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Re: Comments on Docket No. FR-6250-P-01, Affirmatively Furthering Fair Housing

To Whom It May Concern:

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) writes to submit our comments regarding the proposed rule (NPR) published by the U.S. Department of Housing and Urban Development (HUD) on February 9, 2023 (88 Fed. Reg. 8,516) addressing the affirmatively furthering fair housing (AFFH) provision of the Fair Housing Act (FHA). The Lawyers' Committee, which was formed 60 years ago at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity. The Lawyers' Committee's Fair Housing & Community Development Project has been involved in virtually every facet of HUD's prior approaches to AFFH from drafting fair housing plans to providing technical assistance as a subcontractor to HUD to filing administrative complaints challenging HUD grantees' compliance to, lastly, suing to challenge the Trump Administration's suspension of the implementation of HUD's 2015 AFFH rule, 80 Fed. Reg. 42,771, in 2018. The Lawyers' Committee is uniquely situated to provide input on how HUD can learn from the past to craft the most effective AFFH rule possible, one that would truly advance racial justice in keeping with President Biden's Executive Order 13,985, Advancing Racial Equity and Support for Underserved Communities.

The Lawyers' Committee commends HUD on the publication of this NPR, which is essential to the full restoration of the Department's commitment to AFFH and to the FHA's promise of inclusive communities and access to opportunity for all. The NPR applies lessons learned from prior AFFH rules and, most notably and importantly, incorporates a complaint process that, for the first time, would ensure a meaningful level of accountability with respect to AFFH. With that said, there are still aspects of the NPR that have the potential to cause confusion or that may be challenging to effectively implement. These comments clarify the historical and legal context for the NPR, demonstrating that HUD is well within its authority to engage in such rulemaking; identify the most promising features of the NPR, which HUD should retain in a final rule; and, lastly, note areas where HUD could make changes to the NPR that would result in an even stronger final rule.

I. The History of the AFFH Duty Reflects the Need for a Robust Fair Housing Planning Process.

Affirmatively furthering fair housing means far more than supporting fair housing efforts. It requires jurisdictions to take *meaningful actions* to overcome patterns of segregation so that members of protected classes have equal opportunities. Congress intended for HUD grantees to certify a commitment to affirmatively further fair housing in a variety of circumstances. For example, in the case of Community Development Block Grant funds, for example, the statutory language articulates HUD grantees must provide a statement of objectives and projected use of funds and also directs that grantees must certify to the satisfaction of the Secretary that “the grantee will affirmatively further fair housing.”¹

Congress’ intent is buttressed by multiple federal courts holdings upholding HUD’s duty to affirmatively further fair housing over the last fifty years. In the 1970 case *Shannon v. HUD*, the Third Circuit held that section 3608 of the FHA is not just intended to prevent discrimination against individual minorities, but to promote racial integration.² In 1973, the Southern District of New York similarly held in *Otero v. New York City Housing Authority* that the FHA directs that “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, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.”³ Fifteen years later, in *NAACP Boston Chapter v. HUD*, the First Circuit identified the scope of HUD’s affirmative duty to be robust, determining that section 3608 actually required HUD to “consider [the] effect [of a HUD grant] on the racial and socio-economic composition of the surrounding area,” rather than limiting HUD’s liability to “purposive support of discrimination by others” or “activity that itself forecloses housing opportunities on the basis of race.”⁴ Going even further, the Maryland federal district court in *Thompson v. HUD* held the agency liable for violating its statutory duty to affirmatively further fair housing by failing to consider regional approaches to remedying the problem of segregation in public housing.⁵

HUD’s approach to implementing the affirmatively furthering fair housing requirement prior to 2015—the Analysis of Impediments to Fair Housing Choice (“AI”)—had limited success in helping HUD grantees identify and address impediments to fair housing due to limited oversight and poor administration.⁶ The AIs at issue in *Anti-Discrimination Center v. Westchester County* showcased the shortcomings of HUD’s administration of the AI program.⁷ There, Westchester County conducted AIs in 2000 and 2004 that focused only on affordable housing, rather than *fair* housing, meaning that the County continued to receive federal funds while having failed to analyze race-based impediments to fair housing altogether for years.⁸ Over the course of that case, the court

¹ 42 U.S.C. 5304(b)(2).

