



October 15, 2018

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0001

Submitted electronically via Regulations.gov

Re: Request for comments on proposed “streamlining and enhancements” changes to Affirmatively Furthering Fair Housing, Docket No. FR-6123-A-01

On behalf of the Center for American Progress (CAP), we are writing this letter in response to the Notice FR-6123-A-01 published in the Federal Register on August 16, 2018, which seeks comments regarding HUD’s proposed changes to the Affirmatively Furthering Fair Housing (AFFH) rule.

CAP is a non-partisan think tank dedicated to improving the lives of Americans through bold, progressive ideas and action. As part of its core mission, CAP conducts research and develops new policy ideas that help enhance the economic security of Americans, boost their opportunities for advancement, and promote equality.

We write in support of the AFFH rule finalized in 2015 and urge HUD to preserve the rule in the form that it was implemented. A critical fair housing measure, AFFH is necessary to ensure that everyone in the United States has access to housing free from discrimination and that residents of all neighborhoods are connected to the opportunities they need to flourish.

AFFH helps local leaders successfully meet their long-standing requirement to affirmatively further fair housing set forth in the Fair Housing Act of 1968 by providing them with resources in the form of guidance, a data and mapping tool, and technical assistance to support their community action plans. The locally driven planning process, called the Assessment of Fair Housing (AFH), helps communities overcome persistent challenges related to disparities in opportunity, fair housing choice, racial segregation, and concentrated poverty for all protected classes.

The Fair Housing Act and enduring residential segregation

Signed exactly 50 years ago, the Fair Housing Act implemented a comprehensive reform, the aim of which was to outlaw overt discrimination against any person based on race, sex, color, disability, religion, familial status, or national origin. The Act represented a landmark advance toward equitable sale, rental, and homeownership for all Americans. In 2012, those protections

were extended on the basis of sexual orientation and gender identity through regulatory action.

The Fair Housing Act also set out to promote diverse, inclusive communities through the AFFH provision. The provision directed the U.S. Department of Housing and Urban Development (HUD) to ensure that neither it nor its state and local partners could discriminate in their programs. The goal was for HUD to assist in expanding housing choices to make all neighborhoods hubs for opportunities. However, because it lacked clear implementation and enforcement guidelines, many jurisdictions accepted HUD funds but failed to satisfy their AFFH obligations, resulting in a provision that was visionary but weak.ⁱ The 2015 rule created by the Obama Administration greatly strengthened the provision and made it enforceable.

Prior to the 2015 rule, due to weak enforcement and a lack of political oversight, the Fair Housing Act was not as effective as intended to combat the segregation and housing disparities that persist today.ⁱⁱ In some major metropolitan areas of the Midwest and Northeast, 70 percent or more of African Americans would have to move to a different neighborhood in order to achieve greater integration and be less isolated from non-Hispanic whites.ⁱⁱⁱ Many of the communities of color that were redlined in the 1930s still face patterns of segregation and disinvestment similar to those of that time.^{iv} People living with multiple, intersecting marginalized identities, like lesbian, gay, bisexual, transgender, and queer (LGBTQ) people of color and LGBTQ people with disabilities, are even more likely to face discrimination in access to housing. Residential segregation and the lack of access to mortgage credit in communities of color have encouraged predatory lenders to target those neighborhoods.^v Communities of color were also disproportionately hit by the foreclosure crisis and many are still underwater.^{vi}

The net worth of the median white household is 13 times greater than that of the median black household. In 2015, the median black household income was 59 percent that of their white counterparts – a 7 percentage point decrease from 2000.^{vii} Paired with the rise of unaffordable rents,^{viii} stark residential segregation across ZIP codes, neighborhoods, and school districts determines opportunity for our children. Moreover, housing discrimination remains an issue for many Americans, especially for people with disabilities, African-Americans,^{ix} and LGBTQ^x renters and homeowners. In 2016, more than 28,000 housing discrimination complaints were reported.^{xi} And in states that prohibit discrimination against LGBTQ people in housing, discrimination complaints are filed by LGBTQ people at a rate similar to race discrimination complaints filed by people of color.^{xii}

Public policies are the primary tools for shaping communities, which in turn play a pivotal role in establishing the level of success and health that their members can expect to achieve.^{xiii} The acute and compounding impacts of separate and unequal built-environments born from government-backed redlining and longstanding disparate treatment are well documented. As Flint, Michigan's ongoing lead-poisoning crisis and Lowndes County, Alabama's raw sewage hookworm epidemic^{xiv} highlight, present-day negligent policy decisions and flawed governing structures exacerbate racial inequity resulting in communities of color being exposed to life-

threatening conditions and developing illnesses that are completely preventable. Asthma is one of the most common, longstanding health disparities that afflicts African Americans^{xv} who are most at risk of living in sub-par housing infested with mold and pests^{xvi} as well as communities that border air-polluting industries.^{xvii}

It is also not coincidence that black, Latino, and Native American communities also disproportionately live in food deserts – neighborhoods that have the worst access to quality supermarkets with healthy and fresh food options.^{xviii} Supportive, accessible, and stable housing is a core building block of health and a quality of life that enables individuals and families to thrive.^{xix} Through discriminatory public policies and practices, neighborhoods where people of color dwell have repeatedly been placed at greatest risk of being less supported and resourced; isolated, devalued, and illness-inducing. The detrimental health toll of relegating people to live in built-environments that were designed to exclude them from both wealth and wellness-building resources and opportunities continues to be generationally cumulative and compounding.^{xx} Remedying these man-made health crises, born from historical injustices, requires both intentional and vigilant approaches, like AFFH, designed to bring about equitable change and tangibly level the playing field for those most affected.

