

Comments

Department of Housing and Urban Development

Notice of Proposed Rulemaking

Affirmatively Furthering Fair Housing

Docket No. FR-6250-P-01

RIN 2529—AB05

Submitted by:

CENTER ON BUDGET AND POLICY PRIORITIES

April 24, 2023

These comments are submitted on behalf of the Center on Budget and Policy Priorities in response to the Department of Housing and Urban Development’s (HUD) Notice of Proposed Rulemaking entitled “Affirmatively Furthering Fair Housing” published in the Federal Register on February 9, 2023.

The Center on Budget and Policy Priorities (CBPP) is a nonpartisan research and policy institute. CBPP pursues federal and state policies designed to reduce both poverty and income disparity, to promote opportunity, and to achieve fiscal responsibility in equitable and effective ways. We apply our expertise in programs and policies to inform debates on issues affecting low- and moderate-income people and fiscal policy. Through our work, we have developed a deep knowledge of eligibility and enrollment policies and processes as well as the short- and long-term benefits of major federal assistance programs, including the federal affordable housing and rental assistance programs that would be affected by the proposed rule. We appreciate the opportunity to comment on the important policy issues presented by the proposed rule.

We commend HUD for taking this step to restore and enhance the Affirmatively Furthering Fair Housing (AFFH) regulation, which is a critical tool for creating more equitable and inclusive communities. In addition to prohibiting housing discrimination for members of protected classes, the Fair Housing Act is intended “to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States.”¹ A long history of policies and practices, including current ones, continue to impede people’s fair access to housing, and a proactive and coordinated approach is necessary to advance fair housing. Meaningful enforcement of the obligation to affirmatively further fair housing would mean that HUD and its program participants would be addressing the policy decisions that have diverted public or private investments and positive economic growth away from communities of color and members of other protected classes.

This proposed rule provides a strong framework to help program participants meet their AFFH obligation and further the goals of the Fair Housing Act of 1968. We are particularly pleased to see HUD’s emphasis on a balanced approach to furthering fair housing; increased measures for accountability and community engagement; a greater emphasis on creating and meeting goals that are informed by meaningful analysis of fair housing challenges that individuals face; and the strong requirements for housing agencies administering federal rental assistance programs.

This comment supports these changes from the 2015 AFFH rule and includes recommendations to further strengthen the rule, including:

- I. Clarifying important definitions
- II. Strengthening HUD’s Equity Plan framework
- III. Ensuring robust community engagement
- IV. Strengthening the review and compliance procedures
- V. Clarifying how Equity Plans are incorporated into PHA planning documents
- VI. Affirming that the benefits of the proposed rule would greatly outweigh potential implementation costs

¹ H.R. Res. 1095, 110th Cong., 154 Cong. Rec. H2280–01 (April 15, 2008).

Many of these recommendations focus on the proposed requirements for public housing agencies. We also include suggestions on issues to clarify through sub-regulatory guidance and technical assistance that will help ensure program participants are successful while allowing flexibility to accommodate changing best practices.

I. Definitions

Defining key terms is critical to ensuring that program participants understand their AFFH obligations and include key factors in their analyses and Equity Plans. Overall, we applaud HUD for balancing the need to provide clear definitions with allowing some flexibility for entities to tailor their analyses and Equity Plans to the unique needs and characteristics of their communities and regions. However, there are terms that require deeper explanations to ensure adherence to HUD's intent. Below, we provide recommendations for further clarifying certain definitions.

Affordable housing opportunities

In response to number 6 of HUD's questions for comment, we recommend this entry define affordability and further break down income tiers in (1)(i). Affordability can be measured based on different metrics, so we recommend HUD clarify that, within the context of an Equity Plan, "affordable" should match HUD's definition, which is currently paying no more than 30 percent of a household's gross income on housing and utility costs. This will ensure uniformity and align entities' analyses with the HUD-funded resources that are available to help entities and communities advance their Equity Plans.

In addition, we encourage HUD to further define and break down "low-income households" to include 0-15 percent of area median income (AMI), 15-30 percent of AMI, 30-50 percent of AMI (defined as very low-income households), and 50-80 percent of AMI (defined as low-income households). This will help ensure that entities appropriately focus on people with the lowest incomes. Otherwise, negative outcomes and impacts on people with the lowest incomes could be hidden by positive outcomes for people at the higher end of the spectrum. People with the lowest incomes, particularly those with intersecting marginalized identities protected under the Fair Housing Act, are most vulnerable to eviction, homelessness, limited housing choice and other severe consequences of housing discrimination and segregation so should be thoroughly reflected in analyses and Equity Plans. Understanding implications for this population is critical to eliminating these negative outcomes entirely.

Balanced Approach

We strongly support the way HUD defines and emphasizes communities bringing a balanced approach to AFFH implementation. Ensuring that all people have access to all communities *and* that resources are not hoarded by and concentrated in certain areas allows people to have true choice about where they live and builds towards a future in which all communities contain the resources their residents need to thrive. The balanced approach HUD describes also bolsters communities' abilities to coordinate housing and services in ways that allow people to connect with the housing and services that best meet their needs and adjust as necessary as their desires and needs change.

