



## Housing Assistance Council

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### Submitted via Regulations.gov

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

Re: Docket No. FR-6123-P-02  
Affirmatively Furthering Fair Housing

Dear Office of General Counsel:

The Housing Assistance Council (HAC) appreciates the opportunity to comment on the Affirmatively Furthering Fair Housing proposed rule by the Department of Housing and Urban Development (HUD). A nonprofit organization, HAC has been helping local organizations build affordable homes in rural America since 1971. With nearly 50 years as a thought leader and voice for rural America, HAC grounds its comments in the need for strong, consistent fair housing enforcement in rural places.

HAC has consistently supported efforts to implement the Affirmatively Furthering Fair Housing (AFFH) requirement and its ultimate goal of ensuring that all have access to decent, safe and affordable housing in strong and healthy communities. To that end, HAC strongly supports the existing AFFH regulation and opposes amending it.

### **The proposed revised definition of AFFH is inadequate.**

Current patterns of segregation, restrictions and housing discrimination were established with the active participation of all levels of government over the course of our nation's history.<sup>1</sup> Affirmative steps to change these patterns cannot be expected to be easy. The 2015 regulation's definition of affirmatively furthering fair housing sought to better enable local communities to "address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated

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<sup>1</sup> Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: Liveright Publishing Corp., 2017).

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and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.”<sup>2</sup> Jurisdictions were not expected to achieve these goals quickly, or easily, or without assistance from many other entities. But they were expected to have these ideals in mind as they analyzed their communities and determined what steps they could take.

In contrast, the definition now proposed – “acting in a manner consistent with reducing obstacles within the participant’s sphere of influence to providing fair housing choice” (§5.150(a)(1)) – asks very little. It omits any vision of a truly fair community, contemplating only the actions that can be taken by a single entity without any far-reaching goals. Taken with the rest of the proposal’s weakened provisions, this definition inappropriately downgrades the importance of AFFH activities.

**The proposed “comparison metrics” are not related to fair housing.**

HUD proposes to measure whether a jurisdiction is affirmatively furthering fair housing by examining its lack of adjudicated fair housing violations, the availability of affordable housing and the availability of affordable housing in decent condition. Yet none of these is a determinant of fair housing choice.

*Absence of adjudicated violations*

First, the regulations propose to consider whether a jurisdiction or PHA “has in the past five years been found by a court or administrative law judge in a case brought by or on behalf of HUD or by the United States Department of Justice to be in violation of civil rights law ...” (§5.155(d)(3)(i)). A lack of filed claims does not indicate a lack of violations, however. Those who experience fair housing violations may not report them for various reasons, including a fear of retaliation. This may be even more true in rural places where a complainant may have few alternative housing options or may expect to encounter a violator in the grocery store or at church.<sup>3</sup>

Furthermore, adjudicated cases represent only a fraction of fair housing claims. Three-quarters of housing discrimination complaints are processed by private fair housing groups rather than government agencies.<sup>4</sup> Even when a case is brought by or on behalf of HUD or the Justice Department, the parties may settle before adjudication. In fact, this regulatory provision would give jurisdictions an even stronger incentive to settle.

*Adequate supply of affordable and available housing*

The mere existence of adequate, available affordable housing does not mean such housing is equally available to everyone. Its presence provides no protection for people in the classes protected by the Fair Housing Act. Fair housing violations can occur whether a jurisdiction has an overabundance of housing or a shortage, and the existence of units is no substitute for affirmative steps towards making those units available to everyone equally. Affordability is not a proxy for lack of discrimination or for AFFH.

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<sup>2</sup> 24 C.F.R. §5.152.

<sup>3</sup> Leslie R. Strauss, “Working Towards Fair Housing in 2018’s Rural America,” *Rural Voices*, May 2018, p. 12, <http://www.ruralhome.org/storage/documents/rural-voices/rv-may-2018.pdf> (accessed 2/24/20).

<sup>4</sup> National Fair Housing Alliance, *Defending Against Unprecedented Attacks on Fair Housing: 2019 Fair Housing Trends Report*, p. 8, <https://nationalfairhousing.org/wp-content/uploads/2019/10/2019-Trends-Report.pdf> (accessed 2/24/20).

*Adequate supply of affordable, available, decent quality housing*

Just as an adequate supply of affordable and available housing does not eliminate discrimination, neither does an adequate supply of decent quality affordable housing. A landlord can discriminate based on membership in a protected class even if the jurisdiction has ample available housing with complete plumbing, or housing accessible to people with disabilities.

HUD says it is “considering using worst-case housing needs data, which documents lack of kitchen facilities and adequate plumbing and overcrowding, to determine how well a jurisdiction is encouraging a supply of housing that is of sufficient quality.”<sup>5</sup> In fact, however, only a small proportion of homes in the U.S. have these housing quality problems, and the rate of inadequacy is slightly higher in rural places than in metropolitan areas. Poor quality housing is disproportionately occupied by minorities in rural areas, and housing on Native American lands and in Alaska is especially likely to lack complete plumbing.<sup>6</sup> Not only is there no logical connection between these conditions and current discrimination, but HUD’s proposal to disadvantage these areas in funding competitions means their residents would be penalized for the past discrimination that led to the existence of these poor housing conditions, rather than receiving sufficient assistance to eliminate these inadequacies.

