair housing." *See,* H. Rep. Rpt. 98-123 (May 13, 1988), p. 2. *See also,* Housing and Urban-Rural Recovery Act of 1983, Pub. L. 98-181 (November 30, 1983), 97 Stat. 1162 (amending 42 U.S.C. §5304(b)(2) to add affirmatively furthering fair housing as a compliance requirement) and 97 Stat. 1166 (adding 42 U.S.C. §5306(d)(5)(B) to impose the AFFH certification requirement). Congress' intent was clear:

> The Committee is concerned that the proposed CDBG regulations did not stress enough the responsibility for CDBG recipient communities to affirmatively further fair housing opportunities, so it has amended the statute to clarify that responsibility for both entitlement and non-entitlement communities. It is expected that regulations issued by the Department will provide clear guidance as to this responsibility in compliance with the Committee's intent. H. Rep. Rpt. 98-123, p. 12.

The concept of an analysis of impediments to fair housing choice has its origin in HUD's implementation of the 1983 statutory changes. Regulations issued by HUD in 1988 (the "1988 CDBG Rule") required participating jurisdictions to conduct an "analysis to determine the impediments to fair housing choice in its housing and community development program and activities." The analysis was required to include a review of six enumerated fair housing related conditions. "Based on the conclusions" of the analysis, a recipient was required to take "lawful steps… relating to housing and community development to overcome the effects of conditions that limit fair housing choice within the recipient's jurisdiction." The rule went on to provide specific examples of the kinds of activities a participating jurisdiction might undertake. *See,*

53 Fed. Reg. 34416, 34468-69 (September 6, 1988) amending 24 C.F.R. §570.904 (equal opportunity review). For your convenience, the text of the 1988 AI Rule is set out in full as an attachment to the memo.[2]

4. The 1994 AI Rule.

(a) The National Affordable Housing Act. In 1990, Congress made significant changes to community development programs with the passage of the National Affordable Housing Act. NAHA authorized the HOME program. It repealed the CDBG program's housing assistance plan requirements and replaced it with a "comprehensive housing affordability strategy" ("CHAS") requirement. The AFFH certification requirement remained a feature of the CDBG statute, and identical certification standards were made part of the CHAS. A CHAS (including the AFFH certification) was a condition of distribution of HOME funds to participating jurisdictions. *See,* Pub. L. 101-625, §105(b)(13) (November 28, 1990), 104 Stat. 4089 (CHAS AFFH certification), §216(5), 104 Stat. 4104 (CHAS as a condition of HOME allocations) and §913(B)(1)(A), 104 Stat. 4392 (repeal of housing assistance plan). The purpose of the AFFH certification was to require "that participating jurisdictions represent that they not only would comply with existing fair housing laws but also would affirmatively carry out activities that reduce or eliminate discriminatory impact in housing on the basis of race, creed, national origin, gender or disability." *See,* S. Rpt. 101-316 (June 8, 1990).

(b) The 1994 AI Rule: Overview. The 1994 AI Rule was the product of an extended period of HUD regulatory activity to implement NAHA in a period that saw the end of a Republican presidential administration and the beginning of a Democratic administration. At the end of the rulemaking process, the obligation to AFFH was largely located within HUD's consolidated planning rules codified at 24 C.F.R. part 91. As you know, 1994 AI Rule imposed three requirements on participating jurisdictions: (1) the duty to carry out an analysis of impediments to fair housing choice; (2) the responsibility to take action to address any impediments identified in the analysis; and (3) the obligation to maintain records evidencing both the analysis and the actions undertaken to address fair housing impediments. These requirements closely correspond to the CDBG program's early housing assistance plan and equal opportunity review criteria and align with the 1988 CDBG rule. However, the 1994 AI rule also represented a retreat from the more detailed content of the 1988 CDBG Rule.

