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Via regulations.gov

Re: FR-6250-P-01
Affirmatively Furthering Fair Housing

The National Low Income Housing Coalition (NLIHC) is dedicated solely to achieving racially and socially equitable public policy that ensures people with the lowest incomes have quality homes that are accessible and affordable in communities of their choice. Our members include state and local housing coalitions, residents of public and assisted housing, nonprofit housing providers, homeless service providers, fair housing organizations, researchers, public housing agencies, private developers and property owners, local and state government agencies, faith-based organizations, and concerned citizens. While our members include the spectrum of housing interests, we do not represent any segment of the housing industry. Rather, we focus on policy and funding improvements for extremely low-income people who receive and those who need federal housing assistance.

NLIHC applauds the Biden-Harris administration's proposed "Affirmatively Furthering Fair Housing" (AFFH) rule to help communities meet our nation's more than five-decade old requirement to actively address systemic racism and segregation, which have often resulted from specific federal policies. The proposed rule seeks to further improve a 2015 rule issued by the Obama administration that was suspended abruptly and replaced by the Trump administration in 2018. Housing justice and racial justice are inextricably linked. More than ever, large-scale, sustained investments and anti-racist reforms are necessary to ensure that people with the lowest incomes have quality homes that are accessible and affordable in communities of their choice. The proposed rule is an important step toward addressing structural racism and achieving greater racial equity and justice.

The National Low Income Housing Coalition is dedicated to achieving racially and socially equitable public policy that ensures people with the lowest incomes have quality homes that are accessible and affordable in communities of their choice.

NLIHC is generally pleased with the proposed AFFH rule and considers it an improvement over the 2015 AFFH rule. However, NLIHC offers a number of suggestions to further improve the draft version and raises serious concerns regarding several provisions. This letter begins by highlighting in brief, without undue recitation of the actual text, the features NLIHC is glad to endorse. For four of the six endorsements NLIHC adds a brief critique. For our endorsement of the Community Engagement provisions, an extended critique is provided after all endorsements are presented. After the presentation of endorsements, NLIHC provides detailed suggestions and critiques for various sections of the proposed rule that we urge HUD to adopt.

SIX PROVISIONS THAT WARRENT SPECIAL ENDORSMENT

Community Engagement

It is a very positive sign that the summary in the proposed rule's preamble begins with a discussion of improved public participation provisions, now termed "community engagement." In addition, all throughout the actual proposed text the rule reminds program participants of their community engagement obligations. Key words in §5.158 clearly convey the message that HUD intends community engagement to be "meaningful" and for program participants to "proactively facilitate community engagement," and to "actively engage a wide variety of diverse perspectives." The proposed rule provides examples of potential sources of essential information to "connect with" advocates, public housing resident advisory boards, community-based organizations, service providers, and others. Furthermore, the proposed rule requires program participants to "employ communications methods to reach the broadest possible audience" with a focus on protected classes and "underserved communities."

The proposed rule augments prior public participation provisions by calling for at least three public meetings during the development of an Equity Plan, and unlike the Consolidated Plan and PHA Plan public participation rules, calls for these meetings to be held at "various accessible locations and at different times to ensure" protected class groups and in particular "underserved communities" have greater opportunities for input. In addition to these three meetings, the proposed rule calls for two more meetings each year to obtain public input regarding how a program participant's progress toward meeting its fair housing goals from the previous year (Annual Progress Evaluations). NLIHC appreciates the use of the term "meetings" instead of "hearings" because meetings have the advantage of enabling more relaxed (less intimidating) engagement outside of the formality of a "hearing" at the city/county council chambers, at locations easier for underserved populations to reach, and on days and at times more accommodating to their work and family schedules.

NLIHC Suggested Improvements

NLIHC has a number of suggested improvements for community engagement discussed starting on page 7 of these comments.

Greater Public Transparency

Related to community engagement are the welcome “publication” provisions at §5.154(j) that require HUD to post on a HUD-maintained website, submitted Equity Plans and Annual Progress Evaluations, along with HUD “notifications” to program participants regarding concerns regarding a submitted Equity Plan – such as reasons HUD accepted an Equity Plan or HUD’s communications with a program participant indicating why an Equity Plan was not accepted, along with actions a program participant can take to achieve acceptance [§5.162(a)(2)]. Public engagement does not end once an Equity Plan is submitted to HUD for review because the public can directly provide to HUD, information relating to whether an Equity Plan was developed according to the community engagement requirements of §5.158 and whether: its content is deficient (such as whether fair housing issues were appropriately identified); information provided during the community engagement process was appropriately incorporated; fair housing issues were appropriately prioritized; and, fair housing goals are appropriate [§5.156(j)(3) and [§5.162(a)(1)].

NLIHC Suggested Improvements

NLIHC urges HUD to modify the rule to require program participants to post on an easily identified webpage of their own website, their draft Equity Plans, submitted Equity Plans, Annual Progress Evaluations, and key communications between HUD and the program participant. It is not sufficient for these materials to be posted on a HUD-maintained website. Nor is it sufficient for HUD to merely “encourage” program participants to post only their HUD-reviewed Equity Plans on their own websites as provided in the proposed rule.

NLIHC also suggests that HUD require program participants to inform the public during the required community engagement process that while HUD is reviewing a submitted Equity Plan the public can directly provide information to HUD relating to whether the Equity Plan was developed in accordance with the AFFH rule.

Public Complaint Process

Another very welcome “community engagement” provision [§5.170(a)] is the introduction of a formal process allowing the public to submit directly to HUD, complaints regarding allegations that a program participant has failed to comply with the AFFH regulations, its AFFH commitments, or that it has taken actions materially inconsistent with the obligation to AFFH as defined in the rule. Moreover, HUD is obligated to process complaints and open a compliance review if warranted.

NLIHC Suggested Improvement

NLIHC suggests the rule establish a timeframe for acknowledging a complaint (20 days) and for completing an investigation (180 days).

Stronger Link Between Equity Plan Goals and ConPlan and PHA Plan

NLIHC endorses the proposed AFFH rule's clearer, more specific and direct requirement that a program participant "incorporate" its Equity Plan's fair housing goals, strategies, and actions, as well as fund allocations, in its Consolidated Plan (ConPlan), Annual Action Plan, or PHA Plan. This is an improvement over the 2015 AFFH rule which was less clear. As drafted, these "incorporation" provisions will better ensure that a program participant's programs, activities, and services, the HUD and other federal, state, and local funds allocated to them, as well as its policies and practices, are consistent with the obligation to affirmatively furthering fair housing.

NLIHC especially appreciates the references at §5.156(a),(b), and (c) regarding use of funds available to a program participant, references such as: "It is the Department's policy to ensure that program funding is used to eliminate disparities..." and "identify specific expected allocation of funding by program year for the use of HUD and other funds to implement each fair housing goal;" and "This incorporation shall include the allocation of resources necessary for achievement of the goal." Without such direction from HUD, a program participant could incorporate goals, strategies, and actions in words only – words that paint a false impression that it intends to affirmatively further fair housing; however, without appropriate and meaningful allocation of funds, those words can be empty rhetoric.

NLIHC also supports the inclusion of disaster plans in the list of program planning documents into which a program participant must incorporate implementation of its Equity Plan fair housing goals and commitments [§5.156(a)]. NLIHC also endorses the provision at (d) requiring program participants to incorporate the fair housing goals of an Equity Plan into planning documents required in connection with receipt of federal financial assistance from any other federal executive department or agency.

NLIHC Suggested Improvements

Disaster plans should be added at three more places referring to incorporation of an Equity Plan's fair housing goals: the definition of "Fair Housing Strategies and Actions," §5.154(c)(2) "Content of Equity Plan," and §5.164(d) for any revised Equity Plan fair housing goals.