² *Shannon v. U.S. Dep’t of Hous. & Urban Dev’t*, 436 F.2d 809 (3d Cir. 1970).

³ 354 F. Supp. 941 (S.D.N.Y. 1973).

⁴ 817 F.2d 149, 156 (1st Cir. 1987).

⁵ 348 F. Supp. 398, 451 (D. Md. 2004).

⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, HOUS. & CMTY. GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS 4 (2010) (“GAO Report”).

⁷ *U.S. ex rel. Anti-Discrimination Center v. Westchester County* (“*Westchester IP*”), 668 F. Supp. 2d 548, 562 (S.D.N.Y. 2009).

⁸ *Id.*

both held that an “interpretation of ‘affirmatively further fair housing’ that excludes consideration of race would be an absurd result,”⁹ and ultimately concluded that “federal law . . . require[s] that[,] to obtain . . . HUD funds[,] . . . the County had to maintain records of its analysis of whether race created an impediment to fair housing” and failed to do so.¹⁰

Shortly after the summary judgment opinion in *Anti-Discrimination Center* was issued, the Government Accountability Office (GAO) published a report in 2010 detailing the administrative failures that permitted HUD grantees to submit insufficient AIs largely without consequence. The report analyzed the conformance, usefulness and potential weaknesses of the AI program in HUD’s Community Development Block Grant (CDBG) and HOME programs and found that the vast majority of grantee AIs were out of date, lacked important information, did not include timelines for implementing recommendations and/or failed to include clear endorsements from elected officials accountable for implementing recommendations.¹¹ The GAO credited HUD’s “limited regulatory requirements and oversight and enforcement” as the culprit for why many AIs were outdated or insufficient, leading the GAO to conclude that it was unclear whether AIs were an effective tool for grantees to identify and address impediments to fair housing.¹² The report further recommended HUD complete a new regulation that addressed (1) standards for grantees to follow in updating AIs, (2) facilitating efforts to measure grantees’ progress in addressing impediments (including time frames and signatures of responsible officials), and (3) routine AI submissions to HUD and HUD’s verification procedure.¹³

Drawing on lessons learned from the 2010 GAO Report, HUD issued a new AFFH rule in 2015 (“2015 AFFH Rule”) that had a transformative positive effect on housing and community development policies in the jurisdictions that pursued implementation of the rule and the completion of their Assessments of Fair Housing (AFHs) in good faith.¹⁴ The Rule made five important changes that made the process a success, summarized clearly by the District of Columbia District Court in *National Fair Housing Alliance v. Carson*.¹⁵ First, the Rule provided a comprehensive and robust definition of “affirmatively furthering fair housing.” The rule defined AFFH to mean “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics,” and further added that “taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.”¹⁶ Second, the Rule “compel[led] grantees to study local fair housing concerns, compliance with fair housing laws and

⁹ *U.S. ex rel. Anti-Discrimination Center v. Westchester County* (“*Westchester I*”), 495 F. Supp. 2d 375, 388 (S.D.N.Y. 2007).

¹⁰ *Westchester II*, 668 F. Supp. 2d at 563.

¹¹ *Id.* at 3, 19–20.

¹² *Id.* at 9–10, 22.

¹³ *Id.* at 32–33.

¹⁴ Affirmatively Furthering Fair Housing (“2015 AFFH Rule”), 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576 and 903).

¹⁵ 397 F.Supp.3d 1 (D.D.C. 2019).

