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Office of the General Counsel
Regulations Division
U.S. Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0500

RE: Docket Number FR-6123-P-02, Affirmatively Furthering Fair Housing Proposed Rule

To Whom It May Concern:

Enterprise Community Partners, Housing Partnership Network (HPN), Local Initiatives Support Corporation (LISC), Low Income Investment Fund (LIIF), National Housing Trust (NHT), and Stewards for Affordable Housing for the Future (SAHF) appreciate the opportunity to provide comments on the U.S. Department of Housing and Urban Development's (HUD) Affirmatively Furthering Fair Housing (AFFH) proposed rule. Over the past five years, the undersigned organizations have strongly supported HUD's efforts in implementing the AFFH rule and its ultimate goal of ensuring that all people have access to decent, safe and affordable housing in strong and healthy communities.

General Comments

Before providing our comments on the proposed rule, our organizations want to emphasize our overall opposition to HUD's proposal. ***We believe HUD should withdraw the current proposed rule and allow additional time for the current AFFH regulation (Final Rule) to be implemented.*** Any changes to the Final Rule should come from subregulatory changes or utilizing existing regulatory flexibilities. HUD also should work to improve the current rule by refining assessment tools, facilitating engagement amongst covered participants, and supporting technical assistance to ensure that localities are furthering fair housing opportunity and reducing housing discrimination.

Comments on HUD's Justification for the Proposed Changes

HUD's responsibility to ensure recipients of federal funding affirmatively further fair housing comes out of the Fair Housing Act (FHA) of 1968. The FHA is responsible for the elimination of many discriminatory housing practices, which historically impeded housing and economic opportunities for racial, ethnic, and religious minorities, women, and others. While the FHA has provided important legal protections against blatant discriminatory practices, there is still hard work to be done to achieve its full potential to provide access and opportunity where decades of policy and practice have restricted it. Full implementation of the FHA is not only HUD's statutory duty, but essential to create vibrant communities that offer opportunities for all people.

HUD has a poor history of AFFH enforcement as the Department itself noted in the Final Rule. HUD's past approach to AFFH, the Analyses of Impediments (AIs), was not effective since HUD did not provide sufficient guidance or data, and generally did not enforce compliance. A 2010 U.S. Government Accountability Office (GAO) report found a lack of compliance with the affirmatively furthering fair housing requirements and recommended that HUD, through regulation, "require grantees to update their AIs periodically, follow a specific format, and submit them for review." We supported the Final Rule and its associated tool since they followed these recommendations by: 1) creating a structured format through which grantees must present their activities through the Assessments of Fair Housing (AFH); 2) providing data through which grantees can identify impediments, plan evidence-based actions, and measure their progress; and 3) setting a transparent process through which AFHs are updated and assessed. As mission-driven practitioners who often navigate regulatory compliance at the federal, state, and local levels, we find the level of transparency included in the Final Rule extremely helpful and believe it allows for sufficient local autonomy. Furthermore, our experiences have taught us that government works best when it is grounded upon concrete data and standardized criteria in assessing regulatory compliance.

HUD's proposal purports to update the Final Rule because it is overly burdensome, ineffective in helping participants meet their reporting obligations, and generally too prescriptive in outcomes. To justify HUD's contention on burden, the proposal states that the "AFH required significant resources from program participants, and its complexity and demands resulted in a high failure rate..." We note though that 15 months of data (October 4, 2016 through January 5, 2018) represents only four percent of the local government program participants (49 of 1,200 participating jurisdictions) and only one percent of the total number of program participants (local, state and insular governments and public housing agencies), which is not enough data to evaluate the effectiveness of the new process. According to HUD, 63 percent of the 49 submissions were either never accepted or were only accepted after HUD required revisions. Importantly, HUD has not adequately discussed why these submissions were not accepted nor characterized the meaningfulness of those deficiencies.

As practitioners, we understand that completing the initial AFH required a commitment to using new tools and providing additional information regarding local assessments, including revisions in some cases. We appreciate HUD's desire to implement an efficient and impactful process. However, HUD should note that creating positive, lasting results that truly promote housing justice will require in-depth analysis and engagement with the community. This process is essential to ensure that all people have access to housing and opportunity and that HUD fulfill its statutory responsibilities.

