

U.S. Department of Housing and Urban Development
Regulations Division, Office of General Counsel
451 7th Street SW, Room 10276
Washington, DC 20410-0500

September 17, 2013

Re: Comments on Docket No. FR-5173-P-01, Affirmatively Furthering Fair Housing (AFFH)

To Whom It May Concern:

The Lawyers' Committee for Civil Rights Under Law along with the Washington Lawyers' Committee for Civil Rights and Urban Affairs, the Chicago Lawyers' Committee for Civil Rights Under Law, and the Mississippi Center for Justice, all of whom are affiliates of the Lawyers' Committee, writes to submit our comments regarding the proposed rule published by the U.S. Department of Housing and Urban Development (HUD) on July 19, 2013 (78 Fed. Reg. 43710), addressing the affirmatively furthering fair housing (AFFH) provision of the Fair Housing Act (FHA). The Lawyers' Committee, which was formed 50 years ago at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination, has been heavily involved in the struggle for fair housing and equal access to community assets.

We commend HUD on the long awaited release of this proposed rule and strongly support its formalization of a badly needed process for what localities, public housing authorities, and states must do to meet their duty to AFFH. Program participants, communities, and advocates will be much better positioned to carry out their activities and to ensure that those activities are conducted in accordance with the law, respectively. When the FHA was passed over 45 years ago, replacing segregated neighborhoods with "truly integrated and balanced living patterns" was a primary goal of the law. The AFFH provision is central to this goal, and the publication of this proposed regulation by HUD is an important step forward in strengthening the promise of the AFFH requirement. The following features are particularly noteworthy:

- The Proposed Rule provides a clear definition of AFFH which sets forth specific proactive steps beyond simply combating discrimination to foster more inclusive communities and access to community assets.
- The Proposed Rule provides a new framework that replaces the existing Analysis of Impediments (AI) with the Assessment of Fair Housing (AFH). It provides more clarity of what is expected to AFFH by explicitly

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setting forth the elements of the AFH. Through careful analysis, program participants must identify fair housing issues and the causes or determinants of those issues and then set forth goals for mitigating or addressing the determinants. Importantly, in contrast to the current AI, the program participants must submit their AFHs to HUD and have their submissions accepted by HUD in order to be eligible for HUD housing funds.

- The Proposed Rule integrates affirmatively furthering fair housing considerations and the AFH into the Consolidated Plan and PHA planning processes for establishing fund allocation priorities.
- To assist in implementation of the requirements of the rule, HUD provides uniform, nationwide data to assist in preparing an AFH which will be available to both those preparing the AFH and the public.
- In recognition of the fact that housing markets often transcend jurisdictional boundaries, the Proposed Rule addresses the importance of regionalism and encourages program participants to collaborate in the development of regional AFHs. The Proposed Rule helpfully makes clear that collaboration on a regional AFH does not absolve program participants of the responsibility to analyze and address local issues and determinants.
- The Proposed Rule significantly enhances the level of public participation that is required in the fair housing planning process. As reflected by our experience working on the “People’s Analysis of Impediments” in New Orleans, robust public participation from a range of stakeholders is vitally important to adopting strategies that are sensitive to the unique qualities of different communities. The Proposed Rule requires public participation at important junctures and specifies several of the types of stakeholders whom program participants must involve. Most importantly, the proposed rule explicitly requires a summary of public participation in the AFH process (§ 5.154(d)(5)) and provides that any AFH that is developed without the required public participation will be deemed “substantially incomplete” and will constitute a basis for a finding by HUD that the AFH is not acceptable. § 5.162(b)(1).

These are important steps forward. At the same time, there are several parts of the Rule that we think can be improved, and we offer comments on those that we think are most important:

1. The Proposed Rule Lacks an Effective Complaint and Enforcement Process

Historically, there has been virtually no HUD oversight and enforcement of the FHA’s AFFH requirement. The 2010 GAO report, entitled “Housing and Community Grants: HUD

Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans,” repeatedly references HUD’s limited oversight of the duty to AFFH. The report’s discussion of the HUD officials who have been responsible for oversight and enforcement of the duty to AFFH notes that their efforts have been both limited and inconsistent.