¹⁶ 24 C.F.R. § 5.152; *see also National Fair Housing Alliance v. HUD*, 397 F.Supp.3d at 4 (quoting 24 C.F.R. § 5.152).

regulations and disparities with respect to, among other things, poverty and housing opportunities based on any protected characteristic” by “requir[ing] grantees to integrate an Assessment of Fair Housing (“AFH”) into the planning documents . . . required by a grant.”¹⁷ Third, the rule “enhanced the role of community participation in the development of both AFHs and Consolidated Plans.”¹⁸ Fourth, the Rule “tightened program participants’ record keeping duties” in an effort to address the “inadequate recordkeeping” in the “pre-2015 regime [that] had not secured compliance with the AFFH requirement.”¹⁹ Finally, the rule encouraged alignment between Consolidated Plans and AFHs by “revis[ing] many of the provisions governing Consolidated Plans to match those applicable to AFHs.”²⁰ All of these attributes of the 2015 AFFH Rule set jurisdictions on a path toward taking meaningful action to advance fair housing and equipped jurisdictions with the tools needed to succeed. In the summer of 2020, the prior administration replaced the 2015 AFFH rule with a rule called “Preserving Neighborhood and Community Choice” (PCNC), which rescinded the 2015 AFFH rule.

In 2021, HUD issued the “Restoring Affirmatively Furthering Fair Housing Definitions and Certifications” interim final rule, citing the need to return to earlier, widely-accepted definitions of AFFH in light of the agency’s failure to follow notice-and-comment procedures when promulgating the 2020 AFFH final rule.²¹ Since then, HUD and its grantees have returned to using the AFFH standard promulgated in the 2015 AFFH Rule, but a final rule is necessary to protect, and improve upon, that prior standard.

Although compliance has often been weak, HUD’s approaches to AFFH over time have been consistent insofar as that they have required program participants to engage in race-conscious analysis of housing conditions within jurisdictions and regions, and there has never been any serious suggestion that such a frame of analysis and policy development violates the Equal Protection Clause. That is because the types of race-conscious analyses and resulting policies that high-quality AIs or AFHs would have included over the years have consisted of exactly the kinds of policies that Justice Kennedy concluded were permissible in his concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring). Rather than deciding who is able to access housing based on their race, the AFFH duty dictates that, for example, HUD and its grantees should consider neighborhood demographics when deciding where to site new affordable housing and should inventory and analyze tenant screening policies that might serve to arbitrarily bar Black tenants. When HUD and its grantees do so, they are thinking about and considering the impact of race on public policy, but they are doing so in ways that do not result in the use of classifications that might invite the application of strict scrutiny by the courts. It is clear that HUD’s consistent, race-conscious approach to AFFH conforms to the U.S. Constitution.

¹⁷ *Id.* at 4–5 (quoting 24 C.F.R. § 5.154(a)).

¹⁸ *Id.* at 5 (citing 24 C.F.R. § 5.158).

¹⁹ *Id.* (citing 24 C.F.R. § 5.168).

²⁰ *Id.* (citing 24 C.F.R. §§ 91.105, 91.205, 91.215, 91.220, 91.225).

²¹ Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,779 (interim final rule published Jun. 10, 2021) (to be codified at 24 CFR pts. 5, 91, 92, 570, 574, 576 and 903).

II. The NPR's Positive Features Would Advance the Goals of the FHA.

This section of this letter outlines positive features of the NPR that the Lawyers' Committee urges HUD to retain in any final rule. The NPR's complaint process, transparency mechanisms, non-reliance on a separate assessment tool, greater emphasis on the setting of robust goals, inclusion of illustrative examples to better inform program participants' analysis, and coverage of public housing authorities are all key to successful AFFH implementation.

a. The Complaint Process.

The NPR's inclusion of a complaint process is an important step toward ensuring meaningful AFFH compliance. Indeed, although the Lawyers' Committee was strongly supportive of the 2015 Final Rule and the 2013 NPR, our comments on the 2013 NPR emphasized the need for just such a process. History – including the history of the FHA itself and the lead-up to its 1988 amendments – shows us that strong enforcement structures are critical to making rights real. Indeed, the lack of a complaint process under prior rules created inconsistency both across and within administrations with respect to how HUD has treated allegations of AFFH noncompliance. Furthermore, at times when HUD's capacity to conduct routine reviews of Equity Plan (EP) submissions is stretched thin, the complaint process would have the effect of triaging HUD's resources to prioritize the program participants with the most serious noncompliance issues. The institution of a complaint process through an AFFH Final Rule would promote fairness, transparency, and accountability. Accordingly, we call upon HUD to preserve the proposed complaint process in any Final Rule.