NLIHC urges the final rule explicitly include Qualified Allocation Plans (QAPs) because the definition of "publicly supported housing" includes housing financed with Low Income Housing Tax Credits (LIHTCs), because the LIHTC program is the federal government's largest program for creating and preserving housing for lower-income households, and because the Fair Housing Act's AFFH mandate includes all federal agencies involved with housing and community development activities.

NLIHC also recommends that the final rule consistently include "other plans relating to education, transportation, infrastructure, and environment and climate related plans" as listed at §5.154(c)(2) and the definition of "Fair Housing Strategies and Actions." This amendment would entail adding those types of plans at §5.156(a) and (c), §5.164(d), and the definition of "Equity Plan" (perhaps indirectly by simple reference §5.156).

The effectiveness of the “incorporation” principle at §5.156 could be severely undermined by the problems NLIHC identifies in our critique of how the proposed rule can allow the AFFH rule’s community engagement provisions (§5.158) to be combined with the public participation rules of the ConPlan and PHA Plan, as well as the proposed ConPlan and PHA Plan rule changes referring to “proposed” fair housing strategies and meaningful actions for affirmatively furthering fair housing (see pages 9, 13, and 16 below).

Annual Evaluation of Progress Toward Achieving Fair Housing Goals

NLIHC supports the proposed rule’s requirement that program participants annually conduct and submit to HUD for review and posting on the HUD website, an Annual Progress Evaluation regarding the status of each fair housing goal [§5.154(a)(6), (i)&(j)]. While the 2015 AFFH rule required program participants to report progress in subsequent Assessments of Fair Housing (AFHs), that meant only once every five years.

In addition, NLIHC welcomes the proposed rule’s community engagement provision pertaining to the Annual Progress Evaluation: program participants must engage the public at least annually through at least two public meetings, one of which must take place in an area in which underserved communities predominately live.

Furthermore, beyond the annual evaluation, as program participants develop a new Equity Plan every five years, the proposed rule requires the new Equity Plan to include a summary of a program participant’s progress in meeting its fair housing goals set in the prior-year Equity Plan, helping to ensure longer-term AFFH goal achievement.

NLIHC Suggested Improvements

As noted in NLIHC’s critique of the Community Engagement provisions at §5.158(d) below, we suggest the regulation add that the two required meetings not only be held at different locations, but at different times to increase the opportunity to participate (see page 20).

Although the Annual Progress Evaluation must be sent to HUD and posted on the HUD-maintained website, the regulation must also clearly instruct program participants to also post their Annual Progress Evaluations on an easily located webpage on the program participant’s website.

While the Annual Progress Evaluation is an excellent tool for the public to attempt to keep a program participant accountable, NLIHC urges the final rule to provide for the public to directly raise concerns with HUD regarding a submitted Annual Progress Evaluation. Communications between HUD and a program participant regarding a reviewed Annual Progress Evaluation should be posted on HUD’s website.

Clarification and Emphasis on the Need for a Balanced Approach

NLIHC welcomes the text of the proposed rule providing a detailed definition of “balanced approach” to affirmatively furthering fair housing, as well as references at three additional places in the proposed rule regarding fair housing goals. A balanced approach, according to the proposed rule, means an approach to community planning and investment that balances a variety of actions to eliminate housing-related disparities using a combination of place-based and mobility actions and investments. This is a major improvement over the 2015 rule, which did not clearly convey that affirmatively furthering fair housing could legitimately entail preserving affordable housing in areas of racially and/or ethnically concentrated poverty if residents of those areas chose to remain in those areas and if a program participant also made substantial investments designed to improve community living conditions and community assets in those disinvested neighborhoods.

NLIHC Suggested Improvements

NLIHC suggests a minor yet important addition to the example of place-based strategies:

“For example, place-based strategies include actions and investment to substantially improve living conditions and community assets in high-poverty neighborhoods while preventing displacement of protected class people and while preserving existing affordable housing stock to meet the needs of underserved communities and address inequitable access to affordable rental and homeownership opportunities.”

There are two provisions in the proposed rule that should be rebalanced because the examples provided only address resident mobility and access to well-resourced communities. Specifically:

§5.154 “The Equity Plan,” (g) “Fair Housing Goals,” paragraph (2) states that fair housing goals, when taken together, must be designed and reasonably expected to result in material positive change *and be consistent with a balanced approach*. However, the following list of examples does not include any place-based examples.

The definition of “Meaningful Actions” at §5.152 does not include the term “balanced approach” and it too suffers from the same, unbalanced, list of examples lacking any place-based options.

NLIHC'S ADDITIONAL SUGGESTED IMPROVEMENTS

Community Engagement

Although NLIHC commends HUD for proposing vastly enhanced community engagement provisions, we have concerns and suggested improvements regarding a number of provisions throughout §5.158.

§5.158(a) General Provisions

The AFFH proposed rule does not specifically call for a program participant to consult with key public and private organizations that can provide valuable initial information regarding fair housing issues and priorities. The AFFH rule should echo the ConPlan consultation regulation structure [at 91.100 and 110] requiring such consultation before engaging in more direct community engagement activities. The AFFH rule should specifically require consultation with FHIPs and FHAPs, other public and private fair housing organizations, legal services, and organizations that represent protected class members (such as disability rights groups, domestic violence and sexual assault organizations, linguistically and culturally specific organizations, LGBTQI+ organizations, and environmental justice organizations). This provision could be (a) with adjustments of each of the following subsections.

§5.158(a)(1)

The text at (a)(1) seeks “meaningful” community engagement.

Because many advocates have experienced rote, proforma public engagement in the ConPlan and PHA Plan processes over the years, NLIHC urges HUD to add for emphasis, a qualifier such as “genuine,” “complete,” or “thorough and well-informed.”

Section (a)(1) sets the stage for the entirety of §5.158 “Community Engagement,” yet (a)(1) is incomplete and can be confusing because key community engagement provisions in (c) and (d) follow a number of provisions in (b) that are about joint Equity Plan community engagement.

Therefore, NLIHC urges HUD to add at (a)(1):

- “prior to and” before “during the development” of an Equity Plan;
- “prioritizing identified fair housing issues;” and
- “commenting on a draft Equity Plan before it is submitted to HUD for review.”

The reasons for these recommended additions follow. In addition, NLIHC offers more specific recommendations about required public meetings in our discussion of (d) “Methods” on page 18.

Adding “Prior to and”

Section (c) “Frequency” at (1) requires a program participant to engage with the community prior to *and* during the development of an Equity Plan. The “prior to” should be included at (a)(1) for several reasons. First is simply to be consistent. Second, assuming HUD intends community engagement to take place prior to the development of an Equity Plan as indicated at (c)(1), in practice program participants focused on (a)(1) might miss the (c)(1) requirement to engage the community “prior to” because most of (c) discusses a very different stage of community engagement – the required annual community engagement while an Equity Plan is already in effect to get public input regarding whether a program participant is taking effective action to implement an Equity Plan’s fair housing goals.

Third, it is crucial to have community engagement very early in the process – prior to developing an Equity Plan while there is a blank slate, before a program participant offers its own suggestions implying those suggestions are the ones for a community to react to. A precedent for community engagement prior to developing a plan exists in the Consolidated Plan (ConPlan) process; the CHAS statute and ConPlan regulations require a public hearing about housing and community development needs before a proposed ConPlan is even drafted.

Therefore, NLIHC urges the final rule add “prior to and” before “during the development of an Equity Plan” at §5.158(a)(1).

Adding “prioritizing identified fair housing issues”

NLIHC also urges HUD to add at (a)(1) that community engagement must take place regarding the prioritization of fair housing issues [as required at §5.154(a)(2) and (f)(2)] prior to setting fair housing goals. Without a separate community engagement process to inform priority setting, a program participant could go through the motions of “listening” to and even listing all of the many fair housing issues raised by the community, but then dismiss or ignore them when deciding which of the many issues to prioritize. Although the public must be engaged in the goal setting process, there is a danger that without direct community engagement, priorities will have already been set by the program participant, thus overly influencing the fair housing goals under consideration.