The existing AFFH regulations provide a clear framework for program participants to assess the fair housing issues in their jurisdiction, without prescribing that participants adopt and implement specific strategies. For instance, the definition of Fair Housing Issues in 24 CFR 5.152 leaves room for participants to identify conditions that "restrict fair housing choice or access to opportunity: including, but not limited to: 1) integration and segregation patterns and trends; 2) racially or ethnically concentrated areas of poverty; 3) significant disparities in access to opportunity; and 4) disproportionate housing needs." The rule appropriately does *not* preclude the identification of other fair housing issues and allows participants to identify contributing

factors before developing goals and strategies.

Comments on HUD's AFFH Proposed Goals

Our organizations do not support HUD's AFFH proposed rule because it is substantially weaker than the current regulation and diminishes the Department's ability to enforce its AFFH responsibilities. In particular, we believe the proposed rule should be withdrawn because it: 1) redefines AFFH to primarily focus on local regulatory barriers to housing development and supply while not requiring an examination of residential segregation or impacts of local actions on protected classes; 2) diminishes public participation requirements; 3) uses a flawed definition to determine a jurisdiction's fair housing performance; 4) disincentivizes regional collaboration; and 5) diminishes AFFH responsibilities for public housing authorities.

HUD's proposed rule replaces the current Assessment of Fair Housing with an AFFH certification. A jurisdiction that submits a consolidated plan would be required to address at least three fair housing choice goals and provide a description of how each goal would affirmatively further fair housing unless the jurisdiction selects one of 16 obstacles HUD has pre-identified as a barrier to fair housing choice. These barriers are primarily focused on local housing conditions and regulatory barriers to housing development and supply. As organizations which function as and represent affordable housing lenders, owners, and developers, we have a deep understanding of how local regulatory issues impact our nation's affordable housing crisis. Our organizations recently submitted comments to HUD on ways in which the government at all levels can decrease barriers to increasing the supply of affordable housing.¹ We believe that the 16 obstacles listed include important topics for localities to examine and may have some relationships with restricting fair housing choice. ***Our concern with the AFFH certification and overall with the goals of this proposed rule is the absence of any requirement to examine how recipient actions impact residential segregation and housing discrimination.*** The measures HUD lists are generally descriptive variables of housing conditions, regulations, and quality; the lack of a requirement describing how they are linked to local housing disparities of protected classes makes the AFFH certification deeply flawed and not a valid AFFH definition.

The proposed rule would eliminate the separate AFFH participation process and fold it into the Consolidated Plan. As we noted in the AFFH advanced notice of proposed rulemaking (ANPR), community participation is a critical component of the current AFH process. How program participants engage members of their community, as well as how those views are eventually represented or reported in the AFH, substantially impacts a community's ability to overcome impediments to fair housing. Under the Final Rule, community planning and consultation must occur in the development of the AFH prior to formulating the Consolidated Plan, as the AFH must inform and be incorporated into these subsequent planning processes. We supported maintaining the current separate public participation requirements since it allows the AFH process to inform the Consolidated Plan. ***We do not support the proposal to consolidate the public participation planning requirements since it limits the ability for stakeholders to solicit feedback on developing meaningful AFFH priorities and will likely result in less robust goals.***

¹https://www.lisc.org/media/filer_public/9a/98/9a98e185-426c-4964-acd0-5b0b8cc3d87d/020320_policy_response_hud_rfi_regulatory_barriers_housing_development.pdf

HUD proposes to evaluate a jurisdiction's AFFH performance by reviewing adjudicated fair housing claims and local housing regulatory and supply factors. HUD argues that a lack of adjudicated fair housing violations would confirm jurisdictions' fulfillment of their AFFH responsibilities. We are concerned by HUD's use of adjudicated fair housing claims brought by or on behalf of HUD or by the Department of Justice (DOJ) in the previous five years. Most claims are brought by local legal service organizations and result in settlements instead of a court decision. These cases would not be captured in HUD's standard. We are also concerned with this standard because many fair housing claims go unchallenged due to insufficient legal resources. Lastly, we have written to HUD that the Department's disparate impact proposed rule would create insurmountable obstacles to bring forward and prove what should be clear claims of housing discrimination.² ***We do not support this standard since it is ineffective in capturing fair housing performance and will result in skewed evaluation results for HUD's proposed AFFH incentivizes.***