In light of this history and the observations in the GAO Report, the lack of provisions in the Proposed Rule setting forth complaint and enforcement processes that strengthen and clarify HUD oversight and enforcement of the duty to AFFH is disappointing. Critical to effective enforcement are explicit processes that (1) permit residents and the public to file complaints with HUD objecting to the AFH or to the failure to meet the duty to AFFH and (2) establish an enforcement mechanism setting forth how complaints will be processed and what potential sanctions may result from violations. Yet, while the rule places great emphasis on, and significantly strengthens, public and community participation in the AFH process, it inexplicably includes no provisions that set forth the right of community members to complain about compliance with the duty to AFFH or the enforcement mechanism to be used in processing such a complaint. Without such provisions, the ability of community-based organizations and advocates to influence the planning process is significantly reduced as is the ability of HUD to ensure compliance with the duty to AFFH.

This is especially disappointing because in recent years HUD has developed an internal process for accepting third party complaints alleging AFFH violations that details how to handle and investigate such complaints. Indeed, the Lawyers’ Committee, along with the Poverty & Race Research Action Council (PRRAC) and the National Fair Housing Alliance (NFHA), recently released a report lauding the improved enforcement efforts taken pursuant to this process. (http://www.lawyerscommittee.org/admin/fair_housing/documents/files/HUD-Report-Card-Part-II-.pdf). Through the process developed for these matters, HUD has accepted and investigated complaints of non-compliance with the AFFH requirement and established a uniform enforcement mechanism for ensuring compliance with the duty to AFFH.

The final rule should include this or a similar enforcement process. More specifically, it should include provisions setting forth (1) that community members and advocacy organizations can submit complaints alleging violations of AFFH, the shortcomings of the submitted AFH, or the failure to implement and follow AFH plans that have been accepted by HUD; (2) the process that HUD will use in determining when to do compliance reviews where there has not been a complaint; and (3) the investigation and enforcement actions that HUD will follow in processing these complaints and conducting compliance reviews. For many years, HUD has had internal procedures in place for when it will undertake AFFH compliance reviews on its own initiative, and the internal procedures recently developed by HUD to improve enforcement of the AFFH requirement provide a blueprint for a provision in the Rule concerning the investigation, conciliation, and enforcement processes. In addition, those enforcement provisions in the Title

VI, Section 109, and Section 504 regulations that have worked well in the past may be useful in developing this provision.

Because of the number of AFHs that HUD will be required to review and the limited capacity and resources of HUD to conduct an in depth review of all such submissions, the review process should be designed to focus enforcement and review resources on the investigations of complaints received and compliance reviews undertaken by HUD – both of which will require greater attention and resources. One approach for doing this is to create an administrative checklist reflecting a cursory review of all AFH submissions to determine whether or not they meet the minimum requirements of acceptability in § 5.162(a)(2) that “the program participant has provided the required elements of an AFH as set forth in § 5.154(d).” This procedure should be designed to (1) weed out AFHs which on their face do not comply with the basic AFH requirements, e.g., the lack of any data analysis or summary of community participation; and (2) free up resources for in depth investigations of third party complaints and for conducting HUD-initiated compliance reviews.

Finally, to conduct adequate review and enforcement of the AFFH duty, there is a need for periodic performance reports on the progress that each program participant has made in achieving the goals in its AFH. The Proposed Rule lacks reporting requirements that go beyond the performance reports required with respect to Consolidated Plans. To ensure adequate review of implementation and progress made in meeting the goals and priorities set in an AFH, the final rule should include a reporting requirement specifically related to the assessment of progress made in meeting the goals and priorities in the AFH. The provision should establish metrics that are relevant to an assessment of these actions.

2. The Proposed Rule Does Not Provide Sufficient Guidance or Explanation on the Content Required in an AFH Related to the “Assessment of determinants of fair housing issues” and “Identification of fair housing priorities and general goals.” §§ 5.154(d)(3) and (4).

In contrast to the significant data that HUD is making available to assist in identifying fair housing issues as required by § 5.154(d)(2), there is a lack of guidance to help program participants and community organizations and individuals involved in the process determine how to meet the requirements of (d)(3) and (4). The assessment of the “determinants” of fair housing issues and the identification of goals and priorities are central to the AFH process, and the lack of guidance on these points is a major shortcoming for those drafting the AFH and for the community participants involved in the process. The Proposed Rule has a very limited explanation of what a “fair housing determinant” is and how to identify the determinants of fair housing issues. Nor is there any explanation or direction about setting goals for mitigating or addressing determinants.