Community assets

We recommend clarifying that community assets are *readily accessible* to the community members. For example, HUD could modify the first sentence of the definition to read “Community assets means programs, infrastructure, and facilities that are readily accessible to community members and that provide opportunity and a desirable environment.” This can help prevent entities with AFFH obligations from overstating community assets. Some under-resourced communities contain important assets that the community residents are not able to access and benefit from. For example, a community might house an employer that provides high quality jobs, but many people receiving services from HUD programs lack access to reliable transportation, and the community isn’t investing in a solution. Or a neighborhood may contain a high-performing school that is application-only or requires high tuition, preventing most neighborhood children from attending.

Equity or Equitable

We applaud the proposed rule’s focus on advancing equity. The AFFH mandate reflects the reality that eliminating discrimination today is not enough to undo the ongoing harms and inequities caused by our nation’s long legacy of discriminatory housing policies and practices. Governments and other entities must affirmatively act to reverse the negative outcomes from unfair practices. Centering equity is essential to implementing the AFFH mandate.

HUD’s proposed definition focuses on “consistent and systematic fair, just, and nondiscriminatory treatment,” but equity goes beyond how people are treated and looks to impact the outcomes produced by policies, programs, etc. While the proposed definition would include “concerted actions to overcome past discrimination,” the terms “fair” and “just” alone are not enough to clarify that this requires entities to advance and sometimes target policies, practices, and funding to improve housing choice options and advance equitable *outcomes* for members of protected classes and their communities. We recommend HUD clarify the definition to explicitly define “equity or equitable” in terms of “affirmatively” improving outcomes for people in ways that are proactive and restorative, in addition to fair treatment.

Equal and nondiscriminatory treatment of people and communities today does not necessarily result in equal outcomes for people with different identities protected by the Fair Housing Act and can, in fact, help maintain inequities that were created by past discrimination. Language that acknowledges that certain groups may need different supports or resources for everyone to achieve the same outcome will strengthen this definition and help program participants move beyond equality and toward equity.

Geographic area

In response to question 8(g), we recommend HUD provide additional, sub-regulatory guidance after the AFFH rule is finalized to help program participants understand when they should conduct analysis at lower levels of geography, such as neighborhoods and zip codes. This is an appropriate topic for sub-regulatory guidance and technical assistance given the wide variation in how jurisdictions are constructed and their relationships with other levels of government.

Meaningful actions

We recommend HUD amend the definition to clarify that in some cases it will be essential to not only increase opportunities within the grantee’s jurisdiction, but also for residents of neighboring jurisdictions and the broader geographic area. For instance, a grantee in a jurisdiction with rich opportunities may affirmatively further fair housing by promoting more housing choice so that residents in neighboring jurisdictions have greater access to those opportunities. One way HUD could achieve this is to amend the definition to say (in part) “...or decreasing disparities in access to opportunity *for residents* in the program participant’s jurisdiction *and for residents of the geographic area.*”

Racially or ethnically concentrated areas of poverty (R/ECAPs)

Understanding the geographic intersections of race and poverty is a critical step for creating more equitable and inclusive communities. However, the proposed definition of racially or ethnically concentrated areas of poverty does not fully capture the complexities of measuring race and poverty in a geographic region. We recommend HUD provide metrics for identifying R/ECAPs in sub-regulatory guidance. HUD will need to explain what constitutes “significant concentrations” for both poverty and racial or ethnic demographics. HUD’s measurements and guidance should consider the broader context of the region when creating metrics instead of setting standard thresholds that can seem arbitrary in the regional and local context. When looking at racial/ethnic demographics, a neighborhood (or other relevant geographic area) with high poverty levels where a majority of residents are of one racial or ethnic group is not necessarily as noteworthy if the racial and ethnic make-up matches the broader region. For example, more than 80 percent of residents in El Paso, TX identify as Hispanic or Latino population.² So while an El Paso neighborhood meeting the appropriate poverty threshold and with a majority of residents identifying as Latino could meet the definition of a R/ECAP, the context of the city broadly may mean that the racial/ethnic makeup of the neighborhood is representative of the area and not a result of policies with a discriminatory racial/ethnic impact. It would still be an area of concentrated poverty deserving of attention, but the solutions in El Paso might differ from solutions in a place where the larger geographic region is majority white.

Given the research showing the harmful impacts that concentrated poverty and disinvestment have on people, we recommend a poverty rate threshold of 30 percent of individuals living below the poverty line when identifying R/ECAPs. The 2015 rule utilized a 40 percent poverty rate threshold that excluded neighborhoods that would be important to include in a fair housing analysis. A 30 percent threshold is also consistent with research on the impact of concentrated poverty.³

R/ECAPs must also be considered with a balanced approach and the recognition that historically marginalized communities living near each other is not inherently harmful. These communities can be a source of important social, familial, and cultural networks. Moreover, there are communities

² “El Paso city, Texas,” Quick Facts: US Census Bureau, accessed April 2023, <https://www.census.gov/quickfacts/fact/table/elpasocitytexas/PST045222>.

³ See: George Galster, "An Economic Efficiency Analysis of Deconcentrating Poverty Populations," Journal of Housing Economics 11:303-29, 2002; G. Thomas Kingsley and Kathryn L. S. Pettit, “Concentrated Poverty: A Change in Course. Urban Institute,” 2003; Scott J. South, Kyle Crowder, and Erick Chavez. 2005. “Exiting and Entering High-Poverty Neighborhoods: Latinos, Blacks and Anglos Compared.” Social Forces 84:2, 873-900.

where the majority of residents are people of color and the poverty rate is low. HUD should ensure that program participants are not simply promoting integration in isolation of what residents need to thrive but instead promoting fair housing choice that respects the wishes of residents who are members of protected classes, especially those with low incomes.⁴ Identifying R/ECAPs should be done in the service of locating areas that need additional resources and investment for current residents to enjoy and removing barriers to places that already have resources.