We are concerned that HUD's proposed rule would diminish regional efforts to AFFH. HUD proposes that recipients of HUD funding must affirmatively further fair housing "within the participant's sphere of influence to providing a fair housing choice." Our organizations understand the complexities in requiring public housing authorities (PHAs) and housing entities to influence transportation, schools, and other issues outside of their direct control when AFFH. ***We do believe, though, that HUD should require these collaborations since it is not feasible to truly affirmatively further fair housing without cross-sector, regional stakeholders working in concert towards a common goal of promoting fair housing choice.*** For instance, research has shown that deconcentrating poverty is linked to economic and education improvements for low-income families, especially children.³ It is HUD's obligation, as the agency charged with enforcing the duty to AFFH to encourage program participants, to evaluate whether conditions in their communities restrict protected classes of people from the opportunities and outcomes that access to low poverty communities would provide. This examination requires recipients to evaluate all conditions precluding true fair housing choice. We also believe that regional responses help mitigate public burden by avoiding duplicative community engagements and regional analyses.

HUD's proposed rule diminishes the AFFH responsibilities of PHAs because it only requires an annual certification that a PHA has consulted with the jurisdiction and would affirmatively further fair housing in its own programs and in areas under their direct control. The Final Rule required PHAs to take "meaningful actions....and address fair housing issues and contributing factors in its programs." The Final Rule emphasized the role PHAs play in furthering segregation through public housing occupancy standards and their administration of housing vouchers. The proposed rule fails to require a certification from PHAs detailing their AFFH goals and obstacles. ***We do not support the weakening of PHA AFFH responsibilities. Simply requiring a PHA to consult with a jurisdiction will not typically lead to meaningful PHA AFFH goals such as scaling mobility initiatives, ensuring appropriate tenant selection preferences, and other actions.*** PHAs administer affordable housing programs distinct from local jurisdictions and

²https://www.lisc.org/media/filer_public/24/34/2434197e-2ef3-454e-9e9a-a75f7b191704/101819_policy_disparate_impact_comment_letter.pdf

³<https://scholar.harvard.edu/hendren/publications/effects-exposure-better-neighborhoods-children-new-evidence-moving-opportunity>

as recipients of HUD funding should have a stronger AFFH requirement for programs under their purview.

Specific Comments

In response to question #1: Is three the appropriate number of goals a jurisdiction should submit? If not, what would be a more suitable number? Would a higher number more appropriately hold jurisdictions accountable to AFFH without imposing an undue burden?

We do not recommend that HUD prescribe a set number of goals since fair housing concerns will vary substantially across the range of jurisdictions. For example, larger cities which conducted their AFHs under the Final Rule utilized up to 10 goals and more than several dozen strategies, suggesting that prescribing three goals may place an artificial and unproductive cap on some jurisdictions. .

Recommendation: HUD could set a minimum number of required goals although should not encourage nor require HUD recipients to only submit three goals.

In response to question #2 and #3:

- *How should HUD balance requiring overly prescriptive standards with ensuring integrity for data sources that support such goals?*
- *What, if any, aspects of the proposed rule and other policies not in the proposed rule, would motivate jurisdictions to more meaningfully engage in the AFFH planning process and make progress on the goals of the local AFFH plan?*

Provide Accessible, Standardized Data. HUD and jurisdictions must take an evidence-based approach in order to effectively carry out their statutory duty to affirmatively further fair housing. HUD can help promote meaningful engagement by providing clear guidance and data that is standardized and easy to use. As written, the proposed rule does not help jurisdictions navigate the sizable body of research demonstrating the persistence of segregation and growing concentration of poverty across cities and regions. In contrast, the Final Rule gave jurisdictions access to detailed data which would enable them to identify impediments to fair housing, plan evidence-based actions, and measure their progress.

The standardized data set provided by the previous rule offered participants an accessible resource to help assess their fair housing impediments and progress. The database also increased parity for participants serving rural areas, which are less likely to have access to local or external datasets.

