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

RE: Docket No. FR-6250-P-01; Affirmatively Furthering Fair Housing

Dear Regulations Division:

These comments on HUD's proposed Affirmatively Furthering Fair Housing regulation are filed on behalf of the Fair Housing Justice Center ("FHJC"). The Fair Housing Justice Center is a regional non-profit civil rights organization dedicated to eliminating housing discrimination; promoting policies and programs that foster open, accessible, and inclusive communities; and strengthening enforcement of fair housing laws in New York City and the seven surrounding New York counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester (New York City Region). Our service area contains roughly 65% of the State of New York's population.

The FHJC has assisted over a thousand individuals and organizations with housing discrimination complaints to exercise their fair housing rights over the past eighteen years. The FHJC is a full-service fair housing program that conducts proactive testing investigations to find and eliminate systemic housing discrimination. These investigations have led to over 150 legal challenges to discriminatory housing policies and practices by private housing providers and government agencies to bring them into compliance with fair housing laws. As a result of the FHJC's work, over 74,000 housing units have been opened to previously excluded people, and more than \$52 million in monetary damages and penalties have been recovered. In addition, the FHJC advocates for policies and programs that advance our mandate of more open, accessible, and inclusive communities; we engage in outreach and educational activities to increase awareness of fair housing rights; and provide technical assistance, training, and other tools to upgrade and strengthen fair housing law enforcement.

The AFFH Mandate and Rules

The AFFH mandate was an important component of the Fair Housing Act when it was passed in 1968 but has primarily gone without effective implementation for 55 years. AFFH is a critical tool for ensuring that all communities provide their residents with equitable access to the

resources, assets, and opportunities they need to thrive. We need a strong AFFH rule to achieve much-needed equity and boost our country's prosperity.

The FHJC was supportive of the initial 2015 AFFH regulation to fix this gap. The rule required the New York City Housing Authority (NYCHA) and the Department of Housing Preservation and Development (HPD) to engage in a planning process to help New York City take “meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities.” Since January 2018, when HUD suspended the AFFH rule that it had adopted three years earlier, the HUD program participants (“grantees”) in our service area have made decisions about how and where to use their HUD funding and other housing and community development resources with no effective guidance or oversight to ensure those activities affirmatively further fair housing. That is far too long for grantees to go without the guidance they need about advancing fair housing and expanding access to opportunity for all the residents they serve. In January 2020, New York City and HPD released the Where We Live NYC Draft Plan for public review. The 216-page report is the culmination of a two-year Assessment of Fair Housing (AFH) process to identify barriers to housing choice in New York City and to identify goals, strategies, and actions it planned to undertake to affirmatively further fair housing over the next five years.

The FHJC did not find the City's Draft Plan sufficient to meet their obligations under the AFFH rule and the Fair Housing Act. The FHJC's position is fully explained in its March 9, 2020, public comments to HPD on the Draft Plan. The FHJC's key findings included:

- (1) The Draft Plan does not meet New York City's commitment to comprehensive fair housing planning because it fails to analyze its own policies and programs.
- (2) New York City's community engagement process lacked fair housing expertise to provide meaningful community input into the assessment process.
- (3) New York City failed to gather, present, and analyze relevant data on fair housing enforcement, discrimination complaints, and litigation.
- (4) The Draft Plan ignores New York City policies and programs that perpetuate barriers to housing choice and impede progress toward creating open, accessible, and inclusive communities.
- (5) New York City did not utilize a regional or intersectional approach to identifying barriers to housing choice.

[FHJC's comments also provide fifteen examples of fair housing issues and actions](#) that New York City should have addressed in its Draft Plan. In 2023, New York City released [a Progress Report](#) to follow its Draft Plan, which superficially raises some issues identified by the FHJC in 2020 but fails to provide substantive goals toward implementing these priorities.

The FHJC, therefore, welcomes this proposed new rule to implement the Affirmatively Furthering Fair Housing (AFFH) provisions of the federal Fair Housing Act. HUD's publication of this proposed rule is a welcome step toward restoring an effective structure for implementing AFFH in our communities. We urge you to move forward quickly to issue a final regulation.