As HUD itself has found, the original Fair Housing Act of 1968 failed to live up to its full potential because of its inadequate enforcement procedures, particularly regarding administrative enforcement. Congress corrected this inadequacy through passage of the Fair Housing Amendments Act of 1988. The amendments both created the basic framework for HUD's receipt and processing of complaints challenging discriminatory housing practices and granted the Secretary of HUD rulemaking authority to "carry out" the Fair Housing Act, including its AFFH provisions. Those changes have been a demonstrable success, with a greater volume of FHA enforcement, whether through litigation or the administrative process, occurring after the 1988 amendments than before. For AFFH, recourse to an administrative complaint process is especially critical, because, unlike with respect to discriminatory housing practices, there is not an expressed private right of action to enforce 42 U.S.C. § 3608 and some courts have also held that there is no implied private right of action and that the AFFH duty is not enforceable under 42 U.S.C. § 1983. Although there has been one successful attempt to use the False Claims Act to hold noncompliant program participants accountable, that victory has not been replicated.

During the Obama Administration, HUD negotiated several major voluntary compliance agreements with grantees that complainants alleged were not in compliance with the AFFH duty; however, complaints structured those complaints as ones alleging violations of other civil rights laws such as the nondiscrimination provisions of the FHA, Title VI of the Civil Rights Act of 1964, and Section 504 of the Rehabilitation Act of 1973 for which complaint procedures existed. Based on the Lawyers' Committee's experience, HUD had stopped actively pursuing such complaints even before the end of the Obama Administration. During the Trump Administration, there was

no meaningful recourse for advocates and members of the public to file complaints that would trigger attempts by HUD to address AFFH noncompliance. Despite the U.S. District Court for the District of Columbia finding that there was a mechanism for the filing of AFFH complaints, the lack of clarity about what complaint process, if any, is available has certainly hampered compliance efforts. The NPR's complaint process would resolve that ambiguity.

Lastly, it is no secret that HUD, in general, and the Office of Fair Housing and Equal Opportunity (FHEO), in particular, are chronically understaffed. FHEO already fails to comply with its statutory mandate to investigate discrimination complaints within 100 days in a majority of cases. The implementation of the NPR, if finalized, will undoubtedly add more demands to a department that is already stretched thin. Those demands are sufficiently important – as well as dictated by statute – that HUD should and must incur them; however, they also raise the practical question of how HUD will review over a thousand Equity Plan submissions in busy years like 2029. To the extent that HUD's review capacity falls short of the need at those times, the contemplated complaint process would provide a critical backstop, increasing the likelihood that the worst offenders are held accountable and that HUD funds are used in a manner consistent with statutory requirements. In light of the overarching importance of enforcement to making the FHA's rights real, the value of ensuring greater consistency in how AFFH complaints are treated between and within presidential administrations, and HUD's limited ability to catch all of the most important AFFH noncompliance issues in its staff's frontline review, it is critical that any final rule maintain the NPR's complaint process.

b. Transparency Mechanisms.

By requiring that Equity Plans be posted to HUD's website and not just program participants' own websites, the NPR would significantly enhance transparency in AFFH implementation. This would both benefit residents and community stakeholders seeking to engage in the Equity Plan process and researchers attempting to measure the efficacy of HUD and program participants' approaches to AFFH. At the program participant level, particularly among public housing authorities, websites can be hard to find and hard to navigate. Issues can also arise with links to key documents becoming "dead" when websites are changed or migrated. By having Equity Plans posted to HUD's website in addition to program participants' own websites, HUD would ensure that there is a backstop if any program participant's website is not adequate for any reason. This is a significant improvement over the 2015 Rule; however, HUD could still improve the NPR by making the posting of the document on program participants' websites mandatory rather than recommended. Doing so would only require minor changes to the proposed text of 24 C.F.R. § 5.154(j)(2) and 24 C.F.R. § 5.158(a)(5). In finalizing the NPR, HUD should preserve the provisions requiring the publication of Equity Plans on a dedicated HUD webpage and clarify that program participants are required to publish their plans to their own websites, as well.

c. Incorporation of Required Questions into the NPR.