Adding “commenting on a draft Equity Plan before it is submitted to HUD for review”

“During the development of an Equity Plan” entails one more step after public engagement informing the establishment of fair housing goals – drafting an Equity Plan to submit to HUD for review. Unless there is another opportunity for community engagement about a draft Equity Plan, much of the preceding community engagement could be for naught. The public must have an opportunity to comment on a draft Equity Plan before it is submitted to HUD for review.

Furthermore, for the final rule to simply be consistent, “commenting on a draft Equity Plan” at (a)(1) should be added because §5.154(j)(1) regarding “Publication” requires program participants to make drafts of the Equity Plan available for the §5.158 “Community Engagement” process.

Therefore, HUD should add “commenting on a draft Equity Plan” to the text of (a)(1).

§5.158(a)(3)

HUD proposes to allow program participants to combine the AFFH §5.158 community engagement provisions with the ConPlan’s “citizen” participation requirements or the PHA Plan resident and public participation requirements. If such a combination is chosen, the proposed text requires program participants to explain the Fair Housing Act’s affirmatively furthering fair housing duty and ensure engagement regarding that the Equity Plan meets all the criteria set forth in §5.158.

NLIHC thinks that the ConPlan and PHA Plan regulations, even as proposed to be amended, render meaningless the backstop text, “meets all the criteria set forth in this section.” The AFFH community engagement provisions are simply incompatible with the ConPlan and PHA Plan public participation provisions.

If HUD, nonetheless, does allow combined public engagement – even with the “meets all the criteria set forth in this section” clause – NLIHC does not think that AFFH can truly receive the attention it deserves given program participants’ long history with the ConPlan processes (in particular), which can be overwhelmingly consumed by entities in a jurisdiction identifying housing and community development needs (during ConPlan’s required “needs” public hearing), and by entities seeking CDBG, HOME, and other CPD formula funds from a jurisdiction (during a draft Annual Action Plan public hearing). Likewise, in the PHA Plan public engagement process, NLIHC doubts the single, required public “hearing” can provide adequate time and attention regarding a PHA’s policies that might be barriers to AFFH, given the many other problems public housing and voucher residents will raise (e.g. housing quality) during a hearing. See page 13 below for more.

NLIHC is very concerned about allowing such combinations and strongly urges HUD to eliminate all provisions allowing them. The AFFH community engagement requirements must be separate from and in addition to the ConPlan citizen participation provisions and the PHA Plan resident and public participation provisions. The reasons for our concerns are presented on the following pages.

§5.158(a)(4)

In accordance with [ConPlan and PHA Plan] program regulations, the public must have a “reasonable opportunity” for involvement in the “incorporation” of fair housing goals as strategies and meaningful actions into the ConPlan, Annual Action Plan, PHA Plan, and other required planning documents.

NLIHC thinks the term “reasonable opportunity” is too ambiguous; it does not equate to a more specific community engagement requirement such as holding a meeting.

The proposed changes to the ConPlan regulations at §91.105(e) regarding ConPlan public “hearings” state that of the two required ConPlan public hearings, “Together, the hearings must address (1) housing and community development needs, (2) development of proposed activities, (3) *proposed* fair housing strategies and meaningful actions for affirmatively furthering fair housing based on the fair housing goals from the Equity Plan...and (4) a review of program performance.”

NLIHC notes, however, that an “accepted” Equity Plan is necessary before a proposed Five-Year ConPlan is up for consideration. In addition, at the ConPlan Annual Action stage (when funding of proposed activities is open to public comment), an Equity Plan’s fair housing goals, strategies, and actions have been “finalized” – they are no longer “proposed.” Rather, at the Annual Action Plan stage, those Equity Plan goals, strategies, and actions should strongly suggest – from an AFFH perspective – which proposed activities should be approved, at what funding levels, and at which locations.

The ideal solution is requiring a fifth public meeting devoted solely to community engagement involving the incorporation of fair housing goals, strategies, and actions in the ConPlan and each Annual Action Plan.

If HUD does not accept this recommendation, then at least the final revised ConPlan provision at §91.105(e) must delete the word “proposed” and replace it with “ensuring that those proposed activities and fund allocations are consistent with the jurisdiction’s fair housing strategies and meaningful actions for affirmatively furthering fair housing based on the fair housing goals from the Equity Plan...”

Adding to the uncertainty, §91.105(e) adds that “If the jurisdiction has included the community engagement procedures for the development of the Equity Plan in its citizen participation plan, the requirements of §5.158 of this title shall apply.”

NLIHC comments that the “if” in the above provision seems to allow a program participant to choose to not follow §5.158 and thereby evade the better AFFH community engagement provisions.

If a jurisdiction only relies on the ConPlan public “hearing” regarding “development of proposed activities and program performance,” NLIHC doubts that there will be sufficient time during the hearing for public input regarding

proposed fair housing goals, strategies, and actions that ought to influence policy makers' decisions regard "proposed activities" and the associated allocation of federal funds. At this hearing about proposed activities, it could be too late because a jurisdiction might be reluctant to make major changes to a draft Annual Action Plan based on public concern regarding consistency with an Equity Plan's goals, strategies, and actions.

NLIHC has similar concerns pertaining to the PHA Plan context regarding "reasonable opportunity" and incorporation of Equity Plan goals, strategies, and activities into the PHA Plan process.

§5.158(a)(5)

The proposed rule requires program participants to use communication methods designed to reach the broadest possible audience, and "*should*" make efforts to reach members of protected class groups and underserved communities.

NLIHC urges HUD to change "and should" to "including making efforts" to reach...

The proposed text continues, "Such communications may include but are not limited to publishing a summary of each document on the program participant's official government website and one or more newspapers of general circulation, and by making copies of each document available on the Internet (including free web-based social bulletin boards and platforms), and as well as libraries, government offices, and public spaces."

First, NLIHC urges HUD to substitute "must include" in place of "may include."

Second, HUD must clarify "publishing" in the context of this provision because the definition section at §5.152 defines "publication" to only mean "public online posting." NLIHC understands the need to merely publish "summaries" of key documents in newspapers of general circulation – a regulatory provision associated with CDBG and later ConPlan public participation practice.

- However, in the context of (a)(5) HUD needs to clarify what is meant by "document;" does HUD mean a summary of an Equity Plan or an Annual Progress Evaluation?
- Summaries for publication in newspapers makes sense, but not for "publishing" via posting on a program participant's official government website.
- Electronically posted summaries might make sense in efforts to provide summaries in languages other than English for "underserved communities" that have limited English proficiency, or summaries utilizing non-print media for people with visual impairment.
- As NLIHC will comment later, the final rule must require a program participant to post on an easily located/identifiable webpage on its official government site, the draft Equity Plan, Equity Plan sent to HUD for review, "accepted" Equity Plan, and Annual Progress Evaluations."

Third, the final rule should clarify HUD's meaning by the clause "and by making copies of each document available on the Internet (including free web-based social bulletin boards and platforms)." NLIHC presumes this refers to Internet locations that are not part of a program participant's official government website; rather Internet locations oriented to protected class groups and underserved communities.

To maximize reaching the broadest possible audience, NLIHC recommends the final rule provide as examples, providing notification of the availability of documents, public meetings, and other community engagement activities through publications, websites, blogs, neighborhood newsletters, and radio stations oriented to protected class populations and underserved communities. Although it might be tempting for HUD to relegate this to subregulatory guidance, it is best to codify in the regulation (and it only requires one sentence).

§5.158(a)(6)

Program participants must actively engage a wide variety of diverse perspectives within their communities and use available information in a manner that promotes setting meaningful fair housing goals that will lead to material positive change.

This provision is similar to (a)(2), which focuses on fair housing issues, while (a)(6) focuses on setting fair housing goals. Rather than have these two exhortations to "proactively facilitate community engagement" and "actively engage with a wide variety of diverse perspectives," spread far apart in the text, the final rule could incorporate the concepts of (a)(6) into (a)(2).