With that in mind, HUD should consider asking program participants to look at the inverse of a R/ECAP and identify racially or ethnically concentrated areas of affluence, which are generally wealthy neighborhoods where the vast majority of the residents are white. What policies have created those areas and allowed them to thrive? What resources do they receive that R/ECAPs don't and what can be done to more equitably distribute investments? Questions like these are important to consider in conjunction with the R/ECAP analysis outlined in the proposed rule. HUD could then provide sub-regulatory guidance on how to identify areas of affluence that builds off existing methods, such as the one created by researchers at University of Minnesota⁵ and the version in use by California Department of Housing and Community Development.⁶

Significant disparities in access to opportunity

Identifying disparities in members of protected classes' access to important community resources is crucial to understanding the barriers to fair housing choice and opportunities for affirmatively furthering fair housing. We recommend HUD make minor changes to this definition to clarify that it includes disparities 1) regardless of whether they were intentionally or unintentionally created by discriminatory policies or practices, and 2) that reflect other barriers to access beyond geography.

The proposed definition states that “significant disparities in access to opportunity mean... differences in access... based on protected class and related to where individuals... reside in the program participant’s geographic analysis.” The phrase “based on protected class” could cause some program participants to incorrectly assume that this means explicit or intentional discrimination when disparities can also be the result of an unintentional disparate impact of policies or practices. And while where people live is a common driver of disparities in access to opportunity, the language “and related to where individuals... reside in the program participant’s geographic analysis” may cause program participants to focus solely on limitations to access related to geography when some members of protected classes face barriers to access even when resources are located near them. HUD could provide clarity that significant disparities include a broad range fair housing barriers with language akin to the following:

⁴ While not an explicit violation of AFFH, it is important to note that communities with low poverty rates where the majority of the population is people of color should also ensure that people with low incomes have access to their neighborhoods.

⁵ Edward G. Goetz, Anthony Damiano, and Rashad A. Williams, “Racially Concentrated Areas of Affluence: A Preliminary Investigation,” *Cityscape* Volume 21, Number 1, 2019, <https://www.huduser.gov/portal/periodicals/cityscpe/vol21num1/ch4.pdf>.

⁶ “Racially Concentrated Areas of Affluence,” California Department of Housing and Community Development, June 29, 2022, <https://www.arcgis.com/home/item.html?id=4100330678564ad699d139b1c193ef14>.

“Significant disparities in access to opportunity mean... differences in access... for members of any protected class in relation to other protected classes or other people or related to where individuals... reside in the program participant’s geographic analysis.”

Siting decisions

We recommend HUD add public housing agencies to the list of state or local entities that make siting decisions. Public housing agencies make decisions about where to locate project-based voucher properties and public housing but are not reflected in HUD’s proposed definition.

Underserved communities

We strongly support the inclusion of “individuals experiencing homelessness” and “persons with criminal records” as examples in this definition. To further strengthen the example, and in response to question 11, we recommend adding “people with disabilities” to the list of examples. We also recommend making “persons with criminal records” “persons with records of conviction, incarceration, or arrest” or at least clarifying via sub-regulatory guidance that “persons with criminal records” includes the many people who have a history of incarceration or arrest but no conviction.

We also support that this definition reflects both the ways that groups or individuals are underserved regardless of their location or geography *and* how exclusion from resources or fair housing choice can be tied to location. HUD should use guidance and technical assistance to ensure that program participants apply this term consistently in this way so that they do not solely focus on geography, including within the definition of “equity or equitable.”

II. Equity Plan

We support HUD’s proposed Equity Plan framework that builds on the 2015 rule’s Assessment of Fair Housing to still require meaningful analysis while increasing the focus on setting goals in important fair housing issue areas. The following section explains the importance and value of the Equity Plan framework, provides recommendations for further strengthening this framework and ensuring effective implementation, and answers several questions HUD poses under number 8.

Proposed Equity Plan Provides Strong Framework

Proposed Rule Reflects PHA’s Role in AFFH

The proposed rule would create a distinct set of Equity Plan analysis questions for public housing agencies (PHAs). We support this approach, which recognizes the unique and important role PHAs play in affirmatively furthering fair housing in their communities in addition to the limitations that agencies face, both in terms of capacity and jurisdictional scope. The analysis outlined in the proposed rule importantly requires in-depth analysis of the PHA’s programmatic data and evaluation of its own policies. We encourage HUD to retain the analysis and requirements outlined in this section of the NPRM (with some recommended changes detailed later in this comment).