HUD's preliminary decision, as reflected in the NPR, to embed required questions for the Equity Plan in the regulation itself rather than referring to a separate assessment tool that would have to go through periodic Paperwork Reduction Act notice-and-comment is a significant improvement that, if retained in a Final Rule, would help protect the long-term sustainability of

the rule and conserve limited HUD staff capacity. When the Trump Administration and then-Secretary Ben Carson undermined the 2015 Final Rule in 2018, they first attempted to postpone compliance deadlines baked into the rule. Perhaps because of concern that this approach would be vulnerable to be overturned in court, HUD then followed that up by withdrawing the Local Government Assessment Tool that local governments were required to use to complete their Assessments of Fair Housing. This approach survived in court, despite a challenge in which the Lawyers' Committee was among co-counsel, but it also begged the question of whether another approach, undertaken at a later point in time would have also sufficed to weaken the 2015 Final Rule without notice and comment: simply failing to seek and receive Paperwork Reduction Act reauthorization of the Assessment Tool when it would have lapsed in January 2020. This approach would have been significantly harder for civil rights advocates to challenge in court as it is axiomatic that agency inaction is less vulnerable to suit under the Administrative Procedure Act than is agency action. By embedding required questions in regulation, the NPR, if finalized, would require any future administration that opposes the AFFH mandate to do what the Administrative Procedure Act general requires: admit that they are proposing to gut a rule and take their damaging proposal through notice-and-comment.

Additionally, even in the absence of the efforts like those of the Trump Administration and Secretary Carson, taking a set of required questions through the Paperwork Reduction Act notice-and-comment process every three years is an inefficient and unwise use of scare HUD and Office of Management and Budget (OMB) staff time. In the case of HUD, it would be far more productive to devote that capacity to the review of Equity Plans, the processing of AFFH complaints, and the provision of technical assistance to program participants than it would be to go through those motions every three years. In light of this consideration and the above-described concern regarding the greater vulnerability of a separate assessment tool to being gutted, we recommend that any Final Rule embed required questions in the rule itself rather than referring to a separate assessment tool.

d. Emphasis on Setting Robust Goals.

The ultimate test of whether any approach to AFFH lives up to the statutory purposes of the provision and of the FHA, in general, is whether it results in material change in the living conditions of individuals and families with protected characteristics. Do Black families live in more integrated neighborhoods because of HUD's regulatory intervention? Do people with disabilities face lower and less disproportionate rates of homelessness? Do female-headed households face eviction at lower and less disproportionate rates? Knowing the data about existing rates of segregation and disaggregated data about housing insecurity is undoubtedly helpful for coming up with plans to meaningfully address fair housing issues. At the same time, awareness of data, on its own, is inadequate to change material conditions. Instead, program participants must, having identified key problems through the use of data, set goals for overcoming those problems and then take meaningful action to achieve those goals. Data collection and analysis, on the one hand, and goal setting and concrete action, on the other, are not mutually exclusive, but the fact that they are not mutually exclusive does not mean that there are no trade-offs resulting from comparative emphasis on each respective part of the process. Based on the Lawyers' Committee's experience, it is clear that the 2015 Rule, while a massive improvement overall, emphasized data to such a degree that some lower capacity program participants were spread too thin to come up

with the kinds of transformative goals that were truly necessary. Additionally, in HUD's review of Assessment of Fair Housing (AFH) submissions, HUD could lose the forest for the trees and devote significant time to evaluating the completeness of a program participants' discussion of data while allowing goals that lack meaningful impact to remain unchallenged. The Lawyers' Committee applauds HUD's recognition in the NPR that the balance between data discussion and goal setting in the Equity Plan should tilt more towards the latter.

In particular, AFHs under the 2015 Rule often devoted many pages to paragraphs of narrative description essentially recounting what the foregoing tables or maps say or show in different terms. Although tables and maps should be contextualized, program participants can do that without transcribing the numbers from a table and inserting them in paragraphs of complete sentences. Instead, the essence of program participants' data discussion should be the distillation of key high-level trends and takeaways regarding what the data and maps show. If the only notable takeaways from a table regarding disproportionate housing needs are that Black households are disproportionately likely to be cost-burdened and Latinx households are disproportionately likely to live in overcrowded conditions, those two points can be relayed without regurgitating all of the data from the table and without spelling out the comparisons for which there are no meaningful disparities. HUD has made clear in the NPR that this is the type of shift that it is contemplating, and that would free up resources to focus on goal-setting, which can be time-intensive in its own way.