The text should provide examples of "a wide variety of diverse perspectives," as the proposed rule does for other provisions (e.g., the definitions of "underserved communities" and "protected characteristics.") NLIHC suggests a non-exhaustive list to include community-based organizations that are trusted by the people they serve: immigrant-serving organizations, groups serving people with limited English proficiency, disability rights organizations and providers of services to people with disabilities, LBGTQI+ groups, entities providing services to gender violence survivors and/or advocacy organizations addressing gender violence, and groups representing formerly incarcerated and justice-involved people.

§5.158(a)(7)

All aspects of community engagement must be conducted in compliance with fair housing and civil rights requirements, including Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act.

In order to make this provision clearer and "reader-friendly" to those who do not know exactly what Title VI, Section 502, and ADA entail, the final rule should first spell out the protected classes the provisions are meant to serve and in what ways. In other words the text should make the typical references to disabilities and the various means needed to be considered in order to facilitate engagement with a particular form of disability. Similarly, the text should explicitly refer to limited English proficiency and ways to ensure maximum participation throughout all community engagement touch points.

§5.158(a)(8)

Program participants may combine the requirements of this section with the ConPlan or PHA Plan public participation requirements.

This subsection (a)(8) repeats (a)(3) by allowing the §5.158 community engagement provisions to be combined with the public participation requirements of the ConPlan and PHA Plan, but with more specific references for ConPlan program participants at (a)(8)(i) and PHA Plan program participants at (a)(8)(ii).

As previously stated in reference to (a)(3), NLIHC is very concerned about allowing such combinations and strongly urges HUD to eliminate all provisions allowing them. The AFFH community engagement requirements must be separate from and in addition to the ConPlan citizen participation regulations and the PHA Plan resident and public participation requirements. The reasons for our concerns are presented on the following pages.

§5.158(a)(8)(i) Consolidated Plan Program Participants

The jurisdiction may combine the requirements of §5.158 with its applicable ConPlan citizen participation plan requirements.

However, for purposes of developing an Equity Plan, community engagement must allow for sufficient opportunity for the community to have the in-depth discussions about fair housing “issues” required by this section. Therefore, to the extent the citizen participation plan does not provide for this opportunity, program participants must undertake separate public engagement activities.

As remarked above at (a)(3), NLIHC is very concerned about allowing such combinations. Paragraph (8)(i) seems to only apply to fair housing “issues,” which in the scheme of ConPlan regs, would seem to apply to the ConPlan public participation requirement to have a public “hearing” regarding “housing and community development needs.” Parallel text is not present that would apply to public engagement for prioritizing fair housing issues and for setting fair housing goals – crucial elements of “developing an Equity Plan.”

A key concern is whether there will be adequate time for public comment about both AFFH’s fair housing issues and the ConPlan’s housing and community development needs during the single, required public “hearing.” There is a deep concern that a jurisdiction will not comply with the proposed AFFH requirement that “to the extent the citizen participation plan does not provide for this opportunity, program participants must undertake separate engagement activities.

Concerns Regarding Proposed Changes to the ConPlan Citizen Participation Regs

HUD proposes amending the ConPlan “citizen” participation requirements to adjust to the proposed AFFH rule.

Local Governments §91.105 and State Government §91.115

In the ConPlan regs at §91.105(b) and §91.115(b) “Development of the ConPlan,” paragraph (3) regarding the requirement to provide at least one public “hearing” during the development of the ConPlan (local government) and regarding housing and community development “needs” before a proposed ConPlan is published for comment (states), the proposed AFFH change to paragraph (3) would direct jurisdictions to refer to §5.158(d) of the AFFH reg “for *public hearing* requirements for purposes of the Equity Plan”.

However, §5.158(d) calls for at least three public “meetings” and does not use the term “public hearing.” (See page 19 for more about §5.158(d).) This seems to be an inconsistency that the final rule should correct.

The remainder of this discussion only applies to the local government ConPlan regs, §91.105.

Section §91.105(e)(i) of the local government ConPlan regs has long provided requirements regarding public hearings, requiring at least two public hearings per year, conducted at a minimum of two different stages of the program year, in order to obtain residents’ views and to respond to proposals and questions. Together, the two hearings must address housing and community development needs, development of proposed activities, *proposed fair housing strategies and meaningful actions for affirmatively furthering fair housing* **based on the fair housing goals from the Equity Plan** [new text in bold]...and a review of program performance.”

Given this regulatory instruction, jurisdictions typically have one hearing about housing and community development “needs” and one hearing about “proposed activities” (i.e., a hearing about a draft Annual Action Plan).

As NLIHC previously noted, at both the Five-Year ConPlan and Annual Action Plan stages regarding proposed activities, a jurisdiction’s fair housing goals, strategies, and actions have already been “finalized” in an accepted Equity Plan – they are no longer “proposed.” Rather, at the Annual Action Plan stage in particular, those Equity Plan goals, strategies, and actions should strongly suggest – from an AFFH perspective – which proposed activities should be approved, at what funding levels, and at which locations.

The text says the hearing “must address.” Is it HUD’s attempt here to strengthen the proposed AFFH rule’s requirement to “incorporate” the Equity Plan’s fair housing goals, strategies, and actions in the ConPlan? If so, the word “proposed” should be deleted because at this stage the jurisdiction is no longer addressing “proposed” fair housing goals, strategies, and actions. It

would be appropriate for the ConPlan regulation to clearly indicate that at a hearing regarding proposed activities, the public should assess whether the proposed activities and fund allocation amounts are consistent with the Equity Plan's goals, strategies, and actions. Therefore, as NLIHC has proposed above (on page 10), the final revised ConPlan provision at §91.105(e) must delete the word "proposed" and replace it with "ensuring that those proposed activities and fund allocations are consistent with the jurisdiction's fair housing strategies and meaningful actions for affirmatively furthering fair housing based on the fair housing goals from the Equity Plan..."

The proposed ConPlan change adds at the end, "If the jurisdiction has included the community engagement procedures for development of the Equity Plan in its citizen participation plan, the requirements of §5.158 of this title shall apply."

If a jurisdiction does not include the §5.158 community engagement procedures in its citizen participation plan, does that mean its [*proposed*] *fair housing strategies and meaningful actions for affirmatively furthering fair housing* will only be subject to the sole ConPlan hearing? That would seem to completely undermine the proposed AFFH rule's intent to enhance community engagement. The proposed AFFH rule does not specifically require a public "meeting" about incorporating Equity Plan goals, strategies, and actions into the ConPlan (as NLIHC urges HUD to adopt); however, §5.158(a)(4) does call for a "reasonable opportunity" for public involvement (as presented above on page 10 above). Clarification or further HUD guidance is essential.

The existing ConPlan public hearing provision at (e)(1)(ii) is unchanged. It requires a jurisdiction to obtain community views regarding housing and community development needs, including priority non-housing community development needs, *and* affirmatively furthering fair housing during at least one of the two ConPlan required hearings *before a proposed ConPlan/Annual Action Plan is published for comment* (emphasis added).

This suggests that obtaining public input regarding an Equity Plan's fair housing goals, strategies, and actions should occur during the required ConPlan/Annual Action Plan "needs" hearing. The hearing is about needs; however, an Equity Plan's fair housing goals will have already been established at this stage. Those fair housing goals' strategies and actions, as they relate to an Annual Action Plan, are more appropriately addressed (as stated above) in a subsequent hearing devoted to how a jurisdiction proposes to use its funds to carry out programs and activities and whether those proposed programs and activities are consistent with the existing fair housing goals, strategies, and actions previously established in the Equity Plan.

HUD must amend the provisions at §91.105(e)(1)(i) and (ii) so that they are consistent and address the intent to incorporate the Equity Plan's fair housing goals, strategies, and actions in the ConPlan.