AFFH: A critical tool to advance fair housing that should be preserved

In 2015, to strengthen the Fair Housing Act, a significant step toward improving AFFH's accountability and tracking its progress was made. Under the rule, program participants were required to submit to HUD an Assessment of Fair Housing, which replaced the Analysis of Impediments (AI) that was required prior to 2015.^{xxi} The new regulation offered HUD grantees a means for analyzing local and regional fair housing issues, known as the Affirmatively Furthering Fair Housing Assessment Tool.^{xxii} The tool includes guidelines that delineate the specific process of conducting required Assessments of Fair Housing (AFHs): program participants are equipped with instructions on how to identify patterns of segregation and access to opportunity. Due to the diversity of HUD grantees subject to the AFFH rule, HUD has developed separate assessment tools for use by public housing agencies, States and Insular Areas, as well as local governments. The latter is called the Local Government Assessment Tool.^{xxiii}

Within this tool, HUD provides local governments which receive Community Development Block Grants, HOME Investment Partnerships Program, Emergency Solutions Grants, or Housing Opportunities for Persons With AIDS formula funding from HUD, with baseline data and a mapping resource to analyze local housing needs, patterns of segregation, and access to opportunities. At the same time, the AFFH rule encourages program participants to complement baseline data analysis performed with the assessment tool with local knowledge, especially through extensive public engagement. Program participants are thus equipped with the flexibility necessary to formulate plans that, while furthering fair housing, can meet the specific housing needs of each community. In other words, the rule empowers local communities with the

flexibility and capacity to address access to opportunity and fair housing advancement while providing them with the resources to perform a robust assessment of fair housing in their community.

Attacks on AFFH are Groundless and Premature

In January 2018, HUD announced that it was suspending the obligation of local jurisdictions to file plans under the AFFH rule, and in May 2018, it withdrew the Local Government Assessment Tool that local governments were required to use when submitting their AFHs.^{xxiv} HUD justified the withdrawal of the tool by stating that HUD's analysis of 49 initial AFH submissions suggested a pattern of problems that included: "(a) inadequate community participation; (b) insufficient use of local data and knowledge; (c) lack of regional analysis; (d) problems with identification of contributing factors; (e) prioritization of contributing factors; (f) problems with setting goals; and (g) inadequate responses due to duplication of questions."^{xxv} Most importantly, HUD concluded that the assessment tool is not efficient because of the high failure rate among initial submissions and the high level of technical assistance required of HUD.

Additionally, in August 2018, HUD published a notice inviting public comments on amendments to existing AFFH regulations. As stated in the August notice, the proposed changes to the rule would "(1) minimize regulatory burdens; (2) create a process that would be focused predominantly on positive outcomes; (3) promote local control; (4) increase housing choice through greater housing supply; and (5) encourage a better use of HUD resources."^{xxvi}

HUD claims that the AFFH rule is very prescriptive and that the Local Government Assessment Tool is ineffective in assisting the formulation of fair housing plans by local jurisdictions. It also claims that the AFFH rule discourages the production of affordable housing.^{xxvii} Both the withdrawal of the Local Government Assessment Tool and the amendments to the AFFH that the August notice contemplates are premature and based on premises that fail to justify such actions.

The Department's contention that the AFFH rule is ineffective is suspect and merits significant scrutiny. It both ignores the positive steps taken to date and the fact that AFFH rule has not been given enough time to be meaningfully implemented. Since 2015, just a small number of the roughly 1,200 local jurisdictions required to comply over the coming years have begun to implement their anti-discrimination plans.^{xxviii} Further, HUD has withdrawn the assessment tool after evaluating only 49 initial submissions. The results of HUD's evaluation of the AFFH rule are in stark contrast with those of academic research which highlights the positive aspects of the rule. In particular, Steil and Kelly's 2017 study finds that, compared with the AIs that localities filed prior to the 2015 AFFH rule, the plans filed under the 2015 rule contain more concrete and robust goals, measurable objectives, and innovative policies.^{xxix} This is partly because the elements of the rule, including HUD's "pass-back" system, propelled participants to commit to meaningful goals reflecting specific local problems.^{xxx} Researchers also discovered that jurisdictional measures of local motivation are positively associated with goals that enhance

household mobility or propose place-based investments. Moreover, local capacity is positively correlated with measurable objectives or new policies.^{xxxix} This predicts a strong future for AFFH that should not be ignored. The study also stresses that the fact that some of the initial AFHs were rejected by HUD for failure to comply with the new rule is a sign that the new rule's standards are rather rigorous and effective and should not be interpreted as evidence of the rule's failure.

