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Regulations Division
Office of General Counsel
US Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410-0050

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

To Whom It May Concern:

I am writing on behalf of the Fair Housing Justice Center (FHJC) to express our strong opposition to HUD's proposed new Affirmatively Furthering Fair Housing (AFFH) regulation, as described in FR-6123-P-02. The FHJC is a regional non-profit civil rights organization dedicated to eliminating housing discrimination; promoting policies and programs that foster open, accessible, and inclusive communities; and strengthening enforcement of fair housing laws in New York City and the seven surrounding New York counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester (New York City Region).

For nearly fifteen years, the FHJC has provided fair housing complaint intake and investigative services to the New York City Region, including assisting over fifteen hundred individuals and organizations with housing discrimination complaints to exercise their fair housing rights. The FHJC implements a full-service fair housing program which conducts proactive testing investigations to ferret out systemic housing discrimination. These investigations have led to legal challenges that have changed the way many private housing providers and government agencies do business and brought them into compliance with fair housing laws. These legal challenges have opened over 65,000 housing units to previously excluded populations and resulted in a total monetary recovery of nearly \$40 million in damages and penalties. In addition, the FHJC advocates for policies and programs that advance the development of more open, accessible, and inclusive communities; engages in outreach and educational activities to increase awareness on fair housing rights; and provides technical assistance, training, and other tools to upgrade and strengthen fair housing law enforcement.

The AFFH provision of the Fair Housing Act¹ is an essential tool for creating a more fair, equitable, and integrated nation that Congress envisioned when it passed the Act in 1968. Congress gave HUD the mandate to implement those provisions, and they are a critical component of HUD's mission to create "strong, sustainable, inclusive communities."² By adopting these provisions, Congress tasked HUD with the job of ensuring that its programs are free from discrimination. Congress also wanted HUD and its grantees to work actively to dismantle residential segregation and to redress the harms segregation imposed on people of all races and national origins under the Act. Since 1968, Congress has amended the Act to expand its protections while maintaining the obligation and commitment of the AFFH provision.

HUD has largely ignored this mandate for most of the 52 years since the Fair Housing Act was passed. In 2015, after extensive input from stakeholders and pilot testing, HUD adopted a regulation that provided its grantees with the clarity, guidance, and tools they had requested in order to better fulfill their fair housing obligations. HUD also provided grantees the data and mapping capacity needed to understand how segregation and discrimination were manifested in their communities, a framework that focused their analysis on relevant fair housing problems, a requirement for robust community engagement to ensure that the voices of those most affected by these problems were front and center in this debate, and a requirement to identify specific goals and priorities, with metrics and timelines for assessing progress. At the same time, the regulation allowed grantees the flexibility to decide for themselves what priorities to set, what goals to adopt, what metrics to use, and what strategies to employ. In all of these ways, the 2015 regulation was a dramatic improvement over HUD's previous approach, responded to the specific critiques identified by the Government Accountability Office (GAO), and provided for a bottom-up approach to achieving the vision set out by Congress in the Fair Housing Act. Although it was only in effect for a short time, the 2015 rule showed real promise.

New York City is the third most segregated area for the African American population and the second most segregated area for Latinx and Asian American populations in the United States. Tens of thousands of housing providers continue to violate fair housing laws with impunity, often keeping entire neighborhoods and buildings closed to protected populations in the New York City Region. A testing investigation conducted by *Newsday* resulted in the November 2019 report entitled "Long Island Divided." The report illustrated how racial steering and racial discrimination by the real estate industry was still pervasive and persistent. FHJC testing investigations have uncovered similar discrimination in rental housing, nursing homes, assisted living facilities, retirement housing, housing cooperatives, and lending institutions. FHJC testing investigations have also documented continuing discrimination in the operation of affordable and subsidized housing programs and in land-use and zoning practices by suburban communities and housing authorities.

And while illegal housing discrimination has become more subtle and difficult to detect, it remains a harsh reality for many New Yorkers who seek nothing more than a decent, safe, and affordable place to call home. Residential racial segregation perpetuates inequalities, reinforces discrimination and otherness, and creates perilous consequences for all of us. To the people and communities directly

¹ (42 USC 3608 (d) and (e))

² <https://www.hud.gov/about/mission>

impacted, it does immense damage. It is punishing, limiting, costly, and humiliating. And illegal discrimination is not only based on race. Immigrants, LGBTQ populations, people with disabilities, survivors of domestic violence, families with children, religious minorities, and other marginalized and vulnerable populations continue to face housing discrimination as well. Residential segregation is the foundation for many of the inequalities in our society, making fair housing a requisite cornerstone of a just society is one of the most pressing social justice issues of our time.