Because of the confusing text in the proposed changes to the ConPlan regulations and because it does not seem possible to effectively mesh the

AFFH regulation's community engagement provisions with the ConPlan hearing provisions, NLIHC urges HUD to remove all proposed provisions allowing the two sets of public participation provisions to be combined. The AFFH community engagement requirements must be separate from and in addition to the ConPlan citizen participation regulations and the PHA Plan resident and public participation requirements.

§5.158(a)(8)(ii) PHAs

Continuation of §5.158(a)(8), now focused on community engagement for PHAs.

Program participants may combine the requirements of §5.158 with the ConPlan or PHA Plan public participation requirements.

PHAs may combine the requirements of §5.158 when implementing the procedures in the PHA Plan regulations (Part 903.13, 903.15, 903.17, and 903.19) in the process of developing the Equity Plan, obtaining Resident Advisory Board and community feedback, and addressing complaints.

The community engagement for purposes of developing an Equity Plan must allow for sufficient opportunity for the community to have the in-depth discussions about fair housing "issues" required by §5.158. To the extent the regulations at Part 903 do not provide for this opportunity, PHAs must undertake separate engagement activities or incorporate such activities into the implementation of the specific, applicable program regulations.

Concerns Regarding Proposed Changes to the PHA Plan Resident Participation Regs

As remarked above regarding the ConPlan provisions, NLIHC is very concerned about allowing such combinations and strongly urges HUD to eliminate all provisions allowing them.

Paragraph (8)(ii) seems to only apply to fair housing "issues," which in the scheme of the PHA Plan regs, would seem to apply to two features of the PHA Plan regulations:

- The role of the Resident Advisory Board (RAB) at §903.13(a)(1) would be amended to add that the RAB's role includes making recommendations regarding the development of the AFFH Equity Plan following the AFFH community engagement provisions at §5.158.

Except for the spirit of §5.158, it is not clear which of its provisions could be combined with that of §903.13(a)(1).

- The public participation requirements at §903.17(a) and (c) require a PHA to have a public "hearing" (at a location convenient residents served by the PHA) to discuss a PHA Plan, and to conduct outreach to encourage broad public participation.

Nothing in §903 parallels a §5.158 “meeting” for engaging residents or the public regarding a PHA’s Equity Plan. The elements of a PHA Plan that are presented to residents and the general public by a PHA at the one and only “public hearing” to “discuss” a PHA plan could be fairly well baked in at that point in time, making it difficult for residents and the public to secure AFFH improvements.

As with the ConPlan, it remains unclear how the regular PHA Plan resident and public participation regulations could be effectively combined with the more comprehensive AFFH community engagement provisions. Therefore, NLIHC again urges HUD to remove all of the “combine” provisions. The AFFH regulation’s community engagement provisions should only be added to, not merged with, the PHA Plan resident/public participation provisions.

5.158(c) Frequency

§5.158(c)(1)

Program participants must engage the community “prior to” and during the development of an Equity Plan.

It is not clear what is intended by “prior to.” The proposed regulation does not otherwise have provisions relating to activities prior to “development” – unless “development” means identifying “issues.”

As stated previously, it is crucial to have community engagement very early in the process – prior to developing an Equity Plan while there is a blank slate, before a program participant offers its own suggestions implying those suggestions are the ones for a community to react to. A precedent for community engagement prior to developing a plan exists in the ConPlan process; the CHAS statute and ConPlan regulations require a public hearing about housing and community development needs before a proposed ConPlan is even drafted. Perhaps the “prior to” stage is the stage at which community engagement gathers fair housing issues?

§5.158(c)(2)

While an Equity Plan is in effect, a program participant must engage the community at least annually. The proposed rule requires two public meetings, as stated at §5.158(d)(2). It also allows this engagement to be combined with ConPlan or PHA Plan public participation requirements.

If the allowed combination applied, in a ConPlan context, §91.105(e) regarding ConPlan public “hearings” states that of the two required ConPlan public hearings, “Together, the hearings must address housing and community development needs, development of proposed activities, *proposed* fair housing strategies and meaningful actions for affirmatively furthering fair housing based on the fair housing goals from the Equity Plan...*and a review of program performance.*”

As previously stated, the word “proposed” is inappropriate. The word “proposed” should be deleted and replaced with “ensuring that those proposed activities and fund allocations are consistent with the jurisdiction’s...” as NLIHC has proposed.

With the exception of some states, most jurisdictions do not have a separate public hearing regarding program performance (about the Consolidated Annual Performance and Evaluation Report – CAPER). In practice, the effect is that a single public hearing would be tasked with obtaining public input regarding: (1) which proposed projects and activities a jurisdiction should undertake next year and how much funding to allocate to them; (2) an assessment of whether those proposed programs and activities and fund allocations would be consistent with an Equity Plan’s fair housing goals, strategies, and actions; (3) an assessment of a jurisdiction’s performance regarding last year’s housing and community development programs and activities and fund allocations; and (4) the degree to which a jurisdiction took effective and necessary actions to implement its fair housing goals of the previous year. This agenda is far too loaded and fair housing considerations would most likely suffer.

Unless there is a third, separate ConPlan-related hearing, the required AFFH annual community engagement about whether a jurisdiction is taking effective and necessary actions to implement an Equity Plan’s goals, this crucial opportunity for AFFH accountability to the community will have to compete with the single hearing focused on an Annual Action Plan’s proposed housing and community development activities discussion.

For this reason, NLIHC again urges HUD to remove the sentence allowing such combinations.

§5.158(d) Methods

§5.158(d)(1)

For the development of an Equity Plan, a program participant must hold at least three public “meetings,” at various accessible locations and at different times to ensure protected class groups and underserved communities have opportunities to provide input.

It is not clear whether the three required meetings must address different stages of developing an Equity Plan (e.g. one stage to gather input regarding fair housing issues, another stage regarding setting priorities among all of the identified fair housing issues, and a third stage to engage the community in setting fair housing goals, strategies, and actions). Or does HUD intend that the three required meetings take place at the required different locations and times?

NLIHC recommends the latter *and* adding separate, required meetings, one for identifying fair housing issues, one for setting fair housing priorities, and one for deciding on fair housing goals, strategies, and actions, along with a fourth separate community engagement meeting pertaining to a draft Equity Plan before it is sent to HUD for review.

A fourth meeting devoted to a draft Equity Plan is warranted because there is no explicit requirement within §5.158 calling for the public to have an opportunity to comment on a “draft” Equity Plan before it is sent to HUD for review. However, the section of the AFFH rule describing the Equity Plan §5.154 at subsection (j)(1) regarding “Publication” does require program participants to make *drafts* of the Equity Plan available for the §5.158 community engagement process. In addition, the proposed State ConPlan regulation changes call for the public to have an opportunity to review and comment on a “proposed” Equity Plan [§91.115(b)(2)]; the parallel local government ConPlan regulation does not [§91.105(b)(2)].

NLIHC urges HUD to add explicit language at §5.158 (a)(1) and (d) requiring a fourth public meeting to obtain public review and comment regarding a *draft* Equity Plan before a program participant submits an Equity Plan to HUD for review.

In short, NLIHC recommends requiring at least four stages of community engagement meetings prior to and during the development of an Equity Plan:

1. Identifying fair housing issues
2. Establishing which fair housing issues to prioritize
3. Establishing fair housing goals
4. Commenting on a draft Equity Plan before its submission to HUD

NLIHC suggests that the regulation (or subregulatory guidance) include as an acceptable meeting format, hybrid meetings that allow virtual engagement as long as there is concurrent in-person engagement. Participating virtually may enable more protected class and underserved community persons to engage, those who: have childcare or eldercare responsibilities, have a disability that makes attending in-person meetings difficult, lack affordable or reliable transportation, or have other barriers to in-person participation.

§5.158(d)(2)

For the annual engagement, a program participant must hold at least two public “meetings” at different locations.

NLIHC suggests the regulation add that meetings must be at different times to increase the opportunity to participate, as is required in paragraph (1).