**Ranking jurisdictions would be counterproductive.**

HAC does not support HUD’s proposal to rank jurisdictions against each other. This would provide no useful information about each jurisdiction’s affirmatively furthering fair housing activities or progress. HUD suggests it would “encourage collaboration and cooperation among all stakeholders within a jurisdiction.” Competitive rankings would, however, discourage regional collaboration across jurisdictions, which can also be valuable to further fair housing.

Rankings would also give jurisdictions incentives to minimize their fair housing realities rather than address them. For example, to improve its ranking a jurisdiction would want to divert fair housing claims away from the adjudication process. Likewise, measuring “which jurisdictions had the greatest improvement in their metrics over the past five years”<sup>7</sup> could encourage them to select the easiest goals rather than the most important.

**The proposal focuses on “obstacles” that are unrelated to fair housing choice and often benefit protected classes.**

HUD proposes to allow jurisdictions to identify and explain their own fair housing “obstacles.” It effectively encourages them to rely on its list of 16 obstacles by eliminating the requirement to provide explanations if they select those items. Most of the “obstacles” on HUD’s list, however, are not directly

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<sup>5</sup> Office of the Secretary, U.S. Department of Housing and Urban Development, “Supplementary Information, Proposed Rule, Affirmatively Furthering Fair Housing,” *Federal Register*, January 14, 2020, p. 2048, <https://www.govinfo.gov/content/pkg/FR-2020-01-14/pdf/2020-00234.pdf> (accessed 2/24/20).

<sup>6</sup> Housing Assistance Council, *Taking Stock: Rural People, Poverty, and Housing in the 21<sup>st</sup> Century* (Washington, DC: Housing Assistance Council, 2012), pp. 45-46, [http://www.ruralhome.org/storage/documents/ts2010/ts\\_full\\_report.pdf](http://www.ruralhome.org/storage/documents/ts2010/ts_full_report.pdf) (accessed 2/24/20).

<sup>7</sup> Office of the Secretary, p. 2049.

related to fair housing. Instead, they are things that can increase the cost of building housing, such as rent control, building codes and environmental regulations.

The list of obstacles is inappropriate for three reasons. First, eliminating requirements that increase development costs would not necessarily increase the supply of affordable housing – it would still be more profitable for builders to develop high-end housing rather than affordable units. Second, as explained above, there is no direct link between the supply of affordable housing and the existence of fair housing choice. Third, most of these restrictions benefit people in the Fair Housing Act’s protected classes: for example, rent control helps keep their housing costs affordable, energy efficiency mandates keep their utility costs affordable, labor requirements may create jobs for them and environmental regulations help ensure they have clean water and air.

HAC supports the requirement and process provided in the 2015 regulations to identify and target fair housing issues and the factors contributing to them. The 2015 regulations do not require jurisdictions to address issues or factors beyond their control, but they recognize that knowledge of the larger picture informs choices about what actions to take.

**Jurisdictions should be required to consider AFFH in more detail than the consolidated plan process allows.**

HUD proposes to eliminate the 2015 regulations’ requirements for a public participation process that considers AFFH specifically and in detail, and to fold fair housing into the existing consolidated plan process. Given our nation’s history of official and unofficial discrimination, the urgency of addressing fair housing issues cannot be overemphasized. This is not, and should not be, a quick or easy task. Fair housing concerns deserve the detailed examination leading to the development of an Assessment of Fair Housing (AFH) as prescribed in the 2015 regulations.

**PHAs’ certifications would be meaningless.**

While public housing authorities (PHAs) have opportunities to further fair housing goals through their administration of the public housing and vouchers programs, HUD proposes to allow a PHA simply to “certify that it has consulted with the local jurisdiction on how to satisfy their obligations in common to affirmatively further fair housing, and that it will carry out its plan ..., and that it will affirmatively further fair housing in its programs and in areas under its direct control” (§903.7(o)(1)). Unless it has conducted its own Assessment of Fair Housing, however, a PHA has no clear direction for its AFFH efforts. In addition, because the proposed rule would not require PHAs to provide any information regarding their actual activities, it would be impossible to hold them accountable.

**Conclusion**

Working towards equality is essential. It is inherently the right thing to do – and it is crucial because research shows children’s life chances are deeply impacted by the neighborhoods where they grow up. Taking active steps to eliminate discrimination and segregation in homes and neighborhoods through enforcement of the Affirmatively Furthering Fair Housing requirement leads to inclusive and equitable rural, urban and suburban communities, where all residents can thrive.

Affirmatively Furthering Fair Housing

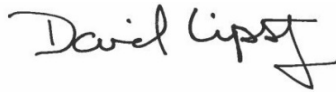
Docket No. FR-6123-P-02

Page 5

For the reasons stated in this letter, HAC urges HUD to preserve the Affirmatively Furthering Fair Housing regulation adopted in 2015.

If you have questions or would like to discuss these comments further, please feel free to contact me.

Sincerely,

A handwritten signature in black ink that reads "David Lipsetz". The signature is written in a cursive style with a large, stylized initial "D".

David Lipsetz  
Chief Executive Officer

DL/lrs