(c) The Rulemaking History.[3] The first rule to emerge implementing NAHA's AFFH certification requirement was an interim rule for the HOME program. It required participating jurisdictions to AFFH through compliance with the 1988 CDBG Rule. 56 Fed. Reg. 65312, 65357 (December 16, 1991). The

[2] The admonition to take "lawful steps" to address impediments identified in the AI reflects a considerable reluctance by HUD to endorse any kind of race conscious activities. HUD's resistance to race conscious "affirmative action" is also evident in the rule's amendments to the Section 109 regulations. HUD was of the view that Section 109 did not require affirmative action "unless there is an earlier formal finding of discrimination by HUD or a court of law or the existence of factors from which the recipient has a firm basis for concluding that discrimination has occurred." Consequently, the 1988 rule addressed compliance with Section 109 with a careful parsing of when and how a participating jurisdiction could and should address conditions of discrimination in its CDBG program and in its program area. *See, e.g.,* 53 Fed. Reg. 34458 (issuing 24 C.F.R. §570.602). The requirements of Section 109 were viewed as separate from the obligation to further fair housing. A full discussion of these matters is beyond the scope of the memo.

[3] Time does not permit a step-by-step recounting of each regulatory action. The discussion that follows describes the primary regulatory actions resulting in the 1994 AI Rule.

initial final CHAS rules only required an AFFH certification because the analysis of impediments and fair housing action requirements associated with AFFH were detailed in the CDBG rule and incorporated by reference in the HOME regulation. 57 Fed. Reg. 40038, 40059 (September 1, 1992). On November 14, 1994, HUD published a "Statement of Regulatory Priorities." The statement gave notice of HUD's intention to adopt an AFFH rule applicable to all "recipients of HUD financial assistance and participants in HUD-administered mortgage/insurance programs (Housing, Public Housing, FHA, etc.) to affirmatively further fair housing." HUD also separately proposed to issue a separate "Fair Housing Plan" rule for the CDBG program. *See,* 59 Fed. Reg. 57087, 57103 (agency wide AFFH rule) and 57104 (Fair Housing Plan).

The 1994 AI rule was issued on January 5, 1995. *See,* 60 Fed. Reg. 1878, 1905 (January 5, 1995) (consolidated plan; local government AFFH certification), 1910 (same, state certification); 1912 (same; consortium); 1913 (same; performance reports); 1915, 1916 and 1917 (same; state CDBG certification).[4] In issuing the rule, HUD indicated that it was something of a placeholder for a later, more comprehensive Fair Housing Plan rule:

> The Department has decided to deal with the more comprehensive issue of a Fair Housing Plan in a separate proposed rule, which is expected to be published shortly. To assure that some minimal requirements for compliance with the statutorily required certification that a jurisdiction is affirmatively furthering fair housing, this rule includes, in the certification section, the requirement that an analysis of impediments be done and that the steps to address the impediments be described, mirroring the language added to the CDBG regulations on the same subject. In addition, the performance report now includes for all programs [governed by the consolidated plan rule] the element of data on race and ethnicity of beneficiaries. 60 Fed. Reg. 1890.

When the public housing laws were substantially overhauled in 1998, Congress and HUD adopted the AFFH certification framework of NAHA and the 1994 AI rule for the public housing agency plan. *See,* Pub, L. 105-276 (October 21, 1998), 112 Stat. 2534 (adopting 42 U.S.C. §14237c-1(b)(15)) and 65 Fed. Reg. 81214 (December 22, 2000). The Fair Housing Plan rule never materialized. In 1998, HUD issued a proposed rule "to provide performance review standards for affirmatively furthering fair housing requirements." 63 Fed. Reg. 57882 (October 28, 1998). That rule also was never made final. It is possible that the proposed rulemaking fell victim to a separate effort at regulatory reform and streamlining. *See, e.g.,* 61 Fed. Reg. 11474 (March 20, 1996). It is also possible that HUD's ambitions for comprehensive, agency wide AFFH and Fair Housing Plan rules were waylaid by opposition resulting from the extensive public meetings held as the rules were being developed. *See,* 59 Fed. Reg. 57105 (describing public engagement on Fair Housing Planning). In any event, the 1994 AI Rule remained unchanged until issuance of the 2015 Rule.