§5.154 Equity Plan

(h) Additional Content

Although not a part of the community engagement section (§5.158), subsection (h) of the section of the AFFH rule describing the Equity Plan (§5.154) requires program participants to include three items as part of their Equity Plans. One of those items is an attachment of all written comments received and transcripts or audio or video of “hearings” held during the development of the Equity Plan.

Because §5.158 consistently uses the term “meetings,” NLIHC suggests the final rule use “meetings” instead of “hearings” at §5.154 Equity Plan(h).

EQUITY PLAN

§5.154(d) Content; Analysis – Local Governments, States, and Insular Areas.

The introductory text instructs program participants to respond to questions with respect to a program participant’s “jurisdiction and region.”

At (d)(1)(i) pertaining to “Demographics,” HUD asks a program participant to respond according to its “geographic area of analysis,” not its “region.” Another 10 questions use geographic area of analysis – not region – as the geographic scope for which a program participant should respond. While the geographic area of analysis could be the region, it seems confusing, nonetheless. Two questions specifically ask for responses based on the region, (2)(ii) and (3)(i)(C). The final rule should be consistent or clarify why the instructions vary.

§5.154(d)(5)(i)&(ii), Access to Affordable Housing Opportunities.

Paragraph (5)(i) asks program participants to describe the availability of “affordable housing opportunities,” and (ii) asks program participants to describe housing cost burden.

NLIHC provides a detailed critique of “affordable housing opportunities” in the Definitions portion of this comment letter below. In short, there is no definition of “affordable” (it should be Brooke rents), and aside from public housing and voucher-assisted units, a resident in HUD-assisted housing could be “cost-burdened.” In addition, there is inadequate direction regarding “at various income levels.”

The paragraph (5)(ii) direction only seeks aggregate cost burden information; it is not directly connected to the “affordable housing” in (5)(i).

For (5)(i) to meaningfully enable a picture of “affordable housing opportunities,” a program participant needs to assess the extent to which households are cost-burdened and severe cost-burdened by income category (ELI, VLI, and Low/Mod) for each type of federally assisted housing, especially the LIHTC program, in a program participant’s geographic area of analysis.

§5.154(d)(7) Local and State Policies and Practices Impacting Fair Housing

NLIHC suggests adding a requirement to describe and assess a program participant’s housing and community development policies and activities that have environmental justice impacts for protected class groups. For example correcting past practices leading to harmful environmental burdens, such as industrial zoning practices, highway development, lax brownfield cleanup.

§5.154(e) Content; Analysis – Public Housing Agencies

The introductory text instructs PHAs to respond to questions with respect to a PHA's "jurisdiction and region." See NLIHC critique above regarding (d) for local governments.

Subsection (e)(1) "Demographics," asks a PHA to describe the current demographics of its geographic area of analysis by protected class group (i), as well as the demographics of different categories of PHA-owned or administered housing.

NLIHC assumes as part of a fair housing analysis, HUD expects (but doesn't directly ask) how the two compare. However, for the geographic area of analysis, not all protected class group members will necessarily be eligible for PHA programs, meaning a comparison could be skewed.

Subsection (e)(3) "R/ECAPs," at (iii)(A) asks how many of a PHA's public housing developments are located in R/ECAPs. Then (iii)(B) asks a PHA to compare the demographics and location of the residents of public housing with the demographics of and location of the R/ECAP.

Although it might be implied because (A) asks about "developments," (B) should be reworded to make clear that the demographics should be presented by each development in a R/ECAP. In addition, the presentation of demographics should be explicitly by protected class group.

Subsection (iv)(A),(B), and (C) ask about vouchers.

NLIHC urges HUD to ask PHAs to respond to each question [(A),(B), and (C)] separately for tenant-based vouchers and Project-Based Vouchers. A PHA's policies can affect where tenant-based vouchers can be successfully used, while a different set of that PHA's policies can also directly determine where PBVs are awarded. Although a PHA has little power to influence discrimination against voucher households in well-resourced areas and other areas outside of R/ECAPs, a PHA determines where to allocate PBVs and for what types of housing. A similar distinction between tenant-based vouchers and PBVs should be asked for question (4)(iii)(A).

There are a number of data/information questions that are important to address in order to conduct a fair housing analysis relevant for PHAs. NLIHC suggests HUD add the following in the final rule:

For both Public Housing and HCV programs:

- Racial demographics and household size of eligible families in a housing market compared with households receiving assistance and households on a waitlist, by program;
- Total number of assisted housing units by census tract (including PHA properties and vouchers, plus LIHTC, PBRA, and any state housing programs);
- Number of accessible units in a market area (including a PHA's portfolio) and types of accessibility features available (mobility features, sensory features, etc.);

- Percentage of limited English proficient families served by a PHA, compared with the broader service area;
- Number of requests for accommodations, including approvals and denials;
- Number of admissions denials for each program, broken down by race, sex, primary language, and disability, and categorized by reason;
- Number of evictions or subsidy terminations for each program, broken down by race, sex, primary language, and disability, and categorized by reason.

For HCV Program:

- Availability/percentage of units accessible to persons with disabilities in a market area; availability of funds for modifications;
- Portability in/out data (including numbers of requests and denials, as well as basis for denial), by protected class;
- Number of requests for exception payment standards and percentage granted, by protected class;
- Search times and extensions by race, household size, and disability;
- Success rates by race/family size/disability;
- Current payment standards in relation to Small Area FMRs; estimate of the number of available units in low-poverty neighborhoods with and without exception payment standards based on SAFMR.

For Project-Based Vouchers:

- Occupancy and application data for project-based vouchers;
- Number of PBVs by census tract, including tract poverty concentration and racial demographic data.

For Public Housing:

- Property conditions (REAC or NSPIRE scores) by neighborhood, including number of units near contaminated sites, how many units near public infrastructure, how many units near public transportation, etc.;
- Number of Violence Against Women Act emergency transfers requested, granted, and denied;
- Data on housing overcrowding by protected class;
- Lead-based paint abatements and remediations.

Subsection (e)(5)(i), “Local policies and practices impacting fair housing” asks a PHA how local laws, policies, ordinances, and other practices impede or promote the siting of affordable housing and use of vouchers in well-resourced areas of opportunity. The introductory text at (i) asks for policies under a PHA’s direct control as well as municipal or state policies. Regarding policies under a PHA’s control, the proposed rule mentions preferences and creation and retention of units for large families. Paragraph (e)(5)(i)(B) asks a PHA to describe its mobility and portability policies and activities, landlord incentives, policies related to portability policies [sic], or payment standards and fair market rents, and asks whether there is a need for mobility services. Subsection (e)(5)(iv), asks a PHA about specific steps it takes to ensure compliance with existing law and regulation, including discretionary policies and practices, mentioning preferences, portability, reasonable accommodation, evictions, and unit tenancing including designated accessible units.

First, NLIHC suggests (e)(5) be rewritten so that the question is broken into two segments a new (i) and a new (ii), the first (i) focusing on policies under a PHA's direct control.

The text for a rewritten (i) should specifically name a PHA's Admissions and Continued Occupancy Policy (ACOP) for public housing and a PHA's Section 8 Administrative Plan for Housing Choice Vouchers and frame the questions regarding the policies in each.

