ANTI-DISCRIMINATION CENTER, INC.

"ONE COMMUNITY, NO EXCLUSION"

April 24, 2023

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

Re: Proposed "Affirmatively Furthering Fair Housing" rule [Docket No. FR-6250-P-01]

Dear Office of General Counsel:

I am the executive director of the Anti-Discrimination Center (ADC). The federal False Claims Act action that ADC brought against Westchester County for falsely representing that it had affirmatively furthered fair housing was the case that brought the theretofore dormant affirmatively furthering fair housing (AFFH) requirement back from the dead.[1] We have been following AFFH developments ever since.

In the 2015 Rule, as ADC was obliged to note during the public-comments stage that "HUD: (a) continues to fetishize analysis over action; (b) ignores the well-documented historical record of entrenched resistance to AFFH; (c) fails to approach the rule-making process as an exercise in effective law enforcement; and (d) indulges in the discredited premise that 'buy-in' to genuine AFFH will be simple and painless."[2]

The current Proposed Rule represents an important set of substantial improvements over the 2015 Rule. I will mention only one in this introductory section: the definition of segregation. It would not be surprising to the general public that: "Racial segregation includes a concentration of persons of the same race regardless of whether that race is the majority or minority population

[1] *See U.S. ex rel. Anti-Discrimination Center v. Westchester County*, 06-cv-2860 (S.D.N.Y.). The decision by the Court granting ADC's motion for partial summary judgment – cited by the Proposed Rule, 88 FR at 8522 – found that the AFFH certification was not supposed to be "a mere boilerplate formality," *Anti-Discrimination Center*, 668 F. Supp. 2d 548, 569 (S.D.N.Y. 2009); that Westchester had "utterly failed" to meet its AFFH requirements, *Id.* at 563; that "each time the County submitted a request for payment of [housing and community development] funds it made an impliedly false certification, *Id.* at 566; and, as such, Westchester had, as a matter of law, made claims to the United States government that were "false or fraudulent." *Id.* at 571. As a result of the litigation, a historic housing desegregation consent decree was entered against Westchester. Because the matter had been brought under the False Claims Act, the responsibility for enforcement fell to the Government. Unfortunately, neither HUD, its counsel (the U.S. Attorney for the Southern District of New York), nor the HUD-nominated and Court-appointed Monitor had the political backbone to enforce in court the central obligation of the decree requiring Westchester to force its many segregated-White municipalities to eliminate their exclusionary zoning. *See, e.g.,* this 2021 article describing some of the sad history.

[2] *See* Comment ID HUD-2013-0066-0640, at 1.

in the geographic area of analysis."[3] Likewise, it would not be surprising to the general public that: "[I]n a community where persons of one race (*e.g.*, White) are concentrated in one neighborhood and persons of another race (*e.g.*, African American) are concentrated in a different neighborhood, racial segregation exists in each of the neighborhoods."[4] But HUD is a specialized environment. It is encouraging that HUD has resisted the pleas of neo-segregationists inside and outside of the agency to the effect that some types of racial or ethnic segregation are of the "good kind." On the contrary, one can respect an individual's actual, protected, and/or enable choice as to residential location, whatever it may be, without romanticizing the segregated neighborhood patterns created and maintained as the *ne plus ultra* of post- World War II White supremacy, patterns that remain as a combination of that legacy and more recent governmental actions and failure to act that have perpetuated segregation.

Despite the improvements – and, to reiterate – there have been many – ADC does have concerns about, and believes there needs to be clarifications to, the Proposed Rule.[5] Due to the press of time, ADC is not able to submit a comprehensive list.

1. The failure to mandate.

HUD states early in the Preamble that, "This proposed rule does not dictate the particular steps a program participant must take to resolve a fair housing issue. Rather, the proposed rule is intended to empower and require program participants to meaningfully engage with their communities and confront difficult issues…"[6] While the Proposed Rule does more than previous rules to encourage program recipients to "confront difficult issues," it is a foundational error for the Proposed Rule to fail to mandate at least some steps *unless a program participant can show by clear and convincing evidence that a particular mandated step would not constitute a meaningful fair housing goal for the program participant and would not contribute to meaningful fair housing outcomes for that program participant.* In essence, this would create a rebuttable presumption that certain goals constitute required components of each "Equity Plan."[7]

The reality is that there is a more than 50-year history of most program recipients *not* taking meaningful steps to address racial segregation. And that failure is not a function of the program participant's lack of information. Program participants have known very well the segregation that characterizes them and the actions and lack of action that perpetuate that segregation.

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[3] 88 FR at 8561.

[4] *Id.* Similarly, "Racial integration means that people of different racial groups generally are not highly concentrated in distinct geographic areas within a community (*e.g.*, census tract or block group). *Id.* at 8560.

