March 16, 2020

Submitted via Regulations.Gov

Regulations Division
Office of the General Counsel
Department of Housing and Urban Development
451 7th Street SW
Room 10276
Washington, DC 20410-0001

RE: Docket No. FR-6123-P-02

To Relevant Parties:

As Senators charged with oversight of Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act or FHA), we are deeply troubled by the Department of Housing and Urban Development's (the Department or HUD) January 14, 2020, Proposed Rule on *Affirmatively Furthering Fair Housing* (AFFH) (FR-6123-P-02) (the proposed rule). This proposed rule guts both the spirit and intent of the FHA and replaces it with an approach that relies on the faulty premise that simply increasing housing supply can address the problems of housing discrimination and segregation. Specifically, the rule would: 1) reverse HUD's most recent efforts to affirmatively further fair housing, including efforts to respond to U.S. Government Accountability Office recommendations,[1] 2) impose an approach that equates increased housing supply with fair housing, and 3) limit the ability of those affected by these policies to make their voices heard.

For these reasons, we believe HUD should withdraw this proposed rule and re-implement its 2015 Affirmatively Further Fair Housing (AFFH) Final Rule (the 2015 Rule)[2].

The Fair Housing Act was designed to end housing discrimination and segregation.

The Fair Housing Act was enacted in the wake of Dr. Martin Luther King, Jr.'s, assassination, and just one year after the National Advisory Commission on Civil Disorders, (the Kerner Commission) issued its warning that "our nation is moving toward two societies, one black, one

[1] Recognizing the need to "affirmatively further fair housing" the Department of Housing and Urban Developing issued its Affirmatively Further Fair Housing (AFFH) Rule Final Rule (the 2015 Rule).
[2] "Affirmatively Furthering Fair Housing; Final Rule." Federal Register 80:136 (July 16, 2015) p. 42272

white—separate and unequal."[3] This landmark legislation sought to address both discrimination in housing and increase integration. To that end, the legislation struck down discriminatory practices like redlining, which had excluded racial and ethnic minority communities from access to housing opportunities and furthered residential segregation.[4] In addition to its prohibition on housing discrimination, the Fair Housing Act also directed HUD to administer its programs in a way that affirmatively furthers the purposes of the Fair Housing Act[5]. Under the FHA, HUD must not only combat discriminatory acts, it must work to overcome the ongoing, deleterious effects of housing discrimination and segregation. Senator Walter F. Mondale, the Senate sponsor of the Fair Housing Act, noted that the law's intent was to replace segregated ghettos with "truly integrated and balanced living patterns."[6]

Sadly, half a century later, our nation has failed to achieve that goal of "truly integrated and balanced living patterns." Despite the Fair Housing Act's clear direction to HUD and its grantees to affirmatively further fair housing, HUD failed for decades to fully implement this provision.[7] In 2010, the GAO found HUD's Affirmatively Furthering Fair Housing (AFFH) process to be ineffective in helping HUD's grantees meet their obligations to affirmatively further fair housing. GAO also made several recommendations for improvement.

HUD released a new AFFH Rule in 2015 after a lengthy public comment and stakeholder consultation process. The 2015 Rule responded to the GAO's recommendations by: 1) providing grantees clear guidance on how to conduct a meaningful Assessment of Fair Housing (AFH), 2) providing communities with the data and maps they would need to inform their analysis, and 3) requiring that the AFH be submitted to HUD for review on a regular basis. The 2015 Rule also called for a dedicated community outreach and engagement process to develop the AFH.

The City of New Orleans was part of the first cohort of communities to submit an AFH under the 2015 Rule. According to a local official, New Orleans found the experience "overwhelmingly positive" and stated that the new data and regulation helped the city identify "that we should be investing smarter to ensure lower income families have equal access to high opportunity neighborhoods, while also improving chronically poor neighborhoods to bring opportunity to them."[8] This is what the 2015 process was intended to do.

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[3] *Report of the National Advisory Commission on Civil Disorders*, The National Advisory Commission on Civil Disorders. (Washington, DC, 1968).
[4] The Fair Housing Act also prohibits housing discrimination in the sale, rental, or financing of housing or other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin.
[5] *See* 42 U.S.C. 3608 (d) and (e).
[6] *Trafficante v. Metro Life Ins. Co., 409 U.S. 205, 211 (1972).*
[7] Nikole Hannah-Jones, "Living Apart: How the Government Betrayed a Landmark Civil Rights Law," Propublica, June 15, 2015, available at: https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law
[8] Testimony of Ellen Lee Director of Community and Economic Development for the City of New Orleans presented to the United States House of Representatives Committee on Oversight and Reform Subcommittee on Civil Rights and Civil Liberties, February 5, 2020, available at: https://docs.house.gov/meetings/GO/GO02/20200205/110452/HHRG-116-GO02-Wstate-LeeE-20200205.pdf

HUD's proposed rule is deeply flawed.

The proposed rule is the culmination of efforts by the current Administration to dismantle the 2015 Rule and gut the FHA's mandate to affirmatively further fair housing.[9] The proposed rule undermines three core elements of any approach to fair housing: 1) detailed, comprehensive analysis of fair housing issues; 2) judicious enforcement; and 3) the public input necessary to ensure that our communities can provide inclusive pathways of opportunity for all Americans. Instead, this proposed rule is premised on the belief that increased housing production at the margins is sufficient to address our nation's long history of housing discrimination. Such an approach is not only in error; it is dangerous. If adopted, this proposed rule will not only ensure that discrimination persists and that too many will remain trapped in poverty, but it will also signal that the federal government will no longer play a role in affirmatively furthering fair housing or in combating the legacy of housing discrimination.