5. Conclusion.

This memo does not examine whether prior iterations of fair housing planning and AFFH criteria were effectively carried out by participating jurisdictions and enforced by HUD, nor does it evaluate whether

[4] A typographical error in the Federal Register makes it appear that the 1994 AI Rule was issued in 1994. It was in fact issued in the January 5, 1995 edition of the Federal Register.

those standards adequately addressed persisting conditions of discrimination and segregation. It is directed only to the veracity of the claim that the 2020 Rule somehow returns to an "original understanding" of Congress and HUD of "the statutory AFFH certification." In this regard, it is worth noting that much of the regulatory history described in this memo is summarized in the Fair Housing Planning Guide, issued in 1998 by HUD to "to offer guidance in complying with a certification required by the Consolidated Plan that it (the State or Entitlement jurisdiction) will affirmatively further fair housing." *See, Fair Housing Planning Guide, Vol. 1* (April 13, 1998), chapter 1. The history summarized in the *Fair Housing Planning Guide* is further evidence that the 2020 Rule's statement that until "1994, HUD did not define" the AFFH obligation "by regulation" is a fabrication.

1988 CDBG Equal Opportunity Rule

53 Fed. Reg. 34416 (September 6, 1988)

24 C.F.R. §570.904(c) Fair housing review criteria. Section 570.601(b) sets forth the general requirements for Title VIII of the Civil Rights Act of 1968 and the grantee's certification that it will affirmatively further fair housing. In reviewing a recipient's actions in carrying out its housing and community development activities in a manner to affirmatively further fair housing in the private and public housing sectors, absent independent evidence to the contrary, the Department will consider that a recipient has taken such actions in accordance with its certification if the recipient meets the following review criteria:

(1) The recipient has conducted an analysis to determine the impediments to fair housing choice in its housing and community development program and activities. The term "fair housing choice" means the ability of persons, regardless of race, color, religion, sex, or national origin, of similar income levels to have available to them the same housing choices. This analysis shall include a review for impediments to fair housing choice in the following areas:

(i) The sale or rental of dwellings;

(ii) The provision of housing brokerage services;

(iii) The provision of financing assistance for dwellings;

(iv) Public policies and actions affecting the approval of sites and other building requirements used in the approval process for the construction of publicly assisted housing;

(v) The administrative policies concerning community development and housing activities, such as urban homesteading, multifamily rehabilitation, and activities causing *34469 displacement, which affect opportunities of minority households to select housing inside or outside areas of minority concentration; and

(vi) Where there is a determination of unlawful segregation or other housing discrimination by a court or a finding of noncompliance by HUD regarding assisted housing within a recipient's jurisdiction, an analysis of the actions which could be taken by the recipient to help remedy the discriminatory condition, including actions involving the expenditure of funds made available under this part.

(2) Based upon the conclusions of the analysis in (1) above, the recipient has taken lawful steps, consistent with this part, relating to housing and community development to overcome the effects of conditions that limit fair housing choice within the recipient's jurisdiction. Such actions may include:

(i) Enactment and enforcement of an ordinance providing for fair housing consistent with the federal fair housing law;

(ii) Support of the administration and enforcement of state fair housing laws providing for fair housing consistent with the federal fair housing law;

(iii) Participation in voluntary partnerships developed with public and private organizations to promote the achievement of the goal of fair housing choice (including implementation of a locally developed and HUD-approved New Horizons comprehensive fair housing plan);

(iv) Contracting with private organizations, including private fair housing organizations, where such support will bring about actions consistent with titles VI and VIII, to address the impediments identified in the analysis described in paragraph (C)(1) of this section;

(v) Activities which assist in remedying findings or determinations of unlawful segregation or other discrimination involving assisted housing within the recipient's jurisdiction.

(vi) Other actions consistent with law determined to be appropriate based upon the conclusions of the analysis.