[5] The Preamble and Proposed Rule are, necessarily, quite long. It is possible that, in making comment, ADC has missed one or more relevant components of either. I apologize in advance if that is the case.

[6] *Id.* at 8520.

[7] The problem with the terminology of "Equity Plan" is discussed, *infra*, Item 6, at 12.

Imagine, for example, if proposed § 5.154(g)(3) (concerning fair housing goals) stated:[8]

> (i) A fair housing goal to overcome segregation in specific neighborhoods of the jurisdiction ~~could consist of~~ *must include*:
>
> (A) Siting development of future affordable housing ~~outside of segregated areas~~ *in a way that reduces segregation*;[9] and
>
> (B) Eliminating barriers to homeownership for members of protected class groups that have historically been denied an equal opportunity to become homeowners.

Or imagine if proposed § 5.154(g)(3) were likewise modified as follows:

> (v) A fair housing goal to increase housing and neighborhood access ~~could consist of~~ *must include* reducing land use and zoning restrictions that limit housing supply and increase housing costs in order to ensure that members of historically underserved communities and protected class groups have equitable access to affordable housing opportunities in well-resourced areas throughout the jurisdiction.[10]

Having a rebuttable presumption that there are elements to goals that each program participant must incorporate would have a very much salutary effect on the efficacy of the Proposed Rule. It would deal with the endemic trying-to-avoid-systemic-change problem. And it would ease the agency's oversight burden, since each program participant would either incorporate the mandatory features or, at least, *address explicitly* the reasons it proposes not to incorporate one or more such features.

The absence of a rebuttable presumption of mandated steps has nothing to do with the variety of conditions that exist in different jurisdictions and everything to do with the doomed political calculation that avoiding a mandate will insulate the rule from the most blistering criticism. Even were it the case that the effectiveness of a rule critical to the ability of the United States to remedy residential racial segregation should be sacrificed to such a consideration, we know from the reception received by the 2015 Rule, from the way it continued to be used as a cudgel, and from the initial cries of "run for your lives" being expressed about the current Proposed

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[8] The text that follows is taken from 88 FR at 8566, with strikethroughs indicating text to be eliminated and italicizing indicating text to be added.

[9] It appears that the drafters may, in this instance, have forgotten the definition of segregation as including neighborhoods segregated White and neighborhoods segregated Black. If, as is so often the case, actual choice for Blacks is limited by the absence of affordable housing opportunities in those segregated-White neighborhoods, one would not site development of future affordable housing outside of *all* segregated neighborhoods but would site the housing in a manner that reduces segregation (*i.e.*, in those segregated-White neighborhoods).

[10] 88 FR at 8566.

Rule that hysterical opposition will exist no matter how much the Rule is ultimately "cushioned."[11] The proper approach is to create a Rule of maximum effectiveness and to go out and actively explain the need for such a Rule (recognizing that some people will be able to be reached and that others will be beyond convincing), not defang the rule, keep quiet, and hope for the best. The latter approach explains a lot why even the weak 2015 Rule was poorly defended: most of the energy was spent on assurances about what that Rule *would not do* instead of being spent on explaining the history and current necessity of bold action after decades of the "pretty please" approach having failed.

2. When do fair housing goals need to be established for "fair housing goal categories," and how does this part of the rule interact with the certification portions of the Proposed Rule?

The answer is found at § 5.154(g)(1),[12] but the answer is insufficiently clear. It makes sense to separate out the first two sentences of the subparagraph in order to analyze them.

> Sentence 1
>
> For each program participant, the Equity Plan shall include the establishment of air housing goals are designed and can be reasonably expected to overcome the fair housing issues *identified through the analysis conducted pursuant to paragraphs (d) and (e) of this section.*[13]
>
> Sentence 2
>
> Program participants are *not* required to set program goals for fair housing goal categories that *do not have identified fair housing issues*.[14]

Sentence 2, standing alone, would suggest an unintended outcome: so long as a program participant hid its head in the sand about fair housing issues occurring within a fair housing goal category (such as segregation and integration; laws and practices that impede the provision of affordable housing in well-resourced areas of opportunity; and violations of civil rights law related

[11] Here's the Chair of the Idaho Republican Party writing on April 20, 2023 in the Magic Valley, Idaho *Times-News*: Democrats want to turn "quiet neighborhoods into streetscapes that 'will resemble the government-constructed and government-run 'project' housing in places like Chicago and Detroit." Zoning is to be reconfigured so that "massive low-income apartment buildings can be built right next to your family home – destroying your property value." Finally, Democrats will "have us smashed head-to-toe in tenement towers with no conceivable way to every own a home."

[12] 88 FR at 8566.

[13] *Id.* (emphasis added).

[14] *Id.* (emphasis added).

to housing),[15] the participant, not having identified a fair housing issue, would not have to develop a fair housing goal within that relevant fair housing goal category.