HUD's proposed rule undermines what it means to "affirmatively further fair housing."

The 2015 Rule sought to help HUD's grantees comprehensively assess access to housing and opportunity throughout a community. In contrast, the proposed rule fundamentally reduces the scope of what it means to affirmatively further fair housing. The 2015 Rule's comprehensive approach required that participating jurisdictions and public housing agencies assess their fair housing needs. HUD's proposed rule discards any requirement to comprehensively understand a community's fair housing needs. Instead, it simply requires jurisdictions to identify the goals they are planning to work toward. Communities that select actions from a pre-approved list do not have to provide any explanation or analysis of their fair housing needs or priorities; a significant change from the 2015 Rule. If adopted, it would be the first time in over 30 years that jurisdictions would not be required to conduct a fair housing examination. Such an approach ignores our nation's documented history of local resistance to efforts to advance fair housing.

The HUD-preselected activities themselves, while identified as removing "inherent" barriers to affordable housing, will not ensure that housing is affordable and accessible to people in protected classes throughout the community. Examinations of policies and practices that limit equal access to affordable housing and opportunity are a critical part of an assessment of a community's fair housing needs. The 2015 Rule supported such assessments prior to being suspended by HUD. However, many of the proposed rule's preselected options are aimed at removing barriers to housing production in general, without regard to whether housing is affordable to people in protected classes in neighborhoods of opportunity or whether new development would fuel displacement of long-time residents. Moreover, many of the preselected activities could undermine protections for the environment, workers, housing safety, or renters. Under the proposed rule, a community could select a list of activities that has the perverse effect of undermining access to housing and opportunity for members of protected classes, with little examination or explanation.

[9] HUD's attempt to implement the 2015 Rule was cut short when the Administration suspended submissions under the rule and withdrew the assessment tools in 2018. Communities have now reverted to using the ineffective pre-2015 Analysis of Impediments, or AI, process to fulfill their fair housing requirements.

Even if the proposed rule's list of inherent barriers to affordable housing were perfect, it is not a complete assessment of fair housing needs and does not meet Congress' direction to address the ongoing effects of segregation and discrimination.[10] For example, it does not include an assessment of the opportunities available to residents of existing housing and neighborhoods, such as access to transportation, green space, healthy food, public infrastructure, or good schools. It also leaves out an assessment of ongoing discrimination in housing markets still experienced by people in protected classes such as people with disabilities, families with children, and people of color. If communities do not identify these issues, they are unlikely to make the appropriate investments to solve them. HUD's proposal to refocus the AFFH process on housing production while ignoring the legacy of discrimination and segregation threatens to perpetuate the inequality of opportunity that affects so many neighborhoods and people.

Given that the proposed rule no longer requires communities to assess their fair housing needs, it follows that the rule's enforcement criteria will not assess a community's efforts to promote fair housing. Instead, it will evaluate a jurisdiction's performance based on readily-available housing market data, most of it unrelated to protected classes. Also concerning is the fact that the proposal would only downgrade a community's performance rating for fair housing violations in the rare cases in which a court rules against the community in a federally-initiated case. Given the paucity of fair housing cases filed by the federal government and the fact that that most cases are settled prior to adjudication, this standard will not provide an accurate assessment of a community's efforts to advance fair housing.

HUD's approved actions are focused on increasing supply and ignore discrimination.

The logic behind HUD's proposed rule is simple: reducing regulatory barriers to housing production solves the problems that the FHA has failed to address. The proposed rule mistakenly presumes increased production will lead to increased fairness. Increasing housing production does not guarantee increased affordability. And, our nation's history makes clear that increased production does not automatically result in increased fairness for disadvantaged communities. Trickle-down economics is a failed approach for promoting economic growth for all Americans. Applying this approach to fair housing is similarly doomed to failure.

A meaningful approach to furthering fair housing must provide for community participation.

The proposed rule removes the robust public engagement requirements of the 2015 Rule, and instead combines fair housing into the community's consolidated planning process. In addition, HUD has ceased to update the local housing data and maps it provides to communities and the public to inform local assessments of fair housing needs. This means that communities who want to engage in a robust fair housing analysis are unable to access up-to-date data. HUD should immediately update and release this information.

The Administration justifies many of the changes in the proposed rule with the explanation that the 2015 Rule process was "overly burdensome to both HUD and its grantees." Concerns about local resources were the impetus behind HUD's 2015 Rule effort to provide communities with

[10] "Affirmatively Furthering Fair Housing; Final Rule." Federal Register 80:136 (July 16, 2015) pp. 42273-42274.

better guidance, tools, ready-made data and maps, and technical assistance to carry out the plan – until halted by this Administration. While the Administration seems concerned with burdens on HUD, it seems less concerned about the burden that ongoing discrimination, segregation, and lack of opportunity places on individuals – and our society. When it enacted the Fair Housing Act, Congress directed HUD to take affirmative steps to carry out its purposes. Congress did not direct HUD to try to evade them.

Our collective future depends on all people having equal access to the opportunity to thrive and realize their potential. The proposed rule is a disappointing abdication of federal efforts to empower communities to address the ongoing effects of discrimination and inequality. Fifty-two years ago, Congress charged HUD with the responsibility of helping communities realize this promise. If HUD is to continue to carry out this responsibility, you must discard this proposed rule and recommit the Department to implementing the 2015 AFFH rule.

Sincerely,

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