Key provisions to preserve in the final AFFH rule:

The proposed rule contains several provisions that are particularly important to its effectiveness, and we recommend that they be preserved in the final rule. These include:

1. In §5.152, the **new definition of *Affirmatively furthering fair housing*** incorporates the definition from the 2015 AFFH rule but adds the phrase, “it extends beyond a program participant’s duty to comply with Federal civil rights laws and *requires a program participant to take actions, make investments and achieve outcomes that remedy the segregation, inequities, and discrimination the Fair Housing Act was designed to redress.*” The emphasis on actions and outcomes helps make clear that simply creating an Equity Plan does not mean that a grantee is fulfilling its AFFH obligation. To do so, it must take concrete steps and achieve measurable outcomes that advance the broad fair housing goals of the statute. This is a very important distinction that is often confusing for grantees, and the new language should give grantees a clearer understanding of what their AFFH obligation entails.
2. There are several **accountability measures** in the rule that are necessary to ensure that grantees make meaningful progress toward achieving their fair housing goals and that HUD can use to carry out its oversight and enforcement responsibilities effectively. These include:
 - a. The ability of the public to submit comments to HUD during its review of Equity Plans (§5.162(a)). This, along with the publication of the submitted Equity Plans on HUD’s website, will provide an important backstop in the Equity Planning process. Allowing community stakeholders to flag for HUD’s review cases where grantees may have violated the Fair Housing Act, failed to comply with the rule’s community engagement requirements, or failed to account for stakeholder recommendations about fair housing issues, priorities, goals, and strategies, will enable those stakeholders to help focus HUD’s review of pertinent shortcomings in specific Equity Plans. Allowing the public to comment during HUD’s review of Equity Plans will also give stakeholders an opportunity to provide important local data and knowledge that may not have been incorporated in the Plan. This, in turn, will allow HUD to take the steps necessary to ensure that changes are made to the final Equity Plans so they will address their communities’ most pressing fair housing issues.
 - b. The goal of a robust community engagement process (§5.158). It appears from the general provisions of §5.158 that HUD intends for grantees to undertake broad and robust community engagement throughout the process of developing, implementing, and monitoring progress under their Equity Plans. This section requires grantees to be proactive in facilitating engagement with their communities, recognizes that some community members may not be familiar with the AFFH mandate and requires grantees to help them understand its intent, and acknowledges that residents are in a unique position to offer insights into local fair housing issues. It requires grantees to use outreach methods that will reach the broadest possible audience, to make special efforts to reach members of protected

classes that historically have been denied equal opportunity, and to conduct their community engagement efforts in ways consistent with federal fair housing and civil rights statutes, so that they address the barriers that impede the ability of people with disabilities, those with limited English proficiency and others to participate fully in the Equity Planning process. It requires grantees to ensure that community members have an opportunity for involvement in determining how the fair housing goals from the Equity Plan are incorporated as strategies and meaningful actions in the ConPlan, PHA plan and other planning documents.

This is the type of outreach that grantees must undertake and input they must seek to ensure they can accurately identify fair housing barriers in their communities as well as develop meaningful goals and solutions for overcoming them. The FHJC has witnessed grantees, such as New York City, claim broad community involvement in their plans yet fail to include qualified fair housing organizations with expertise in identifying barriers to housing choice. Communities should make explicit the need for local fair housing organizations to be included and engaged in equity planning.

It is needed to ensure that Equity Plans are not based on the beliefs, whims, or understandings of grantee officials, but rather centered on the true needs of the communities they serve. We commend HUD for the message these provisions send that grantees must undertake a robust community engagement effort. However, the mechanics of the community engagement process, may not yield the desired result, and we urge HUD to make the necessary changes to ensure this vision of a community engagement process will be a reality in our community and others throughout the nation.

