

March 16, 2020

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

*Via regulations.gov*

**Re: Affirmatively Furthering Fair Housing, Docket No. FR 6123-P-02, RIN 2577-AA97**

To Whom it May Concern:

The 14 undersigned consumer, civil rights, community, housing, and other public interest organizations strongly oppose the Department of Housing and Urban Development (HUD)'s proposed Affirmatively Furthering Fair Housing (AFFH) rule ("2020 proposed rule"). As described in more detail below, the proposed rule fails to comply with HUD's statutory AFFH mandate, ignores fundamental principles of fair housing, abandons important provisions of the 2015 AFFH regulation that allowed for meaningful input by community residents and preserved local decision-making, and advances an ill-conceived and inappropriate deregulatory agenda that will neither address our nation's significant and long-standing barriers to fair housing nor result in an expanded supply of housing affordable to low- and moderate-income people or available to members of protected classes under the Fair Housing Act.

I. 2020 Proposed Rule is Not About Fair Housing

The 2020 proposed rule cannot accurately be characterized as a fair housing rule and will not result in any meaningful implementation of the Fair Housing Act's AFFH provisions. The proposed changes are inconsistent with HUD's statutory obligations under the Fair Housing Act to affirmatively further fair housing. The regulatory framework put forward in the 2020 Proposed Rule would not only be a radical reversal of the important advances embodied in the 2015 AFFH rule, but would even be less effective than the minimal AFFH process that was in place from 1995 to 2015, which the Government Accountability Office (GAO) found to be an ineffective means of carrying out HUD's fair housing obligations.

HUD describes the stated goal of this proposed rule as to "promote and provide incentives for innovations in the areas of affordable housing supply, access to housing, and improved housing conditions."<sup>1</sup> The proposal provides no consideration of the impact of a jurisdiction's policies and practices on members of protected classes in their community who have been historically excluded from housing opportunities. There is no discussion in the goals of how to address

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<sup>1</sup> 85 FR 2043 (proposed January 14, 2020)

housing challenges for protected classes or of how to increase housing opportunities for them, which is the very purpose of an AFFH rule and what the Fair Housing Act requires.

The 2020 proposed rule's approach is a drastic departure from the 2015 AFFH rule, which clearly defined AFFH as a means to address disparities, integrate communities, eliminate concentrated areas of poverty, and encourage compliance with civil rights and fair housing law; created a data-driven approach to assessing fair housing needs; required jurisdictions to take meaningful steps to achieve those goals; and incorporated measures to ensure accountability.

In contrast, almost all of the metrics in the 2020 proposed rule are unrelated to housing discrimination or the particular needs of the groups that the AFFH mandate is meant to address. HUD encourages jurisdictions to pick three "barriers" from a list of 16 pre-approved barriers. But the vast majority of these goals are unrelated to fair housing, and the rule does not require jurisdictions to conduct any analysis of the impact of any of the goals on members of protected classes. Under the proposed rule, a jurisdiction can successfully satisfy its AFFH requirements without considering problems of discrimination and exclusion in their communities.

Furthermore, the "inherent barriers" to fair housing choice included in the AFFH certification only explicitly mention one protected class – persons with disabilities -- but make no further attempt to directly connect disparities in access to housing opportunities with longstanding patterns of segregation and discrimination against other protected classes, or to more fully explore housing barriers faced by persons with disabilities.

## II. 2020 Proposed Rule Completely Ignores Segregation and the Reality of Historical Housing Discrimination within Our Nation's Communities

Examining and addressing inequities in our communities should be the primary focus of AFFH, but the 2020 Proposed Rule eliminates any discussion or analysis acknowledging the continuing role that residential segregation plays within communities across the country. Notably absent is any consideration of either the jurisdiction's own policies and practices affecting people in the protected classes, or the policies and practices of the private market. Nor does the rule include any consideration of ways to overcome historic patterns of housing segregation. In fact, it does not even mention segregation and only makes passing mention of discrimination. The word "segregation" only appears in a reference to the 2015 AFFH Rule. Under the 2020 Proposed Rule, a program participant could complete its AFFH certification without addressing (or even mentioning) the impact of housing segregation in a jurisdiction or region.

Pretending that segregation is not a relevant fair housing issue is wholly inconsistent with AFFH. In *N.A.A.C.P. v. Secretary of HUD*, the court noted that the Fair Housing Act's legislative history "suggests an intent that HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."<sup>2</sup> In order to further fair housing, HUD must first acknowledge the role that discriminatory policies and practices have historically

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<sup>2</sup> 817 F.2d 149, 155 (1st Cir. 1987) (emphasis added).

played, and continue to play, in our nation's communities, but the 2020 proposed rule completely eliminates this consideration.

### III. 2020 Proposed Rule Declares Local Resident Protections as Inherent Fair Housing Barriers without Explanation or Local Context

In the 2020 Proposed Rule, HUD characterizes important local resident protections, such as “certain types of rent control, arbitrary or unnecessary labor requirements, and unduly burdensome wetland or environmental regulations” as “inherent barriers to fair housing choice.”<sup>3</sup> The only mention of the fair housing in the goals section of the 2020 Proposed Rule purportedly “known barriers to fair housing-- such as burdensome governmental processes, the concentration of substandard housing stock in specific areas, or restrictions based on the source of a tenant's income”<sup>4</sup> HUD provides no context or explanation for how these important protections are actually connected to fair housing. Furthermore, HUD fails to define key terms (e.g., “labor requirements”), and includes terms that are inherently subjective (“unnecessary,” “unduly burdensome”).