As the administrators of the Housing Choice Voucher (HCV), public housing, and other rental assistance programs, PHAs have a significant role to play in carrying out the Fair Housing Act’s mandate to affirmatively further fair housing. Moreover, PHAs have an obligation to affirmatively

further fair housing that is independent of HUD’s duty.⁷ In order to fulfill the AFFH obligation, HUD program participants “must consider the existence and impact of race discrimination on housing opportunities and choice in its justification,” and “if such impediments exist, it must take appropriate action to overcome the effects of those impediments.”⁸

PHAs have a history of implementing policies that promote segregation, create a disparate impact on members of protected classes, and violate their duty to affirmatively further fair housing.⁹ For instance, some PHAs in disproportionately white communities with lower poverty rates have implemented preferences within the voucher program for residents who already live in the PHA’s jurisdiction, thereby limiting access for people of protected classes from neighboring communities – particularly people of color.¹⁰

Public housing agencies manage resources that have tremendous opportunity to promote fair housing and help remove barriers to genuine housing choice for members of protected classes. Housing agencies increasingly decide where housing development is located, creating opportunities to combat segregation and promote thoughtful, community-driven place-based investment. For instance, housing agencies lead efforts to revitalize and sometimes relocate public housing properties, particularly through the Rental Assistance Demonstration (RAD) program. Housing agencies can be instrumental in improving the ability of people with housing vouchers to use their assistance in the neighborhood of their choice — including neighborhoods with community assets that best meet their needs — by using tools such as Small Area Fair Market Rent calculations, which better tailor the amount of assistance to the rent costs in a given neighborhood.¹¹ Moreover, PHAs have total control over their landlord recruiting practices and policies that can help shape which properties households with vouchers see and potentially rent. Finally, as mentioned, housing agencies can make decisions about how they manage their waitlists for assistance in ways that can promote (or run counter to) their AFFH obligation.

⁷ Courts have held that public housing agencies have an obligation to affirmatively further fair housing. *E.g. Otero v. New York City Housing Authority*, 484 F.2d 1122, 1124 (2d Cir. 1973) (holding that “the affirmative duty placed on the Secretary of HUD by § 3608(d)(5) and through him on other agencies administering federally-assisted housing programs also requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation”); *Blackshear Res. Org. v. Housing Auth. of Austin*, 347 F. Supp. 1138 (W.D. Tex. 1972) (holding that “both the Housing Authority and HUD are charged with the affirmative obligation to further the national housing policy expressed in the 1964 and 1968 Civil Rights Acts;” *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d (D. Mass. 2002) (holding that PHAs have “an independent obligation to affirmatively further fair housing”). *Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987 (E.D. Pa. 1976) (summarizing a series of court decisions that “applied the affirmative obligation requirement” in the Fair Housing Act to housing authorities).

⁸ *U.S. ex rel. Anti-Discrimination Center of Metro N.Y., Inc. v. Westchester County*, 495 F.Supp.2d 375 (S.D.N.Y. 2007)

⁹ *Otero v NYC Housing Authority; Comer v Cisneros*

¹⁰ See e.g., *Langlois v. Abington Housing Authority*, 234 F.Supp. 2d (D. Mass 2002). Holding that the housing authority’s preference policy and “the PHA’s failure to consider the possible effect of its application procedures on the ability and inclination of qualified minority residents to apply for their Section 8 vouchers is a clear violation of their duty to affirmatively further fair housing”.

¹¹ CBPP and PRAAC, “A Guide to Small Area Fair Market Rents (SAFMRs),” May 4, 2018, <https://www.cbpp.org/research/housing/a-guide-to-small-area-fair-market-rents-safmrs>.

The proposed rule's strong requirements for PHAs are critical because many housing agencies have a long way to go to fully leverage HUD programs to promote fair housing and address their own policies that create barriers to fair housing, reinforce segregation, or promote disinvestment in communities of color. Each category for analysis outlined in the proposed rule is important for PHAs to assess. Similarly, asking PHAs to look at patterns, policies, challenges, and opportunities outside of their control is necessary for understanding fair housing issues, identifying barriers for households, and creating effective and impactful fair housing goals.

Looking beyond PHA control will also mean examining the broader context of available community resources, health and safety issues, and neighborhood environment. For example, in §5.154(e)(4), the proposed rule asks PHAs to analyze access to community assets and affordable housing opportunities for households the PHA serves or could potentially serve. This includes looking at disparities in access to education, employment, transportation, environmentally healthy neighborhoods, and other assets that are well beyond a PHA's direct control. But a PHA still has control over their landlord recruiting practices; the resources and information they provide to households with tenant-based rental assistance to help them make informed decisions; and where to utilize place-based resources, like project-based vouchers or properties converted through RAD. PHAs can also utilize their position to influence policymakers who do have more direct control over non-housing issues by lifting up barriers households receiving assistance face to being able to thrive in their chosen neighborhood. Building inclusive communities and promoting equitable opportunities requires an understanding of the overarching context and collaboration from all stakeholders.

Publication and Process Reports

The addition of annual progress reports and the commitment to post both Equity Plans and the annual progress updates online will help with transparency and accountability and should be kept as part of the final rule. Annual progress evaluations are an important piece of the process since Equity Plans cover a five-year period, which is a relatively long time to go without any updates or opportunities to course correct.

Recommendations to Strengthen Equity Plan

Strengthening Required Analysis

In §5.154(d)(4)(i) and (e)(4)(ii)(A), program participants are asked to assess access to community assets. We recommend HUD explicitly ask program participants to assess quality of resources as part of that requirement. This could be clarified by adding "and quality" following "assets" in the first sentence. While all children can access schools, inequitable funding for the schools that different groups of children can access leads to disparities in educational outcomes. Acknowledging that certain schools have more resources and limited access is critical to understanding the fair housing implications of housing policy, particularly for state and local governments with the power to change decisions about resource allocation for many of the community asset categories listed.