- c. The requirement for program participants to submit annual progress evaluations on their Equity Plans (§5.160(f)). These reports, which should be required to be published on grantees' own websites in addition to HUD's website, will be an invaluable tool for enabling the public to monitor grantees' performance in implementing the strategies they have identified and achieving the goals set out in their Equity Plans. The evaluations will help identify any obstacles that may impede grantees' ability to accomplish those goals and therefore allow for early intervention and course corrections.
- d. The establishment of a complaint process (§5.170). Giving the public the ability to submit complaints to HUD in cases where a grantee has failed to comply with the requirements of the AFFH rule, failed to comply with the commitments it has made under the rule, or has taken action materially inconsistent with its obligation to affirmatively further fair housing, is a critical provision of the proposed rule and must be preserved in the final regulation. Currently, there is no clear mechanism by which members of the public can submit such complaints, hampering their ability to assist HUD in its AFFH oversight and enforcement responsibilities and limiting HUD's ability to do so effectively and efficiently. By

closing this gap, this provision of the proposed rule significantly strengthens the AFFH regulatory framework.

- e. Clarity regarding the procedures that HUD will use to enforce the regulation and the tools available to ensure compliance (§5.172). The proposed rule sets out the procedures that HUD will use to ensure grantees' compliance with the rule, including the steps it will take to protect grantees' due process rights and remedies HUD may seek. No previous AFFH rule has included such explicit enforcement procedures, and their inclusion here sends a strong signal to grantees that HUD takes the AFFH obligation seriously and expects them to do the same. We urge HUD to maintain these provisions in the final rule.

3. Connections to other planning processes (§5.156)

- a. Link to ConPlan, annual action plan, and PHA plan. One of the weaknesses of the Analysis of Impediments (AI) required under the 1995 AFFH regulation was its lack of connection to any other plans a grantee might develop, policies and practices it might adopt, and decisions it might make about allocating housing and community development resources. There was no formal link between the findings and conclusions of the AI, or any goals it might have set, and any of the mechanism's grantees had in place to advance housing and community development activities. This lack of connection robbed the AI of any meaningful impact. The proposed rule tackles that problem head-on, requiring grantees to include the goals, strategies, and meaningful actions from their Equity Plans into their Consolidated Plans, annual action plans, and PHA plans. This is a significant improvement over previous AFFH regulations and must be preserved in the final rule. The FHJC demonstrated the persistent and pervasive nature of illegal housing discrimination in New York City. The FHJC shared examples of its cases and settlements, as well as those brought by its testers, bona fide complainants, and filed by the US Attorney's Office based on its testing evidence, highlighting the enduring, systemic, invidious nature of housing discrimination that persists throughout all of its neighborhoods. The FHJC, and other advocates and attorneys, do not see New York City engaging in robust enforcement efforts or showcasing relevant analyses of impediments to housing choice. Efforts should be made to open as many housing units in New York City as possible to persons who are subject to discrimination because of race, national origin, disability, source of income, and/or other protected characteristics. Rather than framing conversations about fair housing around compelling and current data that is more meaningful to AFFH, New York City focused on administrative accomplishments in tangentially related areas, such as ferry service and artwork in local parks.
- b. Link to plans required under other federal programs. The proposed rule also requires grantees to incorporate the fair housing goals from their Equity Plans into planning documents required under other federal funding programs. Given the connection between housing and other community resources and assets that lies at the heart of the AFFH mandate, this requirement represents an important step toward ensuring that all federal programs relating to housing and urban

development are conducted in a manner consistent with that mandate. We commend HUD for taking this step and urge that this provision be retained in the final rule.

Changes that must be made to strengthen the rule and increase its effectiveness:

At the same time, other provisions of the rule can be sharpened to ensure that it functions as effectively and efficiently as possible and provides the maximum benefit to our communities. Among these changes are the following:

- 1. Inclusion of an assessment of the fair housing outreach and enforcement capacity among the required fair housing goal categories.** As proposed, the rule includes two fair housing goal categories related to the legal framework for fair housing compliance locally. §5.154 (c)(3)(v) addresses “Laws, ordinances, policies, practices, and procedures that impede the provision of affordable housing in well-resourced areas of opportunity, including housing that is accessible for individuals with disabilities.” §5.154 (c)(3)(vii) addresses “Discrimination or violations of civil rights law or regulations related to housing or access to community assets based on race, color, national origin, religion, sex, familial status, and disability.” Between them, these two categories require a more comprehensive assessment of the fair housing implications of the local legal framework, which is commendable.