On the other hand, it would seem implicit in Sentence 1 that the analysis being referenced is one *properly* conducted pursuant to paragraphs (d) and (e) of § 5.154.

It is important that the unintended outcome be avoided, and all the more so because of the nature of the first part of the certification requirement of § 5.166(a). That part of the certification derives from the fair housing goals *that have been identified.*

Rather than relying on what appears implicit in Sentence 1, it would be better to modify Sentence 1 to change "identified" to "identified or that should have been identified," and to modify Sentence 2 in the same way.

3. Pitfalls of the "balanced" approach.

The idea of the "balanced" approach for *fair housing* purposes is entirely ahistorical. The Fair Housing Act's intentions were very much unbalanced and hyper-focused: the idea was to open doors and end segregation. This fact does not in any way denigrate other housing and related goals (such as rehabilitating and preserving affordable housing, as well as building community assets), including in programs that HUD administers. It does mean that the primacy of opening doors and ending segregation as goals of the Fair Housing Act – and hence of the Act's requirement to AFFH – should be respected.

Moreover, the definition and requirement of a "balanced approach" seems to be weirdly untethered to historical context in another respect. That is, the term appears to be synonymous with the term "two-part approach" (place-based and mobility-based)[16] without recognizing the substantive importance of *rebalancing* to redress historic inequities.[17] This is perplexing, especially because the Preamble is elsewhere keenly aware of the need to engage in planning and to take action to redress historic inequality:

> To truly honor Congress' intent, any regulation to implement the Fair Housing Act's AFFH mandate must help program participants move away from the status quo with respect to planning approaches and facilitate the development of innovative solutions to overcome decades, if not centuries, of housing-related inequality throughout American communities.[18]

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[15] *See* § 5.154(c)(3), *Id.* at 8562. The illustrations provided in the parenthetical are taken from clauses (i), (v), and (vii) of subparagraph § 5.143(c)(3).

[16] 88 FR at 8558.

[17] I use the term "inequities" in the dictionary sense of "lack of fairness or justice," as opposed to how "equity" is defined as a term of art in the Proposed Rule. What ADC sees as the Proposed Rule's counterproductive use of the term "equity" is discussed, *infra,* Item 6, at 12.

[18] 88 FR at 8526.

It is almost universally the case that place-based approaches have been used far more extensively over time than mobility approaches. That's certainly true if you are looking at the neighborhoods of large cities; it is true when examining the towns, villages, and unincorporated areas of many counties; it is true when scrutinizing the municipal subdivisions of many states. Put simply, place-based strategies have predominated, and have routinely and pervasively fortified segregation.

So, the question is whether the Proposed Rule adequately guards against the risk that the necessary rebalancing (which is to say, building new affordable housing *overwhelmingly* where relatively little – or none – has been built so far) will not take place. [Phrased in the positive: "Does the Proposed Rule adequately ensure that the necessary rebalancing will take place, notwithstanding the resistance that can reasonably be expected inside and outside of the agency?"]

ADC believes that the legal answer is "probably yes," but that the practical answer is "almost certainly no."

Begin with § 5.154(g)(5): "Fair housing goals in the Equity Plan must not result in policies or practices that discriminate in violation of the Fair Housing Act or other Federal Civil Rights Laws."[19] Siting affordable housing in a way to maintain or increase that housing in racially concentrated areas of poverty is precisely the kind of practice that increases, reinforces, or perpetuates segregated housing patterns on the basis of protected class status in violation of the Fair Housing Act.[20]

Continue with the definition of "fair housing goals," which explains that they must be "designed and can reasonably be expected to overcome circumstances that cause, increase, contribute to, maintain, or perpetuate fair housing issues in the program participant's geographic

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[19] *Id.* at 8567. There is an odd follow-on sentence that states: "Fair housing goals also may not require residents of racially or ethnically concentrated areas of poverty to move away from those areas as a matter of fair housing choice." *Id.* Are there such goals? Is this a reference to the destruction of public housing? ADC has always had a three-fold view: it is important to create and maintain concrete tools to protect security of tenure; it is important to honor the choices that individuals and families make and work to make those choices as informed as possible; and that racially segregated housing patterns were not and are not now "naturally occurring" phenomena to be reinforced for the benefit of any racial or ethnic group. (In any neighborhood where more than one racial or ethnic groups competes for housing, it may be the case that some members of a dominant group *want* to continue that dominance, but, by definition, the exclusion of other groups is hardly "voluntary" in respect to the excluded groups.)

It is the *distortion* of housing markets that created racial segregation and concentrated poverty. It is therefore possible that the pursuit of legitimate fair housing goals will, over time and without prejudice to the rights of existing tenants, reduce the hyper-concentration of low-income or extremely-low-income housing in one part of a jurisdiction while at the same time creating such housing in other parts of the jurisdiction that traditionally have been underserved by such housing. It could not be that remedying such historical distortion of housing markets in this way is intended to be covered by the follow-on sentence, and HUD should confirm this.