Specifically for the content for PHA Equity Plans outlined in §5.154(e), we recommend the following changes, many of which will help ensure PHAs are properly analyzing their use of project-based vouchers since those decision-making responsibilities are not currently as well reflected in the rule as those for other, equally important, rental assistance and community development programs:

1. In (1)(ii)(A), clarify that the different categories of PHA owned or administered housing for which it must answer demographic questions includes any of the following programs that the PHA administers:
 - a. Public housing
 - b. Project-based vouchers
 - c. Tenant-based Housing Choice Vouchers
 - d. Special purpose vouchers, both tenant- and project-based
2. In (3)(iii), add question (C) asking how many of the PHA's PBV-assisted properties, if any, are located in R/ECAPs, and, for each such property, how do the demographics of the PBV-assisted residents of those properties compare to the demographics of the R/ECAP in which the property is located.
3. Modify (3)(iv)(A-C) to require separate data reporting for PBVs and tenant-based HCVs, broken down by type (i.e., special purpose vouchers).
4. In (4)(ii)(A), require the data be reported by each of the programs the PHA administers (per our recommendation above) to help agencies better identify issues.
5. In (4)(ii)(B), require separate reporting for any site-based waiting list the PHA maintains or allows to be maintained for public housing and/or PBV properties.
6. In (4)(iii)(A), location of PBV properties and PBV-assisted resident demographics should be reported separately from other, tenant-based HCV information.
7. In (4)(iii)(B), following "rental opportunities," add "at the current payment standards" and ask PHAs to state the payment standards.
8. In (4)(iii)(C), require separate responses for public housing and HCV programs, and modify the final clause to add italicized words: "based on the PHA's funding *for the particular program*, and the PHA's siting decisions, *and the percentage of the applicable FMR at which the PHA set its HCV payment standard for each bedroom size*."
9. In the introductory clause of (4)(v), add clarification that "the PHA's housing" includes public housing in which the PHA retains any ownership stake and properties with PBVs administered by the PHA.
10. In (5)(i), add to the examples in the parentheses about policies in the PHA's direct control, "the PHA's payment standards for different household sizes and areas, landlord recruitment practices, the PHA's priorities for selection of properties to receive PBV contracts, whether the PHA provides regular notice to residents of PBV-assisted units of the right to move after one year with the next available voucher."
11. In (5)(iv), add to the examples listed in the parentheses, "higher payment standards in well-resourced areas, and increased search time."

Encourage Collaboration Among PHAs

We generally support HUD's approach allowing a PHA and local government, state, or insular area to submit a joint Equity Plan but encourage HUD to consider two changes to strengthen

collaborative efforts. First, we recommend HUD require PHAs not filing a joint analysis to participate in Equity Plan processes for local governments in their service area and their state or insular area. PHAs are an important stakeholder and should engage in the processes for broader regions to help promote collaboration. This should include sharing PHA data not otherwise provided by HUD that can help other program participants with their Equity Plans.

Second, we recommend HUD encourage PHAs operating in neighboring regions to collaborate on Equity Plans. This will be particularly helpful for small PHAs that may have limited capacity but is also helpful for understanding broader fair housing issues in a region. For example, some metro areas have two or three PHAs operating programs that impact many of the same communities. Especially because HCVs are portable, it is important for PHAs to coordinate on priorities and think strategically about how to utilize resources. PHAs will have a greater combined impact on advancing fair housing goals if they work together.

Sub-Regulatory Guidance and Technical Assistance Can Provide Additional Clarity

As part of the technical assistance to entities required to complete an Equity Plan, HUD should provide additional clarity and guidance through sub-regulatory documents, similar to the previous guidebook created for the 2015 AFFH rule, about how to answer the questions, craft and prioritize goals, and use data. Examples, recommendations on data to use, and other advice for the process would be helpful for program participants. Moreover, providing these details through sub-regulatory guidance would allow HUD to update it more easily. Best practices for evaluating and promoting equitable communities will change, so allowing for some flexibility through a guidebook and other sub-regulatory guidance will allow HUD to adjust, as necessary.

Support with Answering Questions and Developing Goals

A specific example where additional clarity is needed is in §5.154(e)(4)(ii)(B), where the proposed rule requires PHA's to examine "protected class groups on the PHA's waiting list or who want to be on the PHA's waiting list." Explanation of how a PHA should define who wants to be on its waiting list does not need to be explained in the regulation but will need to be explained for PHAs to answer this important question. Data availability may also change, meaning that the best tools for identifying who wants to be on a waiting list need to be more easily updated than the regulatory process allows.

Another important piece that will need additional guidance is crafting and prioritizing fair housing goals. While the iterative submission process with HUD proposed in the rule will help program participants land on meaningful goals, HUD should also provide technical assistance on the front end. This could include case studies that walk a grantee through the process of identifying issues, creating goals to address the issue, and then prioritizing those goals.

For example, §5.154(g)(3)(F) states that amending local laws to add protections or remove barriers to fair housing choice can be important fair housing goals and provides two examples—adding local protections for LGBTQ+ people and survivors of domestic violence and removing nuisance or crime-free ordinances. Additional guidance can provide more examples of such laws, such as enacting fair chance laws that prohibit landlords from conducting unnecessary criminal

records screening, enacting source-of-income protections, and removing laws that impose criminal or civil penalties or harmful enforcement tactics related to people experiencing homelessness (e.g. anti-camping or panhandling ordinances). Using such sub-regulatory guidance will allow HUD to adjust these recommendations and examples as trends in state and local laws change over time.