The current rule allows for continuous feedback from HUD. While some plans are accepted at an early stage, others require multiple iterations and refinements in order to meet fair housing requirements. The process entails the use of both HUD's and local governments' resources. HUD's resources and technical assistance are particularly critical when local governments lack local capacity or access to independent consultants for the formulation of their plans. HUD's claim that it lacks sufficient resources for providing technical assistance to local governments is not ground for either (1) withdrawing the technical tool, or (2) amending the rule by handing more responsibility over to localities. Local governments may not have the resources—such as sufficient personnel or data and analytical capability—that are necessary for setting solid and measurable priorities that are compliant with fair housing goals. Without a doubt, withdrawing the technical tool relieves HUD from the burden of providing continuous feedback and technical support to localities' AFH submissions. But this comes with important costs both to local governments—which must rely on their own resources to formulate fair housing compliant plans—and, ultimately, to their own communities.

The August 2018 notice asks whether localities should develop and use data of their choice when formulating plans. The current rule already encourages local governments to complement HUD-provided data with local data and soft knowledge—much of which is obtained through required community engagement and participation—to conduct analyses of the barriers to residential integration, access to opportunities, and the housing needs of their communities. Needs and barriers—typically in the form of zoning regulations—vary greatly across different housing markets. Local governments also operate under different sets of rules across different states. Leaving complete discretion to local governments in the development and choice of baseline data to assess fair housing issues in their jurisdictions is not warranted for the following reasons:

(1) Localities may not have the capacity and resources to develop the indicators already contained in the current Local Government Assessment Tool. Not only was the assessment tool developed with the extensive, complex computation and mapping of specific social and housing indicators with data coming from several sources,^{xxxix} the tool is also intended to be continuously revised and updated in order to provide timely, accurate, and reliable information. Expecting localities to develop their own data would unnecessarily add costs to their budgets.

(2) Allowing local discretion in the choice of data supporting meaningful, measurable fair housing goals may weaken clarity, consistency, and the accountability structure currently

embedded in the AFFH rule thus significantly reducing the public benefits that the FHA mandates.

(3) Localities resistant to FHA compliance may arbitrarily produce plans that to meet or partially meet fair housing goals, by intentionally prioritizing certain indicators and omitting others.

(4) HUD would have to devote a much larger amount of resources to evaluate plans that are based on different sets of data and criteria rather than on uniform analytical standards. The standardized process for fair housing planning that the current rule supplies along with the baseline, consistent, and uniform data embedded in the assessment tool allow for an effective and streamlined evaluation of AFH submissions and a more efficient use of resources.

The August 2018 notice of proposed rulemaking states that amending AFFH would create a process that is focused primarily on accomplishing positive results.^{xxxiii} In order to accomplish positive results, HUD must not downplay the critical importance of a robust and standardized baseline data analysis for assessing fair housing needs and setting goals and priorities. No effective plan can be formulated and yield promising results without this critical assessment stage. Rather than weakening the rule and withdrawing the assessment tool, HUD should seek to maximize the use of its resources in continuing to monitor the outcomes of AFH submissions, highlight best practices, and refine the assessment tool through an incremental process.

The notice also mentions that it seeks to encourage actions that increase housing choice, including through greater housing supply. Yet, there are no details on how this is intended to be accomplished and no specific questions in the notice hint at such a goal.

CONCLUSION

During the three years that it has been in effect, AFFH has already become an invaluable tool for the communities that have completed and submitted their first AFHs. The rule, as currently designed, provides essential and long overdue tools and processes to dismantle longstanding discriminatory public policies and practices that continue to prevent all U.S. residents from living in communities with the support and conditions that allow them to thrive. HUD appears to now be engaged in an arbitrary, capricious, and constitutionally discriminatory attempt to undo a regulatory provision that was adopted just three years ago, but which was built upon years of thoughtful, diverse stakeholder engagement and extensive empirical evidence. CAP strongly urges HUD to respect the careful, inclusive, and deliberative rulemaking process that it undertook to devise the 2015 rule, desist from making its currently proposed changes, and, instead, immediately resume with advancing AFFH's effective implementation.

Thank you for the opportunity to submit comments. Please do not hesitate to contact us at mzonta@americanprogress.org to provide further information.

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ⁱ National Low Income Housing Coalition. “HUD’s Enforcement of Affirmatively Furthering Fair Housing Assessed” (2013), available at <https://nlihc.org/article/hud-s-enforcement-affirmatively-furthering-fair-housing-assessed>.

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^x Caitlin Rooney, Charlie Whittington, and Laura E. Durso, “Protecting Basic Living Standards for LGBTQ People,” (Washington: Center for American Progress, 2018), available at <https://www.americanprogress.org/issues/lgbt/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/>.

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^{xii} Christy Mallory and Brad Sears, “Evidence of Housing Discrimination Based on Sexual Orientation and Gender Identity” (Los Angeles: The Williams Institute, 2016), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Housing-Discrimination-Complaints-2008-2014.pdf>.

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