The 2020 proposed rule does not even require jurisdictions to analyze barriers to fair housing within their communities. Instead, the 2020 proposed rule simply elevates the Administration's deregulatory agenda, rather than advancing housing opportunities for members of protected classes. The regulations that the rule targets as ‘barriers’ are important environmental, labor, and tenant protections to keep people safe and homes habitable. Local laws and policies should be examined in their proper local context. For example, rent stabilization laws in a particular community may help prevent the displacement of communities of color or persons with disabilities, and environmental regulations in certain areas are necessary to ensure that housing is safe and habitable. These requirements are not barriers but rather safeguards for all residents in those local communities, and HUD provides no basis for the claim that they are affecting fair housing choice. HUD should instead continue implementing the 2015 AFFH Rule, which takes the general approach of examining fair housing issues, contributing factors, and fair housing goals within local context and with the benefit of strong local community engagement.

### IV. 2020 Proposed Rule Eliminates Specific Community Engagement On Fair Housing Issues

The 2020 proposed rule removes a meaningful, inclusive fair housing planning process that specifically focuses on a jurisdiction's AFFH mandate. The proposed rule completely eliminates the separate AFFH-focused public participation process that was mandated in the 2015 rule, and which took place in advance of the Consolidated Planning process so that its results could inform the Consolidated Plan. The 2020 proposed rule assumes that the public participation in the Consolidated Plan process is sufficient for addressing AFFH-related concerns and issues. However, the Consolidated Plan's public participation process is designed to obtain input

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<sup>3</sup> 85 FR 2043 (proposed January 14, 2020)

<sup>4</sup> *Id.*

regarding housing and community development needs and assess which needs among the many should have the highest priority in the five-year Consolidated Plan cycle. Identifying and assessing specific fair housing issues, priorities, and goals entail different concepts and may require different stakeholders for an effective identification of AFFH needs.

Strong community participation ensures that program participants' resulting analysis and goals reflect the input of local stakeholders, including residents who are members of protected classes. Community participation that focuses on fair housing issues must remain distinct from community participation requirements in other planning processes. A separate community participation process ensures that people who are most impacted by the fair housing consequences of housing and community development decisions, and most directly affected by local barriers to fair housing, have a voice in the fair housing planning process. Without this, jurisdictions will likely fail to adequately analyze and adjust policies and practices that create or perpetuate discriminatory housing practices. The 2015 AFFH Rule created a process that emphasizes local public engagement on important fair housing issues such as segregation, disparities in access to opportunity, and disproportionate housing needs. We support the 2015 Rule's approach to community engagement because important issues regarding housing discrimination must receive due consideration.

#### V. 2020 Proposed Rule Conflates Affordable Housing and Fair Housing

The 2020 Proposed Rule conflates affordable housing and fair housing concerns, and fails to provide solutions for either. It considers housing that might be "affordable" to be the same as housing that is available to people in the Fair Housing Act's protected classes based on race, color, religion, national origin, sex, familial status, and disability. Among other flaws in this approach, the 2020 proposed rule fails to acknowledge or address the very real barriers to fair housing faced by higher-income members of protected classes, such as mortgage lending discrimination and real estate steering.

During the subprime lending boom of the late 1990s and early 2000s, we saw communities of color flooded with toxic, unsustainable subprime loans. High income borrowers of color were more likely to receive subprime loans than low income white borrowers. The result of these discriminatory practices was an enormous wave of foreclosures that could have been avoided if borrowers had had access to the conventional credit for which they qualified, and an unprecedented loss of wealth in communities of color. Further, a recent investigation on Long Island by Newsday found high levels of racial steering by real estate agents in that region. Agents steered testers posing as prospective buyers to segregated neighborhoods based on the testers' race and national origin, not based on which homes were affordable to them or which neighborhoods they expressed interest in. These barriers had nothing to do with income or affordability. They are very real barriers faced by members of protected classes that the proposed rule completely ignores. Although affordable housing is extremely important, and often complementary to fair housing concerns, the distinct and essential AFFH mandate this rule is meant to implement is to specifically address fair housing needs.

The 2020 proposed rule centers on the flawed premise that simply removing regulatory requirements will increase the supply of affordable housing, and a resulting increase in the supply of affordable housing will address fair housing problems. By characterizing local protections put in place to keep housing safe and affordable as barriers to fair housing, the 2020 proposed rule will likely not result in an increase in affordable housing for those who need it most - low and moderate income people. And it is even less likely to reduce or eliminate discriminatory policies or entrenched segregation as AFFH requires. In its current form, the 2020 Proposed Rule will fail both in affirmatively further fair housing and in having any meaningful positive impact on the supply of affordable housing in a community.

In sum, if HUD adopts this proposed rule, it will be failing to uphold its statutory mandate to affirmatively further fair housing. We strongly urge HUD to withdraw the 2020 proposed rule and instead reinstate and fully implement the 2015 AFFH rule.

Sincerely,

Americans for Financial Reform Education Fund  
California Reinvestment Coalition  
Center for Community Progress  
Center for NYC Neighborhoods  
Consumer Action  
Consumer Federation of America  
Georgia Watch  
Mountain State Justice  
NAACP  
National Consumer Law Center (on behalf of its low income clients)  
New Jersey Citizen Action  
North Texas Fair Housing Center  
People's Action  
Public Law Center