Recommendation: We urge HUD to reinstate and consistently update the previous rule's database to enable and motivate jurisdictions to meaningfully engage in the AFFH planning process and develop evidence-based goals within the AFFH plans. While a standard dataset should be available to all communities, program participants also should be permitted to utilize alternate data sources when more current data or data better reflective of the program participant's service area is available. In all circumstances, program participants should be permitted to complement quantitative data with their own data and qualitative evidence.

Provide a Framework for Public Participation. We believe the previous AFFH rule’s emphasis on public participation was critically important to ensure local accountability. The proposed rule would eliminate the Final Rule’s separate public participation process that required a public hearing and written comment period to inform a jurisdiction about its residents’ fair housing concerns and priorities before any AFFH-related considerations might be reflected in a jurisdiction’s Consolidated Plan. Identifying fair housing issues, assessing priorities, and recommending goals entail very different concepts and even divergent stakeholders, thereby warranting separate public participation procedures.

Obtaining public input regarding fair housing issues should be a very high priority for both HUD and jurisdictions. By maintaining a framework for public participation specifically related to fair housing, HUD would motivate jurisdictions to meaningfully engage in the AFFH process.

Recommendation: We urge HUD to reinstate a standard framework for public participation specifically tied to the AFFH process that informs and precedes the Consolidated Plan. This guidance will help ensure meaningful engagement by jurisdictions. HUD should encourage regional collaboration by considering how the process can be streamlined for regional entities to avoid duplicative community engagement sessions and multiple regional analyses and allow for analysis that is appropriately tailored to the geography of the collaboration.

In response to questions #4 - 6:

- *Are there other factors, in addition to the ones listed in this proposed regulation, which are generally considered to be inherent barriers to fair housing?*
- *Should any of the factors listed as inherent barriers to fair housing be revised or removed? Should there be different inherent barriers for States than for other jurisdictions?*
- *What process should HUD undertake for updating the list in regulations, and how frequently should these updates occur?*

Need to Address Race and Discrimination. The proposed rule would require jurisdictions to identify and address at least three goals related to fair housing choice and provides a “non-exhaustive list of obstacles which HUD considers to be inherent barriers” to fair housing choice. Many of these obstacles would affect the cost of building new housing and perhaps the growth of the housing supply, but most do not reflect the obstacles to fair housing choice for people in the protected classes identified by the Fair Housing Act. The proposed rule does not directly address issues related to racial or ethnic discrimination, concentrations of race and poverty, inequitable investment of resources, and disinvestment in neighborhoods primarily occupied by members of the protected classes.

In contrast, the Final Rule appropriately allowed program participants to identify conditions that “restrict fair housing choice or access to opportunity,” including, but not limited to 1) integration and segregation patterns and trends; 2) racially or ethnically concentrated areas of poverty; 3) significant disparities in access to opportunity; and 4) disproportionate housing needs. As is fitting, the previous rule did not preclude the identification of additional fair housing issues.

Recommendation: The proposed rule’s list of barriers to fair housing should identify specifically the challenges faced by protected classes in accessing equitable housing choices. These obstacles

should include racial and ethnic discrimination, racial or ethnic concentrations of poverty, integration and segregation patterns and trends, inequitable investment of resources and access to opportunity, and disproportionate housing needs. Jurisdictions should have the opportunity to specify additional fair housing challenges.

We object to a universal list of “inherent barriers to fair housing” because this approach negates the importance of local context and incorrectly emphasizes housing supply over fair housing choice. Creating a list of “inherent barriers” guides localities to select these obstacles without describing their goals to address fair housing, and ignores the negative impacts of de facto segregation. Rather than “inherent barriers,” the rule could provide “potential barriers” -- as does the Assessment of Fair Housing -- which more appropriately acknowledges the implicit variations across communities. The AFFH rule should guide HUD recipients to identify their unique barriers of fair housing through evidence-based analysis.