The proposed text mentions a number of important PHA-related policies and practices, but they are scattered over the three provisions, sometimes repeating a particular provision; yet does not include other important provisions. NLIHC suggests the final rule be revised to include in one spot the provisions in the draft as well as a number of other important PHA policies. NLIHC suggests adding the following PHA-controlled policies (some of which include a policy in the draft rule but more clearly explained):

For both Public Housing and HCV programs:

- Admission preferences;
- Admission screening policies, including: criminal records policy, screening for prior landlord-tenant history and references (including nonpayment of unaffordable rents and evictions), screening for negative credit history and prior debts owed to the PHA;
- Waitlist policy limited to first-come/first-served or other policies that disadvantage certain protected class members such as people with disabilities;
- Lack of language access;
- Inadequate reasonable accommodations policies;
- Emergency transfers
- Description of any efforts to increase access when the admissions process has moved online, by addressing language access, unequal access to the Internet, and the needs of older adults;
- Lack of strong affirmative marketing efforts;

For the HCV program:

- Payment standards too low to reach lower poverty neighborhoods (lack of exception payment standards or SAFMR);
- Reasonable rent determinations (i.e., are reasonable rent determinations resulting in overpayment of landlords in softer markets and underpayment of landlords in higher-demand markets?);
- No or insufficient mobility counseling;
- Porting barriers and/or lack of information on porting to tenants;
- Landlord or unit listings predominantly in high poverty neighborhoods (e.g. online listing services);
- Residency preferences;
- HCV search times and policy on extensions;
- Excessively long inspection times and delays in approving RFTAs;

For Public Housing:

- Unreasonable house rules and whether enforcement disproportionately impacts protected class residents;
- Policies to address harassment based on a protected class (sexual harassment, harassment based on race, national origin, disability, etc.) by staff or other tenants;
- Failure to comply with VAWA, and lack of partnership with DV/SA organizations;
- Repositioning policy and impact on existing residents of RAD conversion, Section 18 demolition or disposition, and Section 22 voluntary conversion – especially regarding ability to return, location of replacement housing, and ability to successfully use a voucher.
- Security or police presence within public housing;
- Guest policies.

The text for a rewritten (ii) pertaining to policies that are not under a PHA's control should add:

- Siting decisions regarding the location of community amenities and investments (e.g., parks and other natural amenities, infrastructure investments, public transit, etc.)
- Local school assignment policies that deny PHA children access to high performing schools; schools with unequal resources and sub-par performance;
- Lack of public transportation to access higher opportunity areas.

In addition to the suggested refinements and additions to the text of the final rule, NLIHC suggests that subregulatory guidance address the following:

For both Public Housing and HCV programs:

- Include a strong affirmative marketing program with language access for multiple languages used in client population;
- Incorporate fair housing goals into the Section 8 Admin Plan and ACOP;
- Develop partnerships with community organizations providing services to marginalized communities (specifically targeting populations underrepresented in programs due to historic discrimination and lack of language access), including schools, community health centers, victim service providers, legal aid organizations, etc.;
- Support independent-tenant groups representing all public housing properties and voucher families.

For HCV program:

- Adopt housing a mobility program (counseling, search assistance, and landlord recruitment) with trained staff who have demonstrated success in creating and operationalizing housing mobility;
- Remove financial barriers to moves (assistance with security deposit and moving expenses and utility deposits in high opportunity areas); offer holding payments to landlords for units in high opportunity areas;
- Partner with legal aid and fair housing agencies in support of source of income discrimination cases.

Review of Equity Plan

§5.162(a) Review of Submitted Equity Plan

The proposed rule at (a)(1) allows the public to directly submit to HUD, comments regarding a submitted Equity Plan. The public should submit such comments no later than 60 days from the date an Equity Plan was submitted to HUD.

NLIHC thinks the 60-day timeframe for submitting comments should start when HUD posts the submitted Equity Plan, not when it is submitted to HUD. The public might not be aware that a program participant has submitted an Equity Plan for several days if HUD does not post it immediately. HUD does not have a good track record for posting important items in a timely fashion.

As previously indicated, NLHC urges the final rule to require a program participant to post a “submitted” Equity Plan on an easy to locate webpage on its own website.

To facilitate awareness and to afford the public with as much opportunity as possible to submit comments to HUD, on the day an Equity Plan is submitted to HUD, the program participant must notify via electronic means (including to all who have submitted input or comments regarding fair housing issues, priorities, goals, and any “draft” Equity Plan), that an Equity Plan was submitted and that the public may submit comments to HUD

The proposed rule at (a)(2) directs HUD to notify a program participant whether its Equity Plan is “accepted,” and if it is not accepted indicate the reasons why along with actions the program participant can take to gain acceptance.

It is not clear from the proposed text that HUD will post on the HUD-maintained website, the reasons an Equity Plan is not accepted and what a program participant can do to gain acceptance. The text of the proposed rule might intend that, but the text should be revised to remove any ambiguity.

Revising an Accepted Equity Plan

§5.164(b) Timeframe for Required Revision of Equity Plan after Presidentially Declared Disaster

The proposed rule requires an Equity Plan to be revised if a “material change” occurs due to a Presidentially declared disaster. As proposed, the deadline to submit a revision would automatically be extended to two years after the date of the disaster declaration.

Based on the advice of the Disaster Housing Recovery Coalition (DHRC) coordinated by NLIHC, we urge the final rule to instead require a program participant to submit a revised Equity Plan as soon as possible after a Stafford Act Declaration is made. It is crucial to have a revised Equity Plan ready to go in order to ensure AFFH principles are applied to planning associated with disaster-related funding.

The final rule contains language stating that a “material change” revision is required when substantial, one-time infusions of federal funds are provided. Recent examples of such infusions are the ARPA State and Local Fiscal Recovery Funds and the Infrastructure Improvement Act.

DEFINITIONS

“Affordable Housing Opportunities”

(1)(i) Housing that is affordable to low- and moderate-income households.

A major problem with the proposed rule is that it does not define “affordable” while using the word “affordable” not only in this definition, but throughout the proposed rule. Therefore, NLIHC strongly urges HUD to define “affordable” housing as housing that requires a household to spend no more than 30% of their adjusted income on housing expenses (rent or mortgage) and utilities – the Brooke Rule.

Also as proposed, housing would qualify as “affordable” if it is affordable to low- and moderate-income households. “Low- and moderate-income” is not sufficient. The final rule should provide a more complete and therefore meaningful breakdown defined by the percentage of the area median income (AMI) used to characterize “affordable” in various HUD programs. NLIHC suggests the text to read as, “(i) Is affordable to households at a range of income levels including extremely low-income (equal to or less than 30% AMI or the federal poverty level), very low-income (greater than 31% AMI and equal to or less than 50% AMI), and low-income”/“moderate-income (greater than 51% AMI and less than or equal to 80% AMI).”

NLIHC offers the above three tier definitions in order to establish consistent use in the implementation of AFFH. HUD programs do not have consistent definitions for “very-low,” “low,” and “moderate” income; therefore, it is essential that the AFFH rule apply definitions consistently for the definition of “affordable housing opportunities.” NLIHC explains its recommendations:

- “extremely low-income” (equal to or less than 30% AMI or the federal poverty level), is a standard used in the ConPlan and the national Housing Trust Fund (HTF) program, as well as by PD&R.
- “very low-income” (greater than 31% AMI and equal to or less than 50% AMI), as used in the HTF and HOME programs as well as by PD&R.
- “low-income”/“moderate-income” (greater than 51% AMI and less than or equal to 80% AMI). The HOME program and PD&R use the term “low-income” for 80% AMI, while CDBG and the ConPlan use the term “moderate-income” for 80% AMI.

NLIHC recommends adding a fourth tier that identifies households with income between 0 and 15% AMI to help identify people with income roughly equal to the amount of a Supplemental Security Income (SSI) recipient.

With the exception of public housing, Housing Choice Vouchers, and Project-Based Section Eight programs, other HUD programs and the Treasury Department’s Low Income Housing Tax Credit (LIHTC) do not use Brooke rents; rather they rely on a fixed number based on 30% x a fixed, program-specific AMI-related number – not a resident’s actual, adjusted income.

Consequently, many HUD- and LIHTC-assisted households might be cost-burdened, spending more than 30% of their adjusted income on rent and utilities, and in some instances being “severely cost burdened,” spending more than half of their adjusted income for rent and utilities. Therefore, merely identifying housing as “affordable” because it is HUD- or LIHTC-assisted can be a major exaggeration, greatly undermining the meaning of the term “affordable housing opportunity.”