Setting effective goals is not as simple as looking through examples of best practices from elsewhere and picking a few at random. Community engagement efforts must prioritize the goal-setting process in order to ensure that selected goals (and the means of carrying them out) are responsive to the lived experience and aspirations of intended beneficiaries. Individuals and families with protected characteristics are experts on their own experience and are likely to know whether a given intervention will work or not and, if it is more ambiguous than that, what subtle tweaks might result in better implementation. Additionally, the implementation of transformative goals will often require the coordination of multiple offices of a program participant (for example, a housing and community development department, a planning department, and a department of parks recreation) and the coordination of multiple separate governmental entities (the grantee itself with the school board, a regional transit agency, and a state housing finance agency). Getting all of those proverbial ducks in a row is a time-consuming process and at times a difficult one, as well. Thus, clarity that just that type of intra- and inter-governmental outreach and coordination should be a priority for program participants' time and resources is incredibly valuable. Any final rule should preserve the NPR's emphasis on goal setting as the most important aspect of the development of the Equity Plan.

e. Inclusion of Illustrative Examples.

The NPR's inclusion of illustrative examples of what required Equity Plan content could look like is a positive step and should be retained and expanded upon in a final rule. For example, the NPR's example at the proposed 24 C.F.R. § 5.154(g)(3)(iii) of a PHA goal involving the revision of occupancy policies to be more inclusive of tenants with eviction records and/or records of arrest or conviction aligns with other HUD guidance and is tailored to important racial justice issues. Similarly, the example at the proposed 24 C.F.R. § 5.154(g)(3)(viii) of a local government

enacting source of income nondiscrimination protections is responsive to a pervasive problem that disproportionately harms people of color, and Black tenants in particular, as well as persons with disabilities. Moreover, the example illustrates how effective goals will frequently require legislative action. In practice, there has been a tendency for the civil servants who are primarily responsible for drafting Analyses of Impediments and Assessments of Fair Housing to propose goals for which they do not have to get many layers of buy-in. Such goals, though they may be useful and important, are unlikely to be transformative on the scale necessary to successfully overcome entrenched fair housing issues. Additionally, political officials are part of the entity – the program participant – that has an AFFH duty and therefore they also have to carry out their responsibilities consistent with AFFH. By utilizing an example that captures the important role of elected officials in AFFH implementation, the NPR implicitly underscores that an approach that would neglect that role would be inadequate.

In a final rule, HUD should build upon this kind of use examples by incorporating greater use of examples of “public or private policies or practices, demographic shifts, economic trends, or other factors may have caused or contributed to the patterns” identified in the various data-driven subsections of the Equity Plan. The analysis solicited through the questions using that terminology is analogous to that obtained through the analysis of contributing factors in the Assessment of Fair Housing under the 2015 Rule. While the 2015 Rule, by contrast, required analysis of 45 different possible contributing factors, each with a specific definition, the NPR is much looser with regard to what content would be responsive to these questions. The right balance for HUD is likely somewhere in between the 2015 Rule’s approach and the NPR’s, leveraging questions like these but, through the use of examples and possibly through supplemental guidance as well, clarifying what would be responsive. For example, it is likely that source of income discrimination is a type of private practice that may have contributed to patterns of segregation in many program participants’ jurisdictions. Likewise, exclusionary zoning and land use policies are a public policy likely to have contributed to segregation and high rates of housing cost burden in many areas.

It is important that examples strike an appropriate balance between being so specific that they may not appear to be applicable in a critical mass of jurisdictions, on the one hand, and so general that they do not provide a basis for meaningful corrective measures, on the other. As an example of erring too far in the latter direction, program participants should not be able to point to generic market forces as an explanatory set of drives of fair housing issues. Instead, examples should be specific enough to drive program participants to identify private sector trends more like the following: the large-scale acquisition of single-family homes by private equity-backed landlords for operation as rentals in low- and moderate-income Black neighborhoods; the displacement of tenants from rent controlled or rent stabilized apartments through the withholding of repairs in advance redevelopment; and the tendency of multifamily developers to only include units with two bedrooms or fewer in proposed new construction. Through examples like these, HUD could prompt a more meaningful identification of just what is causing fair housing issues.

f. Coverage of PHAs.