The Proposed Rule recognizes the need for such guidance in the following statement in the summary of the rule: “Paragraph (d) further provides that, using an *assessment tool* provided by HUD, each program participant must: (1) Identify the primary determinants influencing conditions of segregation; concentrations of poverty; disparities in access to community assets; and disproportionate housing needs based on protected class; and the most significant determinants of these disparities; (2) identify fair housing priorities and general goals and articulate a justification for the chosen prioritization; and (3) set one or more goal(s) for mitigating or addressing the determinants.” 78 Fed. Reg. 43718 (emphasis added). Yet, in the definitions section of the Proposed Rule, the assessment tool is defined as something that HUD will issue in the future. 78 Fed. Reg. 43730. Without seeing the tool, we are concerned that jurisdictions may not have the necessary information to prepare these central elements of an AFH.

In light of this concern, we suggest two possible ways of clarifying the obligations of program participants. First, while not detracting from the importance of local conditions and data for addressing the requirements of §§ 5.154(d)(3) and (4), the rule should incorporate the guidance that is being developed as an assessment tool by including illustrative examples of determinants and fair housing priorities and goals for mitigating and addressing the determinants that should be considered in drafting the AFH. Alternatively, the assessment tool should at a minimum be published for comment before it is finalized.

A second concern we have with this part of the Proposed Rule is the lack of any requirement that goals and priorities set pursuant to § 5.154(d)(4) include specific expected results or benchmarks by which progress can be measured. The Proposed Rule should require that all AFHs include benchmarks or measurements and that the performance reports address the progress made in meeting these benchmarks.

A third concern we have is with that part of § 5.154(d)(4)(ii) which suggests that setting only one goal may be adequate for meeting this requirement. That is setting the bar far too low. While one way to read this provision is that there should be one or more goals set for *each* determinant identified, this is far from clear. Accordingly, we suggest that the Proposed Rule should be modified to read: “Identify the most significant fair housing determinants related to these priority issues and set appropriate goals for mitigating or addressing each of the identified determinants.”

3. The Standards for HUD Review of AFHs Must Be Strengthened

The Proposed Rule fails to adequately set forth the standards by which it will determine whether a program participant has met the requirements for conducting its analysis, assessment,

and goal setting required by § 5.154(d). Under the standard of review established in Section 5.162(b), HUD must reject an AFH “. . . if [the AFH] is inconsistent with fair housing or civil rights laws or if the assessment is substantially incomplete.” It then gives two examples of “substantially incomplete” assessments. The first example at § 5.162(b)(1) is clear and concrete: “An assessment that was developed without the required community participation or the required consultation.” But the example for assessing an AFH’s goals and priorities in § 5.162(b)(2) – “an assessment whose priorities or goals are materially inconsistent with the data and other evidence available to the jurisdiction” – is vague and unhelpful in the absence of further elaboration. Furthermore, there is no example of how HUD would decide if the determinants of fair housing issues in an AFH are substantially incomplete.

As noted above, the assessment of the “determinants” of fair housing issues and identification of goals and priorities are central to the AFH process. The lack of an adequate description of the standards that will be used to determine the acceptability of these aspects of an AFH leaves program participants and community members at sea, not fully understanding how an AFH will be judged. HUD has had significant experience in recent years making these kinds of determinations in its review of complaints of violations of the AFFH requirement and in its compliance reviews of the AFFH duty. From these experiences, HUD should include in the Rule several concrete examples of acceptable determinants, goals, and priorities.

4. The Proposed Rule does not strike an effective balance between promoting greater mobility and encouraging community revitalization.

In describing the purpose of AFFH, § 5.150 of the Proposed Rule states:

[T]he AFFH regulatory framework provides program participants a way to assess issues related to fair housing choice and identify fair housing goals that will inform housing and community development policy and investment planning. A program participant’s strategies and actions may include strategically enhancing neighborhood assets (e.g., through targeted investment in neighborhood revitalization or stabilization) *or* promoting greater mobility and access to areas offering vital assets such as quality schools, employment, and transportation, consistent with fair housing goals.