Assistance and Tools for Data Analysis

Any guidebook or other sub-regulatory guidance should also provide clear metrics for data analysis. For example, measurements of segregation and integration can utilize different methods and thresholds, so HUD will need to provide clear guidance to ensure program participants are utilizing comparable metrics.

Fairly significant data analysis will be necessary to answer all the questions in the proposed Equity Plan thoughtfully and accurately. To ease the process, HUD should provide static data, including maps, and narrative descriptions to ease the process (as proposed in Question 3(a)), particularly for smaller program participants since they may not have existing data analytical expertise or financial resources to add that capacity. HUD can also work to make the online data tool more user friendly in a way that guides program participants through the Equity Plan process while still providing raw data for researchers or grantees interested in conducting analyses using these valuable data.

III. Community Engagement

The proposed rule's public engagement requirements underscore the importance of engaging with a wide range of community stakeholders when working to create fair and inclusive communities.

In §5.158(a)(1), the proposed rule states that “program participants must engage with the public during the development of the Equity Plan.” We interpret this to mean that community engagement should be one of the first steps on creating an Equity Plan, but this language should be clarified to make that more explicit.

It is critical that program participants conduct robust outreach and engagement as one of the initial steps in the process. Public engagement will provide program participants with critical qualitative and quantitative data that will help them identify fair housing issues and develop and then prioritize actions and goals to address the issues. Developing a plan in collaboration with the community, including potentially competing perspectives, may be a new exercise for many program participants. Therefore, HUD will need to provide guidance and technical assistance about how to implement effective community engagement at various points of the process. This should include helping program participants meaningfully center the voices of directly impacted people first and foremost.

In response to question 5(d), one change to the proposed rule that would help center directly impacted people would be to require PHAs to notify through mail, email, etc., all residents, voucher participants, and those on the waitlist of opportunities to participate in the Equity Plan process. This would be separate from requirements to engage with the Resident Advisory Board, which build on

important pre-existing obligations for PHA plans. But reaching out to all people involved with PHA programs is important for broader public engagement and should be added to §5.158(a)(8)(ii).

Allowing for robust public engagement also includes offering different methods for people to participate. In response to question 5(a), we strongly support adding a requirement that at least one community engagement meeting be virtual or at least be hybrid. Allowing stakeholders to join meetings remotely will make participating easier and safer for many groups, such as people with caretaking responsibilities, those with limited access to transportation, and people with disabilities.

In addition to community engagement in the development of an Equity Plan, HUD should ensure stakeholders are able to submit public comments once a draft Equity Plan is complete. This will ensure community members have the chance to provide feedback on how well the grantee responded to the earlier community engagement. HUD should consider including an explicit requirement for program participants to provide a public comment period about a draft plan. While we strongly support the opportunity for the public to submit comments to HUD on the draft Equity Plan, creating a more iterative process between community stakeholders and the program participant for writing the Equity Plan is also important. This will allow program participants the opportunity to make important corrections and will help minimize the number of concerns that stakeholders have to take directly to HUD. Allowing the public to provide feedback on a draft and a submitted version will create more opportunity for program participants' Equity Plans to actually reflect the needs and wishes of the communities they serve.

IV. Review and Compliance

Overall, the proposed rule balances the importance of HUD working collaboratively with communities to resolve deficiencies and retaining meaningful enforcement tools should communities fail to meet their legal obligations. The following highlights particular provisions that we support and recommendations for strengthening the review and compliance provisions.

Equity Plan Reviews

We support the proposed approach allowing HUD more time to review Equity Plans and the iterative, collaborative process for HUD and program participants to resolve any issues with the plans.

In §5.162(a)(2), HUD notes that “an Equity Plan may be accepted without HUD review due to infeasibility or other exigent circumstances beyond HUD's control.” While it is reasonable that HUD may have to sometimes accept an Equity Plan without reviewing it because of capacity issues or circumstances outside of HUD's control, it should be rare and done with a clear explanation of why. Plans accepted without HUD review should be marked as such to keep HUD accountable if it becomes a systemic issue.

Public Complaint System

We strongly support the public complaints system proposed in §5.170(a). Such a process exists in other settings, such as alleged Section 504 and Title VI violations, and has not resulted in entities

facing a deluge of unwarranted cases or an increased burden. It is, however, an important piece of accountability missing from previous iterations of AFFH. A straightforward process for someone to file a complaint with HUD alleging an AFFH violation provides another avenue for community members and stakeholders to hold accountable the institutions serving them.

Enforcement Measures for Public Housing Agencies

HUD's ability to enforce PHA and other program participants' AFFH obligations is crucial. The Fair Housing Act not only requires HUD and its program participants to affirmatively further fair housing and address segregation as explained above, but also requires HUD to use its authority to ensure that its program participants (including public housing agencies) also affirmatively further fair housing.¹² In §5.172, the proposed rule provides HUD with multiple, appropriate procedures to withhold or terminate funding to a program participant in noncompliance as an enforcement option.