The Lawyers’ Committee supports the NPR’s inclusion of an Equity Plan requirement for PHAs and strongly urges HUD to retain that feature of the NPR in a final rule. The Analysis of

Impediments requirement of the HUD's 1995 regulation did not apply to PHAs, a deficiency addressed through the 2015 Rule's creation of the Assessment of Fair Housing process. In many communities across the country, PHAs administer greater amounts of federal housing and community development funding than do their local government counterparts, and the housing that they assist through the Housing Choice Voucher and Public Housing programs serves far more households and far more extremely low-income households, in particular. PHAs' policies, including with respect to tenant selection, payments standards for Housing Choice Vouchers, restrictions on the portability of Housing Choice Vouchers, and approaches to the rehabilitation or redevelopment of distressed public housing, have a huge impact on fair housing. These issues are every bit as significant to individuals and families with protected characteristics as are the fodder for local governments' Equity Plans, and they should not be consigned to a sidebar in local government plans. Although, in most circumstances, PHAs should collaborate with local governments with coinciding or overlapping jurisdiction on joint submissions, a freestanding requirement for PHAs must be in place in case that is infeasible for any PHA in practice. For small rural PHAs that may not overlap with an entitlement jurisdiction, HUD should encourage collaboration with state governments on joint submissions, but, in the event that is not workable for any PHA, HUD should also develop data tools and guidance that position small rural PHAs to complete their plans with relatively limited burden, especially with respect to data analysis. Because of the importance of PHA programs to core fair housing issues and possible pitfalls that may prevent joint Equity Plans in some circumstances, HUD should maintain an independent Equity Plan requirement for PHAs in a final rule.

III. Potential Improvements through Revisions to the NPR or Guidance.

There remain additional steps that HUD could take to further enhance the effectiveness of its approach to AFFH through guidance, through technical assistance, and through changes to the rule itself. This section of our comments focuses on the means for doing so.

a. Guidance.

We applaud HUD for simplifying and streamlining the AFFH process by eliminating repetitive questions and no longer requiring jurisdictions to analyze 45 specific contributing factors. However, we are concerned that jurisdictions may lack specific guidance as to how to meaningfully and thoroughly assess what is causing fair housing issues in their communities.

There are several ways HUD can provide guidance and assistance to jurisdictions to help them conduct a comprehensive Equity Plan. HUD can develop "best practices" gleaned from past Assessments of Fair Housing that provide illustrative examples of successful policies and practices that have reduced fair housing barriers and increased opportunities for members of protected classes. Additionally, HUD should make available robust technical assistance to jurisdictions both before, during, and after the Equity Plan process to ensure that jurisdictions have the people, tools, and resources they need to launch and implement a successful fair housing planning process. Guidance and technical assistance can and should embrace different topics, but the question of how to identify the policies, practices, and trends that are contributing to fair housing issues is likely to be pivotal. HUD guidance and technical assistance can put program participants in position to conduct nuanced analyses of factors like exclusionary zoning and public housing

redevelopment. Consistent with our praise of HUD's increased focus on goal-setting, that area is also likely to be one where more guidance and technical assistance are particularly useful.

b. Incorporation of the Equity Plan into Other Planning Documents.

The NPR requires that the Equity Plan strategies be incorporated into Consolidated Plans and PHA Plans and progress towards meeting EP goals be reported on in Annual Action Plans. The rule also requires that grantees identify resources that will be allocated to implement those strategies. The reporting of progress made on the implementation of the Equity Plan will be a yardstick of which to evaluate the plan's success. However, the proposed AFFH Rule does not provide clear guidance on how progress towards EP goals will be aligned with the Consolidated Plan's strategies and action or how HUD plans to monitor progress towards these goals. HUD should provide more specific guidance in the AFFH rule or the subsequent EP guidebook with respect to this process.

c. Coordination with Other Federal Agencies.