[20] *See* 24 CFR § 100.500(a).

areas of analysis."[21] The siting of housing in the manner described in the preceding paragraph constitutes the *opposite* of overcoming circumstances that cause, increase, contribute to, maintain, or perpetuate fair housing issues.

When HUD illustrates the distinction between the activities permitted to be place-based in "underserved communities" (presumably, these are communities in the geographic sense) versus activities to be performed outside of those geographic areas (referred to as mobility approaches), we see that what appears to be intended for an underserved geographic area is "*preserving* affordable housing in particular neighborhoods" (as opposed to specifying the building of new affordable housing) while making complementary investments in *other* infrastructure and assets in those neighborhoods."[22] Mobility strategies (that is, actions *outside* of underserved geographic areas) would necessarily include the construction of new affordable housing because, otherwise, it would generally not be possible to "increase access to well-resourced areas and opportunities for protected class groups that have historically been housing in underserved neighborhoods."[23]

All the foregoing provides a strong legal basis on which to combat program participants who wish to continue the segregated status quo.

But there are elements of the Preamble and Proposed Rule that either do not express this point clearly enough or, worse, can be misconstrued.

Thus, HUD states explicitly in the definition of "balanced approach" that, "A program participant that has the ability to create greater fair housing choice outside segregated, low-income areas should not rely on *solely* place-based strategies consistent with a balanced approach."[24] This injunction is useful insofar as many program participants do still rely solely on place-based strategies inconsistent with their obligation under the Fair Housing Act not to perpetuate segregation and their obligation under the regulations to AFFH. On the other hand, ADC questions whether the phrasing tells a program participant reluctant to see demographic change in a racially or ethnically concentrated area of poverty that its mobility efforts should have primacy and be robust (as opposed to saying that is should simply not be ignored altogether).

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[21] § 5.152, 88 FR at 8559.

[22] 88 FR at 8527 (emphasis added). It is important to confirm that "community assets" is a reference to non-housing assets. If this understanding is incorrect, then the requirement of investing in community assets will often be used to perpetuate segregation and the over-concentration of affordable housing in neighborhoods segregated Black or Hispanic.

[23] *Id.* *See also* 88 FR at 8532 (contrasting the place-based strategy of the "preservation of existing affordable housing" with the mobility strategy of "building affordable housing in well-resourced areas").

[24] *See* § 5.152, 88 FR at 8558 (emphasis added).

It is also of concern that the "balanced approach" is said, without further explanation, to include balancing a variety of action "to eliminate the "housing-related disparities" that result from, *inter alia,* "the loss of affordable housing to meet the needs of underserved communities."[25]

As a preliminary matter, this is a perfect example of why the term "underserved communities" is a distinctly unhelpful defined term to be peppered through the Proposed Rule. The term is defined to mean both underserved protected-class groups and underserved geographic neighborhoods (or, more generally, underserved "geographic communities").[26]

If the usage in the sentence is intended to refer to geographic communities (such as neighborhoods), then the usage is deeply puzzling. It is difficult to understand how any geographic area that has a disproportionately *large* amount of affordable housing is "underserved" in terms of affordable housing supply. Conflating the need for affordable housing (or, more specifically, for the need for affordable housing at a particular percentage of Area Median Income) with the neighborhoods in which such housing currently exists in disproportionately high amounts in relation to broader geographic areas is the opposite of rebalancing historic inequities, undermining the opportunity for realistic fair housing choice.

If the usage is intended to refer to protected-class groups, then the cautions set out in the previous paragraph still apply. It is only if one were to indulge the fantasies of old-line segregationists ("they don't want to live here; the need is where they already are") or the fantasies of neo-segregationists ("our constituents who live in concentrated poverty only wish to access affordable housing in the geographic area that we serve; we want to maintain our base") that one would imagine a problem with a hyper-local reduction in affordable housing supply in a part of a jurisdiction . . . so long as that reduction was countered with an increase in such housing in other parts of the same jurisdiction that have traditionally been averse to the siting of affordable housing.[27]

Since, as HUD knows, so many program participants either themselves want to maintain segregation or are influenced by those within the program participant's geographic area who want to maintain segregation, it is important not to let the incantation of "balanced approach" be a backdoor through which explicit or implicit attempts *to maintain any area's racial profile* are countenanced. There are innumerable euphemisms for the attempts to keep a racial group in place, regardless of individual choice. Preserving community "culture," "history," or "character" are a few. Likewise, "because gentrification" and "because displacement" are used as catchphrases,

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[25] 88 FR at 8530-31.