However, the fundamental fair housing work that leads to the exposure of legal violations and remedies them is missing and should be included. This is the work that we and other fair housing organizations do every day: education and outreach with many different segments of our communities, investigating allegations of discrimination and assisting those whose rights have been violated to get those rights vindicated, assessing the fair housing trends in our communities, and participating in local policy decisions regarding the use of housing and community development resources. Without the active engagement of groups like ours and the support of the HUD grantees in the jurisdictions we serve, the most robust legal framework would have limited benefit for people in our communities because many people would be unaware of their fair housing rights and how to ensure they are protected when that is necessary, and local policymakers would not be prompted to consider the fair housing ramifications of the decisions they make and the policies they adopt.

As referenced above, the FHJC’s testing has served as the basis for over 150 lawsuits and administrative complaints, resulting in a total monetary recovery of \$52 million and over 74,000 housing units opened to previously excluded people. The FHJC has investigated source of income discrimination since it was first made illegal in New York City in 2008 and expanded this work when New York State added protections in 2019. The FHJC has conducted hundreds of tests in the past three years and brought 11 legal actions challenging these discriminatory practices. Its testing became the basis for a successful lawsuit against New York City, resulting in changes to its policies regarding criminal background check policies for applications to publicly subsidized buildings.

The FHJC’s policy work was key to passing a host of state fair housing laws in 2022, especially its involvement in shaping Newsday’s *Long Island Divided* a journalistic news expose of racially discriminatory practices by Long Island real estate agents. The FHJC helped to design and guide the investigations in that study and made significant contributions. FHJC’s fair housing expertise and advocacy helped to shape nine State bills. The most notable legislation passed establishes an Anti-Discrimination in Housing Fund, which the Attorney General’s Office uses for fair housing testing, establishes a state and local agency obligation to Affirmatively Furthering Fair Housing, Increases the Required Training for Real Estate Professionals Relating to Fair Housing Laws and Housing Discrimination; And requires Standardized Intake Procedures be Used by Real Estate Professionals. The FHJC continues to lead in education, outreach, and fair housing enforcement, ensuring our activities bolster the AFFH mandate.

Under the 2015 AFFH rule, grantees were required to consider, among other factors, “The jurisdiction’s fair housing enforcement and fair housing outreach capacity.” (See §5.154(d)). This analysis was very important for understanding the full local fair housing infrastructure and ensuring that any critical gaps were flagged and addressed. We urge HUD to include this as an additional fair housing goal category in the final AFFH rule.

2. Strengthen the community engagement process for Equity Plans.

- a. Clarify the role of fair housing groups and others serving or representing members of protected classes. The community engagement provisions of the 2015 AFFH rule stated that jurisdictions “**shall consult with** other public and private agencies that provide assisted housing, health services, and social services (including those focusing on services to children, elderly persons, persons with disabilities, persons with HIV/AIDS and their families, homeless persons), **community-based and regionally-based organizations that represent protected class members, and organizations that enforce fair housing laws.**” (§91.100 (a)(1), emphasis added)

In the amendments to the ConPlan regulations, the 2015 rule went on to state that in preparing both the ConPlan and the AFH, “**The jurisdiction shall consult with community-based and regionally-based organizations that represent protected class members, and organizations that enforce fair housing laws, such as State or local fair housing enforcement agencies (including participants in the Fair Housing Assistance Program (FHAP)), fair housing organizations and other nonprofit organizations that receive funding under the Fair Housing Initiative Program (FHIP), and other public and private fair housing service agencies, to the extent that such entities operate within its jurisdiction.**” (§91.100 (a)(3)(e), emphasis added) Together, these provisions clearly established the expectations that jurisdictions must consult with fair housing organizations and other organizations that have deep knowledge of and extensive experience with fair housing enforcement, as well as an understanding of the fair housing issues and trends in the area. In addition, that consultation was required to include groups that represent members of protected classes and therefore have firsthand knowledge of the barriers to fair housing they encounter,

as well as other organizations that serve protected classes and are in a position to offer insight into their needs on a range of issues that intersect with housing and are appropriate to consider during the fair housing planning process.

Where the language cited above appears in the proposed rule, it refers only to the ConPlan, not to the Equity Plan – the process for which this input is most important, as it determines which goals, strategies and actions will be included in the ConPlan.