(emphasis added). We think the use of the word “or” results in a misunderstanding of the purpose of the AFFH provision.

Fair housing choice must be about *both* greater mobility to areas with quality schools, employment, and transportation *and* community revitalization and stabilization efforts; the Proposed Rule should say “and,” not “or.” Presently, there is a serious imbalance between

housing opportunities available to low income people – with a dearth of opportunities in low poverty areas with quality schools, good employment opportunities, and proximity to transportation assets compared to opportunities existing in high poverty, segregated areas. The Rule should promote a better balance of housing choices for people who are members of protected classes than currently exists. Furthermore, it should strive to ensure that plans which include enhancing assets in high poverty, segregated neighborhoods are part of revitalization or stabilization plans that improve the quality of life and opportunities for persons living in these communities. Finally, the Rule should promote plans that maintain affordable housing opportunities in neighborhoods experiencing revitalization and that may be gentrifying in order to counter the displacement of low income and minority residents that often occurs as such neighborhoods improve.

5. The Scope of the AFFH Obligation

HUD should clarify the Proposed Rule to make explicit what is already implicit: the duty to AFFH applies to a program participant's activities that do not involve the use of HUD funds. The scope of the duty is particularly important in two contexts. First, when a program participant has violated the nondiscrimination provisions of the FHA through activities that do not involve HUD or other federal funds, that entity cannot certify that it is in compliance with the duty to AFFH. HUD should not accept the certification of such a grantee unless its AFH includes an effective remedy for the violation. Second, in many cases, meaningful goals designed to address fair housing determinants may require actions on the part of program participants that do not involve the use of HUD funds. For example, a jurisdiction's existing zoning ordinance may be identified as one of the determinants influencing existing residential segregation, concentrations of poverty, disparities in access to community assets, and disproportionate housing needs based on protected class. Even if the ordinance does not violate the nondiscrimination provisions of the FHA, that jurisdiction may need to adopt an inclusionary zoning ordinance because such a policy would be the most effective means of addressing the identified determinants under the circumstances. As another example, a jurisdiction that has cited the lack of access to mass transit as a determinant which hinders the development of affordable units in a high opportunity area may need to extend bus service to that neighborhood.

HUD should also add a provision to the Rule acknowledging that the duty to affirmatively further fair housing applies to the department itself and establishing a process through which the department will ensure its own compliance with the duty. The Secretary is statutorily obligated to AFFH under 42 U.S.C. § 3608(e)(5), and strong leadership from HUD could set a powerful example for program participants that are in the process of determining how to best address fair housing determinants. Additionally, if a HUD policy undermines the duty to AFFH, the impact of that violation is felt nationwide and is typically far greater than that of

many program participants' violations. In order to realize the promise of the AFFH provision, HUD must both enforce the duty and comply with the duty.

6. AFFH Related to Disaster Recovery Action Plans

The Lawyers' Committee has worked closely with both the Mississippi Center for Justice and the Greater New Orleans Fair Housing Action Center on hurricane recovery issues, especially housing issues, since shortly after Hurricane Katrina hit Louisiana and Mississippi in 2005. We concur with the comments submitted by them and other advocacy organizations concerning AFFH related to disaster recovery plans. See § 5.164.

7. Comments Requested by HUD

In the Proposed Rule HUD specifically requested comments on fourteen issues. We respond to request #8:

Are there other planning efforts (for example, in transportation, education, health, and other areas) or other federal programs, such as the low income housing tax credit, that should be coordinated with the fair housing planning effort contemplated by this rule, and, if so, how and what issues would be best informed by this coordination?

The short answer to this question is yes and the planning efforts should broadly encompass transportation, education, health, and environmental planning. Most important is the Low Income Housing Tax Credit (LIHTC) program, the federal program that is the largest producer of affordable housing. As such, it must be a part of the AFFH planning process. Inasmuch as the LIHTC program is administered by the Department of Treasury, HUD should be coordinating its enforcement of the duty to AFFH with Treasury and making all efforts to have Treasury incorporate AFFH principles into its administration of the LIHTC program. In addition, HUD should include in its review of state AFHs a determination of the extent to which state Qualified Allocation Plans incorporate AFFH principles. HUD should also be coordinating its AFFH efforts with those operating other federal housing programs, such as those administered by the Department of Agriculture.

Respectfully submitted,

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