However, HUD is appropriately concerned about potential harms to participants in and applicants for PHA-administered rental assistance programs if HUD withholds funding or terminates funding contracts with a PHA. HUD should strengthen the final rule by making the changes recommended below to explicitly reference and facilitate the use of unique statutory authorities that it has under section 6(j)(3) of the U.S. Housing Act to achieve PHAs' compliance with their obligations under federal law without causing harm to the families a PHA serves.

HUD has three possible ways under section 6(j)(3) of the U.S. Housing Act to achieve compliance with obligations under an AFFH rule and related PHA plan requirements without formal administrative or judicial proceedings or terminating its contribution contracts for a PHA's rental assistance programs:

- Select through a competitive process another PHA or private housing management agent to manage part or all of the PHA's programs;
- Take over such management itself; or
- Require the PHA "to make other arrangements acceptable to the Secretary and in the best interests of the public housing residents and families assisted under [Section 8]."¹³

While such "other arrangements" are not specified in the statute, it is reasonable to assume that they could include an agreement to consolidate operations through a complete merger or a consortia agreement with another PHA, including a PHA with state-wide or regional jurisdiction, or to contract with a private entity to manage all or part of its programs.

In some cases, a PHA may unduly limit its fair housing goals or be unable to comply with goals it has set (e.g., its service area includes few if any "well-resourced areas of opportunity" for interested

¹² *National Association for the Advancement of Colored People (NAACP), Boston Chapter v. U.S. Dep't of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987) (finding that HUD could be held accountable for failing to use its enforcement authority to hold jurisdiction accountable to the AFFH obligation). *U.S. ex rel. Anti-Discrimination Center of Metro N.Y., Inc. v. Westchester County*, 495 F.Supp.2d 375 (S.D.N.Y. 2007).

¹³ Section 6(j)(3)(A)(i), (iv) and (v) of the U.S. Housing Act, 42 U.S.C. §1437d(j)(3)(A)(i), (iv) and (v). Clause (A)(ii) allows HUD to petition a court to appoint a receiver of some or all of a PHA's programs.

households to live) and state or local laws impose rigid restrictions on its ability to enter into a voluntary partnership with another PHA.¹⁴ Section 6(j)(3) also provides a potential remedy in such situations, as it does not make the Secretary's authority under the first and third options subject to state and local law constraints.¹⁵ This conclusion is reinforced by another provision of the U.S. Housing Act that, for purposes of administering Section 8 tenant-based rental assistance, defines a "public housing agency" as including a PHA that HUD contracts with to manage the HCV program of a defaulting PHA, "without regard to any otherwise applicable limitations on its area of operation."¹⁶

With that in mind, in order to further strengthen HUD's AFFH enforcement, we recommend the following modifications in the final rule regarding enforcement of PHAs' compliance with the AFFH rule:

- Revise §5.154(g)(3) to clarify that a PHA's authority is not limited to its usual service area but must include consideration of broadening its geographical area of operation through forming management agreements or consortia agreements or consolidating with other PHAs within the region.¹⁷
- To avoid any ambiguity, HUD should include in §5.166 a clear statement that a PHA's failure to adopt an Equity Plan that HUD approves or to comply with an approved plan is a substantial default "with respect to the covenants or conditions" to which a PHA is subject,

¹⁴ Some states have laws that limit the area in which a PHA may administer housing vouchers *and* restrict the ability of PHAs to enter into voluntary agreements with other PHAs to overcome geographical barriers. *See*: Barbara Sard and Deborah Thrope, "Consolidating Rental Assistance Administration Would Increase Efficiency and Expand Opportunity," Center on Budget and Policy Priorities, April 11, 2016, [https://www.cbpp.org/research/housing/consolidating-rental-assistance-administration-would-increase-efficiency-and-
If a particular political jurisdiction is only a small part of the county or metro area in which it is located, and has few or no areas that are well-resourced areas of opportunity and in which most of the residents are of a different racial or ethnic group than a large share of the participants in the PHA's HCV program, but such areas exist in the surrounding region, the PHA's ability to affirmatively further fair housing in its HCV program may be seriously constrained. The PHA could still educate families on their option to move out of the PHA's narrow jurisdiction through the use of portability procedures, but the potential effectiveness of such strategies may be very limited.](https://www.cbpp.org/research/housing/consolidating-rental-assistance-administration-would-increase-efficiency-and-)

¹⁵ Section 6(j)(3)(C)(iii) and (iv) allow a judicial receiver to establish a new PHA to take over programs of the defaulting PHA, or to consolidate all or part of the programs of the defaulting PHA with other PHAs, only if such action is permitted by state or local law. Section 6(j)(D)(i)(III) and (IV) impose similar constraints on HUD if it takes over direct management of a PHA's program(s) under 6(j)(3)(A)(iv). But there is no specific reference to state and local law constraints if HUD selects another PHA to manage the defaulting agency or if HUD selects another PHA to manage the defaulting agency or if HUD requires the defaulting agency to enter into some form of management agreement with another PHA.

¹⁶ Section 3(b)(6)(B)(iii) of the U.S. Housing Act, 42 U.S.C. §1437a(b)(6)(B)(iii). This part of the definition of a PHA applies when HUD "determines that a public housing agency is unwilling or unable to implement a program for tenant-based assistance [under] section 8, or is not performing effectively." Noncompliance with AFFH requirements appears to qualify easily with the statutory requirement of ineffective performance.