The proposed rule’s community engagement requirements for the Equity Plan, in contrast, offer much less detail and specificity about the groups with which grantees must consult during the Equity Plan process. It includes general language about engaging with members of the community or the public at large (§5.158(a)(1)) or engaging with a wide variety of diverse perspectives (§5.158(a)(6)). This language does not provide the same degree of the clarity and specificity that the 2015 rule did, and raises concerns that grantees will not, in fact, consult with those organizations and individuals that best understand local fair housing and related concerns or those that represent protected class members themselves, and best understand their lived experiences and the barriers they face.

The proposed rule does require grantees to, “Connect with and provide information about fair housing planning to local community leaders, which may include, but are not limited to advocates, community-based organizations, clergy, healthcare professionals, educational leaders or teachers, and other service providers such as social workers and case managers to provide and solicit the views of the communities they serve.” However, the reference here to “advocates” and “community-based organizations” is both broad and vague and does not compel the robust engagement jurisdictions and public housing agencies should have with fair housing organizations and groups that represent protected class members and that should be central to the fair housing planning process. Nor does it require grantees to expressly incorporate critical feedback from fair housing experts in the development of strategies and goals for the Equity Plans.

We recommend that the final rule include the language from §91.100 (a)(1) and §91.100 (a)(5)(e) of the 2015 in the community engagement provisions of §5.158. Similar revisions should be made to the community engagement requirements for PHAs. This will ensure that grantees consult with the organizations and individuals best positioned to offer informed input as the grantees go through the various stages of developing their Equity Plans.

- b. Provide better guidance on how and when to engage with the community. The proposed rule states at §5.158(c)(1) that grantees must engage with their communities prior to and during the development of the Equity Plan. §5.158(d)(1) states that they must hold at least three public meetings during the development of the plan, and §5.158(d)(2) requires that they hold at least 2 public meetings in developing their annual progress evaluations. **We recommend that**

HUD provide grantees with more specificity about the points during the Equity Plan process at which they should engage with their communities.

These would include prior to the development of the plan, during the drafting stage, and to solicit feedback on the draft once it is completed.

We also recommend that HUD reconsider the number of meetings grantees are required to hold. In some smaller jurisdictions, 3 meetings may be sufficient. But for grantees that serve large populations or large geographic areas, that number may be too low to allow for meaningful participation by the affected communities.

Further, we recommend that HUD provide greater direction and flexibility about the various formats that may be used to engage the community. The use of the term “public meeting” rather than “public hearing” suggests that formats that are less formal than the traditional public hearing may be acceptable, which is a positive change. However, experience under the 2015 rule and during the pandemic suggests that a wider variety of formats – including smaller, targeted focus groups and virtual meetings that do not require participants to travel from their homes - may enhance the opportunity for meaningful engagement by a range of community members.

- c. Clarify that community stakeholders must be involved in setting priorities among the fair housing issues identified, which determines the goals and strategies that will be incorporated into the final Equity Plan. As currently drafted, the proposed rule states that community members must have the opportunity to provide meaningful input into the identification of fair housing issues and the setting of fair housing goals to address those issues. (§5.158(a)(1)). However, it fails to require that community members have the opportunity to provide meaningful input into the critical stage between those two steps: the establishment of priorities among the fair housing goals. Grantees may identify more fair housing issues in any goal category than HUD expects them to set goals for, and unless community members have input into setting priorities among those goals, their Equity Plans may fail to elevate those fair housing issues that community stakeholders find most pressing. **We recommend that HUD correct this oversight in the final rule.**

3. Clarify the timelines associated with and the remedies available for people or organizations that file complaints under §5.170.

- a. As noted above, the inclusion of a complaint process in the proposed rule is a significant step forward in holding grantees accountable to their AFFH obligations. However, this important provision would be improved by clarifying the timelines and remedies available to those who file meritorious complaints under this section. Specifically, the rule should state:
 - i. HUD will take initial action on any complaints within 20 days.
 - ii. HUD will complete its investigation with 180 days of accepting a complaint.

- iii. Complainants should be allowed to amend their complaints at any time.
- iv. The remedies available to complainants are those authorized under the Fair Housing Act, including injunctive relief, policy changes, money damages and attorney's fees.