In response to questions #7-9 (Comparison Metrics):

- *What are the appropriate economic and population size/growth/decline market conditions categories of local CDBG-receiving jurisdictions that submit consolidated plans? Should there be different categories of States, as well? How many categories should there be?*
- *Given the intentions of HUD for specific types of data discussed more fully below, are there specific data that HUD should use for certain categories and not for others?*
- *What process should HUD undertake for updating the metrics, scoring, weighting, and other components, and how frequently should these updates occur?*

We appreciate HUD’s desire to quantify and compare jurisdictions’ progress in affirmatively furthering fair housing over time based on various metrics. As part of a housing landscape analysis, SAHF recently created categorizations of cities large enough to be a CDBG receiving jurisdiction. As part of this process, SAHF analyzed and compared dozens of quantitative factors, including ones HUD has cited as potential metrics in the proposed rule, for more than 100 cities. Factors considered related to demographics, population growth, income, employment, and housing stock. This quantitative analysis was paired with qualitative investigations through stakeholder interviews and other insights. Through careful analysis SAHF did identify some patterns and clusters in the quantitative data, but found that these often suggested similarities and conditions that were sharply at odds with the realities on the ground in these jurisdictions. Clustering even carefully chosen factors can suggest close similarities in places like Cleveland, Ohio and Augusta, Georgia or Providence, Rhode Island and Baton Rouge, Louisiana, which we know in practice have very different strengths and challenges. Through this analysis, quantitative data alone clearly fails to capture the full complexities that form jurisdictions’ housing environment and that comparing on this basis can lead to false equivalencies – grouping flourishing cities with robust housing strategies, with under-resourced cities battling deep segregation and systemic barriers. Significant qualitative factors such as history, geography, state level politics and policy environment, and other non-housing factors are critical context for evaluating a housing landscape, including how successfully a city is affirmatively furthering fair housing. HUD contradicts itself by acknowledging the inappropriate nature of attempting to fit jurisdictions into predetermined categories “because HUD lacks the extensive localized knowledge of State or local officials.” As HUD pointed out in the proposed rule, “HUD recognizes the broad sweep of the AFFH obligation, its nature which defies easy quantification,

and its susceptibility to widely diverging but reasonable interpretations.” We strongly discourage HUD from trying to rank and compare jurisdictions based on qualitative data.

The state policy and economic environment is an important context for understanding performance at the local level, but AFFH compliance at the state level must be considered differently than at the local level since broad metrics across a state can mask a multitude of fair housing challenges in different communities.

Recommendation: The proposed rule’s comparison metrics are not an appropriate method for gauging fair housing compliance or progress. While metrics may be a helpful tool when understood in the context of the broader local environment, measuring compliance and comparing jurisdictions according to qualitative metrics will incentivize policies and practices related to those specific metrics rather than addressing the statutory requirement to affirmatively further fair housing. It may also advantage or disadvantage jurisdictions without regard to their history or local conditions, in direct contradiction to HUD’s own understanding of the extensive variation between communities and local knowledge. Similarly, we do not believe that ranking non-CDBG jurisdictions demonstrates meaningful improvement in affirmatively furthering fair housing in a specific jurisdiction.

In response to question #10 (Scope): Should HUD also rank non-CDBG jurisdictions that still submit consolidated plans? What are the potential obstacles or problems with those rankings?

In the same way that HUD should not rank CDBG jurisdictions, but instead focus on meaningful progress in affirmatively furthering fair housing in the context of the local jurisdiction, it should not rank non-CDBG jurisdictions. In these smaller communities, quantitative measures may be even less effective in understanding the progress of these communities where smaller populations may mean that opportunities for change are less frequent or of a smaller scale or that conversely, a small change could be overrepresented in metrics.

Conclusion

Rather than strengthening HUD’s ability to enforce the Fair Housing Act, HUD’s proposed rule weakens the Department’s ability to ensure covered participants affirmatively further fair housing. ***Enterprise, HPN, LISC, LIIF, NHT, and SAHF strongly urge HUD to withdraw the current proposed rule and allow additional time for the current AFFH regulation to be implemented.***

We would be happy to provide additional information on our comments. Please contact Sarah Brundage (sbrundage@enterprisecommunity.org), Shannon Ross (ross@housingpartnership.net), Mark Kudlowitz ([mkudlowitz@lisc.org](mailto:m kudlowitz@lisc.org)), Olivia Barrow (obarrow@liifund.org), Ellen Lurie Hoffman (eluriehoffman@nhtinc.org), or Andrea Ponsor (aponсор@sahfnet.org) with any questions.