¹⁷ The particular sentence of concern in 5.154(g)(3) is "Program participants' consideration of the reach and breadth of their own authority and spheres of influence must be taken into account when determining which goals to set." 88 Fed. Reg. 8566.

thereby allowing HUD to invoke its remedial powers under section 6(j)(3) of the U.S. Housing Act.

- Clarify in §5.170 that a Voluntary Compliance Agreement may include requiring a PHA to expand housing opportunities, under the authority of section 6(j)(3)(A)(v) of the U.S. Housing Act or otherwise, that are constrained by the PHA’s area of operation by entering into formal agreements with other PHAs within the region—such as consortia, memoranda of understanding, management agreements, joint portability agreements, or regional project-based voucher agreements—or consolidating with other PHAs.
- Revise §5.172 to make clear that HUD has remedial powers to enforce compliance with the AFFH rule that uniquely apply to PHAs and would avoid any gap in funding for the PHA’s rental assistance programs.
- Add a PHA-specific notice similar to the one in §5.172(d) for state and local governments that would seek assistance from state or local governments in appropriate cases of PHA failure to comply with its AFFH obligations. Such a provision could be helpful if, for example: a PHA is part of the state, city, or county government and are authorized by state law to administer housing vouchers in the area on the non-compliant PHA; a PHA has one or more board members appointed by the Governor; or a situation where action by a state legislature may be needed to modify state law to allow creation of a regional housing authority or to permit a state HCV agency to take over administration of the vouchers of a local PHA.

V. Incorporation of Equity Plan into Other Planning Documents

Incorporation of the Equity Plan into other planning documents will help program participants successfully achieve their fair housing goals, so the proposed rule’s changes to regulations on PHA plans are important.

Specifically, we support the new language in §903.7(o)(3) that adds needed specificity about what a PHA must do to be in compliance with its civil rights certification. For additional clarity, we recommend making the following changes:

- In proposed §903.7(o)(3)(i) and (ii), include “discretionary policies” with “programs and activities” and “proposed programs and activities” to make explicit that the policies governing the program and activities need to be examined as well.
- In proposed §903.7(o)(3)(iv), modify the language to acknowledge that a PHA’s service area may spread over multiple jurisdictions. A revised paragraph could read: “Works with the relevant jurisdictions withing the CBSA or state to implement any of the relevant jurisdictions’ initiatives to affirmatively further fair housing that require the PHA’s involvement.”

While incorporating Equity Plans and PHA plans is addressed, effective incorporation of fair housing goals in PHA’s HCV Administrative Plans is not part of the proposed rule. We recommend HUD support such incorporation by including specific references to the HCV Administrative Plan in §5.156(a) and (b) as well as in the last sentence of the introductory paragraph of §903.7 so that it reads:

“The PHA’s Annual Plan *and the incorporated HCV Administrative plan, if applicable*, must be consistent with the goals and objectives of the PHA’s 5-year Plan and the PHA’s Equity Plan once an Equity Plan is required by §§5.150 through 5.180 of this title.”

Detailed program policies in the HCV Administrative Plan are not necessarily reflected in the PHA Plan, and the commitments in the Equity Plan should be fully incorporated into both. Many PHA plan requirements focus on public housing, while more discretionary HCV policies that have an impact on fair housing are part of the Administrative Plan.

VI. Benefits of the Proposed Rule Overwhelmingly Outweigh Potential Implementation Costs

Reversing generations of housing discrimination and segregation obviously requires great effort. As stated above, there is a long history of policies and practices that created segregated communities and perpetuated housing discrimination toward individuals and communities protected under the Fair Housing Act. Those policies and practices erected barriers to fair housing choice that still exist today. Given that it was federal, state, and local policymakers and HUD program participants that created and perpetuated these problems, they should be expected to do the hard work to reverse it. In fact, this is the hard work that the Fair Housing Act demands of HUD and its program participants. Congress nowhere suggested that the convenience of HUD and local jurisdictions was sufficient grounds to curtail efforts to affirmatively further fair housing.

Thus, any analysis of the likely impact of HUD’s proposed rule must heavily weight the effect it would have on members of protected classes, which have borne the high costs and harms associated with the nation’s long legacy of discriminatory housing policies. As HUD correctly concludes in the preamble and Regulatory Impact Analysis, the costs of implementing the proposed rule would be easily offset by the tremendous societal benefits related to advancing fair housing. We agree with HUD’s analysis that some program participants may have increased costs related to compliance and that these costs are appropriate and small in proportion to the significant impact the rule can have in advancing fair housing. The program participants that face the greatest costs are likely those that have historically underinvested in meeting their existing AFFH compliance duties and are better characterized as finally making an overdue investment than bearing a new cost or administrative burden because of this proposed rule. In addition, the proposed rule builds on existing structures and mechanisms that are already in place, minimizing the costs imposed on program participants. Indeed, some program participants may see greater efficiency due to the improved clarity in their AFFH obligations and, therefore, reduced costs.

Moreover, the positive impact of stronger AFFH goals and compliance is large and extends well beyond housing outcomes. It is difficult to precisely estimate the impact of the rule given the variation in which fair housing goals each program participant will select and focus on. However, there is an inextricable connection between where people live and their health, education, and economic opportunities, and the proposed rule has the potential to contribute to improved outcomes in each of those areas.