[26] *Id.* at 8561. *See* Item 5, *infra*, at 11-12, for a proposal to eliminate the definition a to use two separate terms to create more clarity. *See also* Item 4, *infra*, at 10, for another example of the unhelpfulness of the term.

[27] The same is true in respect to different jurisdictions (such as in the suburban context where towns, villages, and "unincorporated areas" near one another can be very different in terms of the extent to which affordable housing exists, if at all).

often without evidence, and often without concern that any segregation-perpetuating activity be tailored to be the least discriminatory alternative.

The Proposed Rule appears to open the door to these attempts without providing sufficient guidance. The Preamble says that "there are often economic factors affecting fair housing choice, which include rising rents and displacement from existing housing due to gentrification."[28] Similarly, the Proposed Rule states that "affordable housing opportunities" includes "housing stability for protected class groups, which may be adversely affected by factors such as, but not limited to, rising rents, loss of existing affordable housing, and displacement due to economic pressures, evictions, source of income discrimination, or code enforcement."[29] It does so without explaining that "housing stability" in American society is not synonymous with "never having to move." There is a vast difference in consequences depending on whether there is a pipeline of movement and availability. It is very different to be priced out *and have nowhere to go* in the jurisdiction, versus the more dynamic circumstance having the realistic opportunity to move to a more resourced area. As surely as day follows night, the failure to clarify will be used by some to try to justify the maintenance of concentrated poverty and/or racially or ethnically segregated neighborhoods.

HUD should further underline the principal goal of the Fair Housing Act of ending segregation. It should also make clear that it will be looking closely to make sure that measures taken are closely tailored to meeting real problems of tenants' lack of security of tenure (which are widespread), and that those measures are the least discriminatory and do not gratuitously perpetuate segregation. Thus, for example, there are *concrete measures* available to be used to preserve existing affordable housing supply. Thus, for example, a program participant can introduce rent regulation; can prohibit eviction without good cause; can pass laws prohibiting landlord harassment; and can fund legal services for tenants facing eviction.

4. Meaningful actions, interim goals, and long-term goals.

It is clear in the Proposed Rule that HUD intends the AFFH obligation to be real and action-focused, and no longer window-dressing (goodbye poster contests). The definition of "meaningful

[28] 88 FR at 8527. At the same time, the Preamble states: "Some of the proposed rule's questions, in asking about changes in demographics or economic trends, ask about a concept known to many stakeholders as 'gentrification.' The term is used here because of its common colloquial use to facilitate the program participant's and community's ease of understanding the concepts at issue in order to have required discussion about community trends. HUD notes the robust debate around the term 'gentrification' and its impact on communities in both social science research and among communities themselves, and program participants can also consider such discussions in their review. This proposed rule does not establish a HUD definition of 'gentrification,' nor will program participants be required to precisely define the term." *Id.* at 8535. Using, without definition, a colloquial term that means vastly different things to different people will not achieve the asserted goal of facilitating "ease of understanding [of] the concepts at issue…." Rather, it will, without further clarification from HUD, create unintended opportunities for colloquial usage ("because gentrification") to substitute for actual analysis and to mask the desire to perpetuate segregation.

[29] Subparagraph 3(iii) of § 5.152, 88 FR at 8558.

actions"[30] is central. But which and how many such actions? Here, the Proposed Rule is laying the table for unending arguments (and, thus, for the potential of seriously compromised enforcement). There is this:

> In determining how to prioritize fair housing issues within each fair housing goal category, program participants shall give highest priority to fair housing issues that will result in the most effective fair housing goals for achieving material positive change for underserved communities, taking into account that different protected class groups may be impacted by different fair housing issues.[31]

And this:

> A program participant's goals may consist of short-term goals such that material positive change is readily achieved, as well as long-term goals such that material positive change occurs within the jurisdiction over a prolonged but reasonable period of time.[32]

And this:

> A program participant may prioritize implementation of particular goals over others but must ensure that any prioritization will result in meaningful actions that affirmatively further fair housing. So long as a program participant meets these requirements, the program participant has discretion to set goals that can reasonably be expected to address local fair housing issues and to specify actions necessary to implement those goals.[33]

In the first instance, the unhelpful use of "underserved communities" once again rears its unhelpful head.

Second, as a substantive matter, this simply defers the "place-based" versus "mobility" debate. Consistent with the principal purpose of the Fair Housing Act, actions that facilitate desegregation must be prioritized.

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[30] *See* § 5.152, 88 FR at 8560 ("significant actions that are designed and can be reasonably expected to achieve a material positive change that affirmatively furthers fair housing by, for example, decreasing segregation and increasing integration, increasing fair housing choice, or decreasing disparities in access to opportunity in the program participant's jurisdiction"). ADC understands the word "significant" in this context to mean "sufficiently great or important to be worthy of attention; noteworthy" (New Oxford American Dictionary).