The AFFH requirement not only covers HUD's programs and activities related to housing and urban development, but all federal agencies and departments, including those with regulatory or supervisory authority over financial institutions. HUD should develop a policy that lays out how it plans to coordinate with other agencies to ensure that they administer their housing and urban development programs in a manner consistent with their AFFH obligations. It is especially important that HUD work with the Department of the Treasury, which has primary oversight over the Low-Income Housing Tax Credit (LIHTC) program, to ensure that LIHTC is implemented in ways that affirmatively further fair housing.

d. Increased Focus on Tenant Protections.

There is little in the NPR to guide jurisdictions on crafting goals that protect tenants. HUD should include specific "best practices" tenant protections, such as just cause eviction protections, rent control or rent stabilization, and right to counsel, as examples of effective strategies for furthering fair housing in a final rule. Additionally, any final rule should require an analysis of practices by PHAs that in addition to policy issues that increase gentrification and displacement, such as the net loss of public housing units.

e. Increased Focus on State Preemption.

The NPR clearly states that federal law requires states, insular areas, local governments, and PHAs to affirmatively further fair housing. However, states continue to pass or attempt to pass legislation that prohibits local regulations that are designed to increase affordable housing opportunities such as inclusionary zoning. The final rule should include how the agency plans to monitor state preemption laws that prevent local jurisdictions from implementing Equity Plans and bring enforcement actions against states that fail to affirmatively further fair housing. The final rule should identify the repeal of preemption laws as a critical aspect of AFFH compliance by state grantees.

f. Long Delays before Equity Plan Submission for Many Jurisdictions.

The NPR lays out the timeline for jurisdictions and PHAs to submit Equity Plans; however, the phase-in process is lengthier than it needs to be, with local governments that receive less than \$1 million in formula grant funds not being required to submit their plan until 365 days before their first Consolidated Plan after January 1, 2027 is due. Over 60% of HUD local government grantees have Consolidated Plan five-year cycles that start/end in years ending with 0 and 5. Thus, for small grantees, their first Consolidated Plan due after 2027 will be due in 2030, thus rendering their first Equity Plan due in 2029, six years from now. Although jurisdictions that have not done an Analysis of Impediments (AI) or Assessment of Fair Housing (AFH) within three years of the effective date of the Proposed Rule (once finalized) will have to do one and submit it to HUD within a year of the effective date, it would make for sense to complete the Equity Plan which provides more guidance than an AI but should be more efficient than an AFH.

Similarly, PHAs with less than 1,000 combined total number of public housing units and vouchers are on the same timeline as jurisdictions that receive less than \$1 million in formula grant funds. These PHAs would not be required to submit anything until 365 calendar days prior to the date for which a new 5-year plan is due following the start of the fiscal year that begins on or after January 1, 2027. Since their earliest submission is due in 2029, small PHAs would have six years before submitting any fair housing plan, since they were never required to submit an AI or AFH.

g. Compliance Steps Prior to First Submission.

As noted above, the lengthy phase-in process for the first submission of the Equity Plan provides a period of uncertainty as to how HUD plans to affirmatively further fair housing. Currently, jurisdictions (but not PHAs) are required to submit either an AI or AFH. However, there is currently no requirement for HUD to approve either document, nor is there a complaint process in place for stakeholders to comment on a jurisdiction's AI or AFH. HUD should clearly articulate how it plans to monitor grantee compliance with affirmatively furthering fair housing prior to submission of its first Equity Plan.

The Lawyers' Committee appreciates the opportunity to provide these comments on HUD's AFFH NPR. Congress's decision to include the AFFH obligation in the FHA is reflective of a desire to remedy the conditions that made the Act a necessity, conditions that persist in many communities to this day. By finalizing a strong AFFH rule – one that includes a complaint process – HUD could lay the foundation for effective fair housing planning across the country. We hope that the comments presented above provide a basis for the technical adjustments that would make successful implementation an even greater likelihood. The stakes for the Black communities across the country with which the Lawyers' Committee works are all too clear.

Sincerely,

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