Without confidence about their access to these remedies, stakeholders may be discouraged from filing complaints whose successful resolution would advance equity in their communities and support HUD's mission with respect to AFFH.

4. Ensure greater transparency and public access to critical AFFH-related information and documents.

- a. To ensure that community stakeholders, including fair housing groups and others, can be prepared to engage in the Equity Plan process with grantees in their communities, it would be helpful to know in advance when that process will take place. To facilitate their participation, **HUD should publish a list of the dates on which PHA plans and ConPlans will be due** for each of its program participants, along with the corresponding due dates for their Equity Plans. These meetings should be posted in advance and on any publicly available website and social media accounts to create transparent and inclusive access to the information.
- b. Effective community engagement in the development and implementation of Equity Plans depends on the public having access to the relevant documents throughout the process. As drafted, the proposed rule requires grantees to make their draft Equity Plans available to the public, and encourages, but does not require them to publish the final version of the plan. HUD, in turn, intends to publish the submitted plans on a HUD-maintained website, and may publish the final plans or portions thereof on a HUD-maintained site as well, along with each grantee's annual progress evaluation. This proposed system does not ensure consistent, comprehensive public access to the final Equity Plans or annual progress evaluations.

To address this gap in access to critical documents, HUD must **require program participants themselves to make the relevant documents available on their own websites**: the draft Equity Plan that is published for comment, the revised draft submitted to HUD, the final version as accepted by HUD and the annual progress evaluations. This kind of transparency is a local responsibility – not just a federal one – and grantees should be required to provide transparency to community stakeholders to facilitate community engagement in the Equity Plan process. (*See* §5.154(j) and (i)(2))

5. Establish greater clarity regarding the full scope of the AFFH obligation.

- a. This regulation covers only a portion of HUD's programs and activities related to housing and urban development, but the statutory AFFH mandate covers them all. For HUD to fulfill its AFFH obligations comprehensively, it should adopt a policy addressing the steps it will take and the policies it will implement to ensure that it

administers its programs, policies, and activities not covered by this regulation in a manner affirmatively to further fair housing.

- b. HUD is not the only federal agency with an obligation to affirmatively further fair housing; that obligation applies to all executive agencies and departments, including those with regulatory or supervisory authority over financial institutions. (*See* 42 U.S.C. §3608 (d)). HUD has a special role to play in providing leadership to and coordinating with other agencies and ensuring that they administer their programs and activities that relate to housing and urban development in a manner consistent with their AFFH obligations. HUD should adopt a policy detailing how it will carry out this function, along with a concrete plan for doing so.

As noted above, there are several places in the proposed rule where we recommend that HUD make changes to incorporate specific references to the roles that fair housing groups like the FHJC can and should play throughout the Equity Planning process. Fair housing groups are a valuable resource for grantees, whether they be jurisdictions or public housing agencies. We conduct outreach and provide education to many different segments of our communities, including renters and tenants' groups, as well as homeowners (current and prospective), landlords, real estate agents, and many others. In that process, we help people understand their fair housing rights and responsibilities, we help them understand what AFFH means, and we hear about the issues and obstacles they face in the housing market. We record, investigate, and seek to resolve complaints and conduct audits of our local housing markets. These activities give us detailed and specialized knowledge of our communities' fair housing problems and trends. We monitor housing and community development-related public policy proposals and analyze them through a fair housing lens, providing input about their fair housing implications in the decision-making process.

Our expertise makes us uniquely situated to help grantees carry out their Equity Planning processes – from the development stage through implementation – in a manner that aligns grantees' efforts in support of fair housing, as Congress intended. Grantees should seek active partnerships with local fair housing groups where they exist and support efforts to create them in communities where they do not. We hope that HUD will amplify this message in the final AFFH rule and in the guidance and training that may accompany its implementation.

Thank you for the opportunity to submit comments on this critical fair housing rule. We urge HUD to move quickly to issue a final rule and look forward to working with HUD and its grantees on implementing that rule in the future.

Sincerely,

Elizabeth Grossman, *Executive Director/General Counsel*
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Fair Housing Justice Center (FHJC)