[31] § 5.154(f)(2), 88 FR at 8566.

[32] § 5.154(g)(3), 88 FR at 8566.

[33] *Id.*

Third, "meaningful" can be understood in a standalone sense (is this action significant in relation to the requirement to AFFH?) as well as in a contextual sense (do the scope of the actions match the scope of the jurisdiction's problems?). The Proposed Rule does not do enough with its permissive language to ensure a match of scope. So, in addition to requiring that actions to facilitate desegregate must be prioritized, the Proposed Rule should mandate (not simply permit) that there be long-term goals. A realistic evaluation of how meaningful actions are (in context) can only be made if the full context is revealed.

So long as both short-term and long-term goals are required, the remaining step is to do more than require that "material positive change" occur "over a prolonged but reasonable period of time." The phrasing reflects the widespread unwillingness to imagine a profoundly changed and improved society. If we are thinking about the long-term, we need to be thinking of a society where fair housing issues have been fully remediated.[34] The Proposed Rule should incorporate this idea into the goals and actions expected. Thus, for example:

> A program participant's goals ~~may~~ *shall* consist *both* of short-term goals such that material positive change is readily achieved, ~~as well as~~ *and* long-term goals such that ~~material positive change occurs within the~~ *all fair housing issues existing in the* jurisdiction *are fully remedied* over a prolonged but reasonable period of time.[35]

5. The definition of "underserved communities" creates more confusion than clarity.

As previously mentioned, combined the concepts of "protected class groups" and "geographic areas" under one heading is ill-advised. It is not very difficult to use the term "protected class group" to mean "protected class group" and to use "geographic area" or "neighborhood," respectively, to mean "geographic area" or "neighborhood." HUD does precisely this in describing the use of housing mobility programs to "increase access to well-resourced *areas* and *opportunity* for *protected class groups* that have historically been housed in underserved *neighborhoods*.[36] If HUD then wishes to provide a definition of the more specific terms, it should do so.

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[34] ADC acknowledges that the Preamble hints in this direction. *See* 88 FR at 8536 (emphasis added) ("Thus, HUD expects the fair housing goals will result in material positive change even if that change will be incremental, *and it will take multiple funding cycles to fully remedy the fair housing issue*"). The "full remedy" aspect, as suggested above, needs to be tackled head-on.

[35] *Cf.* § 5.154(g)(3), 88 FR at 8566.Deletions indicated by strikethrough; additions by italics. With these changes, it would be fine to acknowledge that a participating jurisdiction's ability to realize fully all goals may be limited by the scope of "their own authority and spheres of influence." That fact should not interfere with the principal that maximum effort should be made over time to conquer all fair housing issues fully.

[36] 88 FR at 8527 (emphasis added). In contrast (and ironically), the Preamble has a sentence, beginning "Stated plainly," that goes on to say that "HUD's review will focus primarily on whether the Equity Plan appropriately identifies the relevant fair housing issues and establishes fair housing goals that can realistically be expected to address them and produce meaningful fair housing outcomes for various *protected class groups* in the program participant's *underserved communities*." *Id.* at 8519 (emphasis added). While the context suggests that the Preamble means "underserved areas" when referencing

There is another benefit to eliminating the use of "community" in a definition. It is one of those words by which supposed racial preference is disguised in more palatable (and less facially absurd) language ("the community wants" instead of "White people want" or "Black people want") and which has, over the decades shifted from the Martin Luther King, Jr., and John Lewis inclusionary meaning (beloved community) to one with the exact opposite meaning ("our X protected-class community, not yours").

6. "Equity Plan" should be replaced with the term "Remedial Plan."

As with "community," "equity" and "equitable" have been repurposed (the process has been more temporally compressed than with "community"). It is an unhelpful term insofar as it often is simply a slogan ("because equity") rather than a specific fact-based argument tethered to the Fair Housing Act in general or the AFFH requirement in particular. That is, the term is often used to mean "have the result I want for the protected-class group I am representing" rather than "these actions are needed to provide a remedy for past or present conduct that continues to hinder members of a protected-class group. Relabeling the "Equity Plan"[37] as a "Remedial Plan" would focus the attention of program participants (and HUD and "advocates" and other interested parties) on the questions of what inequalities, adverse impacts, and segregated living conditions exist and how they can be remedied. "Remedial plan" is a term with a long lineage in civil rights and is understood to tie solutions (including solutions of the boldest kind) to the problem(s) identified.