NLIHC is also concerned that some program participants could conflate “affordable” housing with “fair housing” as was the case in the aftermath of the Westchester County, NY AFFH settlement. In the context of an AFFH rule, it might be obvious that “affordable housing opportunities” and “affordable housing” are based on the protected classes; however, to obviate as much as possible conflating “affordable” and “fair” housing, it is important to write the definition clearly in order to preclude confusion or abuse. Therefore, NLIHC recommends adding language at the beginning of the definition of “affordable housing opportunities” stating that the provisions in the definition are based on the Fair Housing Act’s protected classes.

While it is important to make the distinction between “affordable” and “fair” housing in the definition, it is also important to review other operational elements of the rule. When planning and drafting an Equity Plan, as well as in its day-to-day implementation, it would be easy and understandable for program participant staff to forget to refer back to a seemingly common-sense definition. Therefore, NLIHC urges HUD to review and adjust other text to preclude equating “affordable” housing with “fair” housing. For example, at §5.154(d), “Content Analysis-Local Governments, States, Insular Areas,” (5)(i) “Access to Affordable Housing Opportunities,” it is conceivable that a program participant could reply to the direction to describe the availability of “affordable housing opportunities” by “protected class group” separately from “at various income levels” and “geographic area of analysis.”

(1)(i) Housing that meets basic habitability requirements

NLIHC thinks using the generic “basic habitability requirements” should be augmented to specifically cite HUD-assisted housing requirements. The reference in paragraph (2) is too easily overlooked. The final rule should read, Housing that meets Housing Quality Standards (HQS) regulations for the Housing Choice Voucher program and the NSPIRE regulations for other HUD programs (or any future modifications or substitutions for those programs), and that meets state or local habitability requirements for housing not assisted with a federal program. “Basic habitability standards for HUD-assisted housing also includes full compliance with all lead-based hazards, carbon monoxide, radon, and environmental quality regulations.

(3)(iii) Affordable housing opportunities also include housing stability for protected class groups

The rule should add as another example, the ability of public housing households to use Housing Choice Vouchers when vouchers are provided as a result of a Public Housing Repositioning action due to a Rental Housing Assistance Demonstration (RAD) conversion, a Section 18 demolition or disposition, a Section 22 Voluntary conversion, or a Section 33 Compulsory conversion.

“Equity Plan”

See *NLIHC Suggested Improvements* in discussion of **Stronger Link Between Equity Plan Goals and ConPlan and PHA Plan** above on page 5.

The last sentence, “The Equity Plan includes program participants’ submission of annual progress evaluations, which will be published on HUD maintained webpages,” even in context could be interpreted to mean that only Annual Progress Evaluations will be published on HUD-maintained webpages. However, elsewhere in the proposed rule, the text clearly states that an Equity Plan submitted for HUD review, an “accepted” Equity Plan, and relevant communications between HUD and a program participant must also be posted to a HUD-maintained website.

“Fair Housing Strategies and Actions”

See *NLIHC Suggested Improvements* in discussion of **Stronger Link Between Equity Plan Goals and ConPlan and PHA Plan** above on page 5.

“Geographic Area, Geographic Area of Analysis, or Area”

Due to the placement of a comma, the definition for local governments can be misinterpreted to give a program participant the option to only analyze fair housing issues in its jurisdiction. NLIHC suggests a slight modification to prevent such misinterpretation:

“For local governments, the expected geographic area of analysis includes the whole jurisdiction of the local government pursuant to 24 CFR 91.5 and the CBSA it is part of, and where necessary...”

The last clause of the definition for local governments adds to the potential for misinterpretation:

“...while also including any analysis of circumstances outside the jurisdiction that impact fair housing issues within the jurisdiction.”

If the geographic area of analysis includes the CBSA, then the last clause seems redundant.

It is conceivable that in some instances a CBSA is so extensive that it would be reasonable for a program participant to be able to explain that a smaller portion would be a more reasonable and practical geographic area of analysis – the jurisdiction’s “region” perhaps. HUD should accept such a tailored geographic area of analysis as long as a program participant provides a compelling rationale backed by local data and/or local analysis.

“Meaningful Actions”

The definition only offers examples of one part of the equation for a “balanced approach” to affirmatively furthering fair housing – such as decreasing disparities in access to opportunity in the program participant’s jurisdiction. If HUD is serious about seeking a balanced approach, it must include several examples of place-based activities such as preserving existing affordable housing in racially or ethnically areas of concentrated poverty.

“Protected Characteristics”

NLIHC welcomes the proposed rule’s refinement of the word “sex” to include sexual orientation, gender identity, and nonconformance with gender stereotypes. However, NLIHC suggests the final rule add “sex characteristics” and “pregnancy.” The addition of “sex characteristics” would be consistent with Executive Order 14075.

HUD has long recognized that pregnancy discrimination occurs in housing. Pregnancy may be sex discrimination and/or familial status discrimination. Because the proposed rule definition of protected characteristics refines “sex” in parenthesis, NLIHC urges HUD to add “pregnancy” because some might not otherwise consider pregnancy subject to the Fair Housing Act, under either the sex or familial status protected classes.

“Racially or Ethnically Concentrated Areas of Poverty, (R/ECAPs)”

The definition is simply “a geographic area with both significant concentrations of poverty and segregation of racial or ethnic populations.” It makes sense to have a basic, generic definition in a regulation which will remain static for many years. We assume HUD will provide more quantitative guidance in other, more timely and flexible guidance as it did for the 2015 AFFH rule. The content of the Equity Plan requires a program participant to respond to seven questions based on R/ECAPs, therefore it is a very important element of a program participant’s fair housing analysis.

We urge HUD to improve the quantitative definition of R/ECAPs that it issues in sub-regulatory guidance. We suggest, a R/ECAP be a geographic area based on census tracts with a poverty rate of at least 30% (not 40%) and a total percentage of minority persons within the geographic area at least 20 percentage points (not 50) higher than the total percentage of minorities in a housing market area as a whole.

We also urge the R/ECAP definition be described in a short, simple sub-regulatory guidance document, as well as in more detailed and comprehensive sub-regulatory guidance (such as the “Affirmatively Furthering Fair Housing Data and Mapping Tool (AFFH-T) Data Documentation”) because locating the R/ECAP definition in the latter was not readily apparent to many advocates.

“Underserved Communities”

NLIHC welcomes the proposed rule’s addition of a refinement of protected classes. In particular, we support the examples provided in the definition that include individuals experiencing homelessness, Lesbian, Gay, Bisexual, Transgender, Queer, + persons (LGBTQ+), survivors of domestic violence, and persons with criminal records.

We suggest the final rule slightly revise LGBTQ+ to read LGBTQI+, adding Intersex. This would be consistent with Executive Order 14075.

NLIHC also endorses the inclusion of survivors of domestic violence as one example of an underserved community. We suggest specifically including sexual assault survivors.

NLIHC also urges HUD to remove from the definition “low-income communities or neighborhoods” and “rural communities” because they are not inherently comprised of people in the Fair Housing Act’s protected classes.

“Significant”

Throughout the definition portion of the proposed rule, the term “significant disparities” is used, and elsewhere in the operational portion of the rule “significant concentrations” is used when asking jurisdictions and PHAs about segregation. NLIHC understands it is not possible to assign quantitative definitions of “significant,” especially in regulation; however, NLIHC urges HUD to develop sub-regulatory guidance to help program participants give serious consideration to assessing “significant” disparities and concentrations.

Conclusion

NLIHC urges HUD to preserve the many improvements it has introduced in the proposed AFFH rule, and we urge HUD to include our suggested improvements in the final rule so that it can be a meaningful and effective tool for the nation work toward achieving the spirit and intent of the Fair Housing Act of 1968.

If there are any questions about these comments, please contact [REDACTED] at [REDACTED].

Sincerely,



Diane Yentel
President and CEO