Now HUD is proposing to remove the 2015 rule and abandon its statutory AFFH obligations. For the reasons set out below, the FHJC believes HUD's proposed new AFFH regulation is misguided and unworkable. We urge HUD not to move forward with this proposal, but rather to reinstate the 2015 AFFH regulation and resume its implementation and enforcement.

The Proposed Rule is Contrary to the Mandate of Section 3608 of the Fair Housing Act.

Although the Fair Housing Act does not include a definition of "affirmatively furthering fair housing," the legislative history of the Act³ and subsequent court decisions⁴ have clarified what Congress intended with this provision. In 1968, Senator Edward Brooke (R-Massachusetts), one of the key sponsors of the Fair Housing Act, testified he was deeply concerned that "American cities and suburbs suffer from galloping segregation, a malady so widespread and so deeply imbedded in the national psyche that many Americans...have come to regard it as a natural condition." The late Senator Brooke asserted that the federal government had been the prime force in creating and sustaining this segregation when he stated "[f]irst it built the ghettos; then it locked the gates; now it appears to be fumbling for the key. Nearly everything the Government touches turns to segregation, and the Government touches nearly everything."⁵

The AFFH requirement in the Fair Housing Act consists of three key requirements; HUD must ensure that:

1. Neither HUD nor its grantees are discriminating in their housing and community development policies and programs;
2. HUD policies and programs work to reduce residential segregation; and
3. HUD programs expand housing choice, ensure greater equity, and increase access to opportunity.

The proposed new AFFH rule does none of these things. Instead, it focuses on reducing housing production obstacles within grantees' "spheres of influence" to provide individuals and families housing choice "within their means." It does not consider discrimination. It does not consider segregation and access to opportunity. It limits its focus to housing development and fails to consider the impact of community development activities that help form the neighborhood context and may have significant

³ See, for example, 114 Cong. Rec. 2276-2707 (1968)

⁴ Particularly pertinent court decisions on this issue include *Trafficante v. Metro. Life Insurance* (409 U.S. 205, 211 (1972)), *NAACP, Boston Chapter v. HUD* (817 F.2d at 154), and *Otero v. New York City Housing Authority* (484 F.2d at 1134).

⁵ Senator Edward Brooke, 114 Cong. Rec. S2280 (1968)

impact on access to opportunity. It does not require grantees to take any steps to analyze or understand local fair housing issues that may be barriers to housing choice. For all these reasons, the proposed rule fails to meet the statutory mandate of Section 3608 of the Fair Housing Act.

The FHJC serves 65% of the New York State population and roughly 4% of the United States population. Thousands of New Yorkers face discrimination while attempting to secure a place to live. Discrimination in the housing market not only limits housing choice, but it creates massive inequities in the distribution of resources, services, and opportunities in neighborhoods. It contributes to disparities across a variety of protected classes, such as race, national origin, disability, sex., etc. New York is ranked in the top ten most racially segregated metropolitan regions in the United States.⁶ Our region suffers from a painful history of discrimination, segregation and concentrated poverty. If HUD does not hold states and local jurisdictions accountable to implement their legal duty to affirmatively further fair housing, this history will not be remedied; housing discrimination and residential segregation, along with the attendant inequalities will persist; and the promise of the Fair Housing Act will remain largely unfulfilled.

The Proposed Rule Abandons Important Aspects of the 2015 AFH Rule.

The 2015 rule incorporated a number of elements that helped to ensure that both the process of developing an Assessment of Fair Housing (AFH) and the content of that plan focused on the major barriers to fair housing in a community and outlined concrete steps for overcoming them. Because of these elements, the 2015 rule was a significant improvement over the previous Analysis of Impediments (AI) process and helped jurisdictions chart a path for meaningful action to fulfill their fair housing obligations.

By setting aside the 2015 rule and the AFFH tool for use by local jurisdictions, HUD has intentionally signaled to local communities that they need not take their AFFH requirements very seriously or implement meaningful action steps to reduce residential segregation and repair the harm that housing discrimination has inflicted and continues to inflict on various populations. This position is supported by FHJC's experience in reviewing and commenting on New York City's recent effort to implement an AFH and ultimately produce an AI, as currently required by HUD. Our organization prepared formal comments (attached) that NYC's draft *Where We Live NYC* report, the name of its Assessment of Fair Housing, not only fell short of what would have been required by the 2015 rule (a rule the City publicly stated it would try to observe for its assessment despite HUD's return to the less stringent and much discredited AI requirement) but NYC even failed to live up to basic guidance in HUD's *Fair Housing Planning Guide* for conducting a meaningful AI. In its assessment of fair housing, NYC failed to examine its own policies and programs through a fair housing lens in order to determine whether they were reinforcing segregation and creating barriers to housing choice or reducing segregation and expanding

⁶ The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census
<https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf>

housing opportunities. We identified many fair housing issues and at least 15 action items that the City of New York failed to adequately address in its draft report and plan.⁷

The proposed new rule eliminates essential elements of a fair housing assessment and allows recipients of federal funds to largely disregard their legal responsibility to address barriers to fair housing in any meaningful way. The proposed rule would weaken, not strengthen, implementation of the important AFFH provision of the Fair Housing Act.