7. Scope of record keeping.

Section 5.168 of the Proposed Rule does state that each program participant "must establish and maintain sufficient records to enable the Responsible Civil Rights Official to determine whether the program participant has complied with or is complying with the requirements of this

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"underserved communities," such a construction would place the Proposed Rule in conflict with the Fair Housing Act, which requires fair housing throughout the United States (both in underserved areas and well-served areas). "Underserved communities" in the sense of "underserved protected-class groups" does not work in the sentence because then it becomes circular. And is "protected class groups" really meant to convey "protected class groups" or "protected-class group categories" (such as race, color, disability, etc.)? The point is that "community" allows for the greatest amount of ambiguity, and that disaggregating would force greater thinking through of what particular concept is actually involved.

[37] § 8-152, 88 FR at 8558; and § 8-154, *id.* at 8561-67. I should note that the "underserved communities" problem recurs in the definition of "Equity or equitable," 88 FR at 8558. In addition, the language of the "Equity or equitable" section does not make sufficiently clear that "perpetuation of segregation" is an independent violation of the Fair Housing Act, independent of any showing of "adverse impact." *See* 24 CFR § 100.5(a) (2023) (treating impact and perpetuating disjunctively). *See also* Preamble to Final Disparate Impact Rule, 88 FR 19450, 19482-83 (March 31, 2023) (footnotes omitted) ("HUD agrees with the latter commenters that perpetuation of segregation is prohibited by the Act and, as such, should be included in the definition of discriminatory effects in this rule. The elimination of segregation is a central goal of the Act, one that was highlighted by *Inclusive Communities* and has long been recognized by other courts. *Inclusive Communities* also recognized that practices that perpetuate segregation independently violate the Act. HUD also notes that every federal court of appeals to have addressed the issue has agreed with HUD's interpretation in the 2013 Rule.").

subpart."[38] As it is not possible to determine compliance without knowing what potential goals and actions were rejected (whether after active consideration or not), the requirement to keep records concerning goals and actions rejected is implicitly part of the recordkeeping requirement. This is more so the case because § 5.168(a) includes information and records "related" to the program participant's Equity Plan.[39] Nevertheless, for the sake of clarity and to avoid the situation where a program participant makes invisible the options available it rejected (either after consideration or without consideration), the Proposed Rule should make the requirement explicit.

8. Broaden those from whom "community input" is sought.

Section 5.158(a)(1) does state that input must be sought not only from "members of the community" but also from "other interested parties."[40] The "other interested parties" part is not, so far as I can tell, emphasized , and the Proposed Rule makes the now-common error of fetishizing the wisdom of local input ("Members of the community are in a *unique position* to provide the program participant with perspectives on the impact of fair housing issues facing the community.")[41] It is certainly true that "members of the community" often do provide valuable input. But sometimes those who hold themselves out as community "leaders" (governmental or not) are interested in preserving the segregated status quo. For example, conventional wisdom among some community "leaders" in New York City was that their constituents were determined to stay in place. While litigating against New York City's outsider-restriction policy in its affordable-housing lotteries, by contrast, the analysis of data on hundreds of thousands of unique applicants that had made several million applications showed that approximately 85 percent of unique applicants applied *outside* of their community district *at least* 75 percent of the time, a phenomenon that held true across races and ethnic groups.[42]

In addition, there may be strategies and perspectives from outside of the community (program participant's geographic area) that would be usefully applied to the program participant. By definition, "members of the community" do not include, for example, those who have been excluded from the program participant's geographic area, whether by protected-class status or economic-class status, as well as not-for-profit and for-profit developers who would be interested in constructing affordable housing in the program participant's geographic area *if barriers to doing so were reduced or eliminated)*.

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[38] § 5.168, 88 FR at 8574.

[39] § 5.168(a), 88 FR at 8574.

[40] § 5.158(a)(1), 88 FR at 8568.

[41] § 5.158(a)(2), 88 FR at 8568.

[42] *See* March 6, 2020 declaration of Professor Andrew A. Beveridge in *Noel and Senat v. City of New York,* 15-cv-5236, ECF 883, Chart 1, at 61. The document is *available online* at http://www.antibiaslaw.com/sites/default/files/Bevdec1.pdf.

The Proposed Rule should take account of this fact by emphasizing the importance of the inclusion of "out-of-community" input (as an addition to, not a replacement for, in-community input), and be clear that the program participant in the first instance (and HUD when reviewing) should assess perspectives on the merits, not from where they came from. The illustrations given here should be specified in the Preamble. Note: § 91.100(e)(1), insofar as it deals with consolidated plans, already provides for consultation with, *inter alia*, "regionally-based organizations that represent protected class members and organizations that enforce fair housing laws."[43] It is unclear why the Equity Plan would not incorporate those requirements.

9. *Failures to act* to remove barriers constitute actions for the purposes of certifications.

Section 5.166(a) requires program participants to certify two things: (1) that meaningful actions will be taken actions; and (2) that no action that is materially inconsistent with the duty to AFFH will be taken.[44] Sometimes, of course, the failure to act to remove barriers is effectively an action. A quintessential example concerns exclusionary zoning. Failing to remove a zoning barrier (a failure to act) results both in circumstances where the exclusionary zoning is allowed to be applied *as well as something that is often forgotten:* the *deterring* of developers who would build affordable housing, including mixed-income affordable housing, if the barriers were not in place. Failure to act needs to be fully accounted for in the certification. ADC has not developed specific language for this but believes that the issue needs to be addressed.

10. Further certification requirement regarding past compliance.

The concept that requests for payment from a program participant constitute implied certifications that the program participant *has been* complying with the AFFH requirements is familiar.[45] It would be helpful, however, to make explicit the requirement that jurisdictions seeking funding are certifying that they have been AFFH-compliant in the past.[46] Thus, § 5.166(a) should be modified as follows:

> § 5.166 AFFH certifications required for the receipt of Federal financial assistance.
>
> (a) Certifications. Prior to the receipt of Federal financial assistance, program participants must certify that they*:*
>
> *(i) are currently affirmatively furthering fair housing, and* will *in the future throughout the period for which Federal financial assistance is extended,*

[43] 88 FR at 8577.

[44] *Id.* at 8574.

[45] Anti-Discrimination Center, 668 F. Supp. 2d at 566 ("[E]ach time the County submitted a request for payment of [housing and community development] funds it made an impliedly false certification").

[46] A first-time program participant would not have this requirement.

affirmatively further fair housing, which means engaging in fair housing planning and taking meaningful actions in accordance with the [relevant regulatory requirements]; ~~and~~

(ii) are currently not taking any action, and will in the future throughout the period for which Federal financial assistance is extended, take no action*,* that is materially inconsistent with the duty to affirmatively further fair housing ~~throughout the period for which Federal financial assistance is extended~~; *and*

(iii) [provision relating to failures to take action as referenced, in Item 9, supra, at 14];

provided, however, that first-time participants need not include the representations regarding their current status in their first certification.[47]

11. States to have non-delegable duty.

Huge amounts of federal financial assistance go to States, who then pass those dollars on to counties, cities, towns, and villages. To maximally incentivize States to cause their political subdivisions to comply with AFFH requirements, the Proposed Rule should more explicitly make clear that a State's obligations to AFFH is non-delegable, and that a political subdivision's failure to comply with the obligation to AFFH is chargeable both to the political subdivision and to the state.

12. Go further in using HUD's authority to ensure AFFH compliance.

The Proposed Rule already goes further than the 2015 Rule in contemplating that program participants may be the subject of various enforcement procedures.[48] But, under the Proposed Rule, there will be too much time taken up while program participants are not in compliance. Additional sticks must be available to encourage compliance and deal with non-compliance promptly.

[47] *Cf.* § 5.166(a). 88 FR at 8574. Proposed deletions are indicated by strikethroughs; proposed additions are indicated by italics.

[48] ADC notes that the Proposed Rule's procedures for effecting compliance include "referral to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce the rights of the United States under any law of the United States, or any assurance or contractual undertaking." § 5.172(a)(1), 88 FR at 8576. The Preamble specifies that the term "assurance or contractual undertaking" does include "the assurances and certifications made in connection with grant agreements and the requirements of this proposed rule"). 88 FR at 8539-40. By definition, therefore, the language of §5.172(a)(1) includes proceedings under the False Claims Act.

Part of the process of applying for federal financial assistance should include an agreement to take such steps as HUD directs if the revised Equity Plan submitted in response to a HUD determination of non-acceptance is itself not accepted by HUD.[49]

In addition, HUD has been and continues to be too worried about both the prospect of termination of funding and about the prospect of some jurisdictions choosing not to participate. What seems to have been forgotten over time is that the Fair Housing Act applies to participating jurisdictions and non-participating jurisdictions alike. The Justice Department must establish a far more robust program of prosecuting systemic Fair Housing Act violations. Doing so would not only have the obvious benefits of increased enforcement, but it would also let jurisdictions know that non-participation would not effectively create a safe harbor from fair housing enforcement.

In a similar vein, a federal program to acquire interests in land in resistant jurisdictions to have affordable housing built that was not subject to local zoning requirements (and, likewise, to repurpose existing federal property, including post offices, for mixed use) would have both a salutary substantive effect and reduce the perceived advantages of non-participation.

13. Publication of submitted plans that HUD is reviewing is essential.

There are many reasons why this is true; ADC will mention just one. The Preamble identifies a concern that the proposed complaint process not "be used to relitigate decisions made by program participants in the planning process after opportunity for community input and HUD's acceptance of an Equity Plan."[50] Without pre-decision publication, the public will not have had an opportunity to litigate those program participant decisions in the first place.

Respectfully submitted,

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[49] This creates a different and more expeditious course of action than is currently provided by § 5.162(c)(2), 88 FR at 8572.

[50] 88 FR at 8538.