The Proposed Rule Could Harm FHIP-Funded Fair Housing Organizations and Fair Housing Enforcement.

Under the requirements of the proposed rule, HUD would conduct an annual jurisdictional risk assessment⁸, sorting jurisdictions into several groupings based on population growth and housing market conditions and ranking them based on an analysis of various factors unrelated to fair housing. It would then divide each grouping into three categories, deeming those at the top “outstanding AFFH performers” and those at the bottom “low AFFH performers.” HUD states that outstanding performers would be eligible for certain benefits, including bonus points on applications for competitive funding programs. In the description of this provision in the preamble to the rule, HUD specifically cites the Fair Housing Initiatives Program (FHIP) as one of these. Further, it suggests that for FHIP and possibly other programs, those bonus points would be awarded to applicants located in top performing jurisdictions.

FHIP is a highly competitive program and a few points on an application can make the difference between an applicant receiving funding or not. The notion that an applicant’s score could be increased based not on their own performance or the competitiveness of their application, but by factors outside their control – as the outcome of the proposed jurisdictional risk assessment would be – is unfair and inappropriate. Applicants should be evaluated based on their own performance and the strength of their applications and existing program, not on extraneous and unrelated factors outside of their control.

In addition, the very jurisdictions that are deemed “low-ranking” may need the greatest assistance in improving their fair housing performance, which a FHIP-funded group could provide. It would be counter-productive to decrease the resources available to local fair housing organizations in jurisdictions that are “low-performing,” as these may be the very organizations that the jurisdiction should rely upon to make necessary improvements.

The Proposed Rule Wrongly Exempts Public Housing Authorities from AFFH Compliance.

Under the proposed rule, public housing authorities (PHAs) would be virtually exempt from any meaningful requirements to affirmatively further fair housing.

⁷ FHJC also noted in its comments how our role, as the only full-service fair housing organization (FHIP-funded) based in NYC was greatly diminished from the role played by fair housing organizations in New Orleans, Los Angeles, and Philadelphia which were all following the requirements of the 2015 AFH rule.

⁸ See proposed AFFH rule at §5.155 Jurisdictional Risk Assessment.

PHAs manage critical affordable housing resources in their local communities, providing much-needed housing opportunities for members of protected classes. It is crucial that they undertake a careful analysis of their programs and policies in order to ensure that they are not discriminating and are not perpetuating segregation. The proposed rule would set back efforts to ensure that PHAs are fulfilling their fair housing obligations in a meaningful way.


Over the past fifteen years, the FHJC has investigated several public housing authorities in our region. These investigations have resulted in legal challenges to the administration of Section 8 rental assistance programs in the Town of Smithtown (Suffolk County) as well as the Towns of Yorktown and Eastchester (Westchester County). Our investigations yielded evidence that all three predominantly white suburban Towns maintained and enforced discriminatory residency preferences in the operation of their Section 8 Housing Choice Voucher Programs. These preferences created extended waiting periods for vouchers for African American and Latinx applicants when compared to White applicants. In two of these areas, the FHJC alleged intentional race discrimination based on the PHA's history of excluding non-white applicants for subsidized housing and/or knowledge of the racial barriers its policies created and refusal to eliminate them. Some public housing authorities continue not to abide by the mandates of the Fair Housing Act. HUD has no authority, absent Congressional direction, to exempt these entities from their statutory duty to affirmatively further fair housing.

Conclusion

The AFFH provisions of the Fair Housing Act mandate that HUD should enact policies and use its programs to expand housing choice, reduce residential racial segregation, and build more open, accessible, equitable, and inclusive communities. HUD must take this mandate seriously by requiring states and local jurisdictions to fully implement their AFFH duties in a meaningful manner. This proposed rule, however, falls short of accomplishing this goal. It represents a serious reversal in civil rights enforcement and should be abandoned. We urge HUD to withdraw this proposed rule and immediately reinstate the 2015 AFFH regulation.

Thank you for the opportunity to submit these comments. If you have questions or need additional information, please contact Fred Freiberg, FHJC Executive Director at (212) 400-8201.

Sincerely,



Fred Freiberg, Executive Director
Fair Housing Justice Center, Inc.