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

Via <https://www.regulations.gov/commenton/HUD-2023-0009-0001>.

**RE: Docket No. FR-6250-P-01; RIN 2529-AB05; Affirmatively Furthering Fair Housing**

Texas Appleseed and Texas Housers appreciate the opportunity to provide comments on the proposed Affirmatively Furthering Fair Housing (AFFH) rule.

Texas Appleseed (Appleseed) is a non-partisan, non-profit, 501(c)(3) organization and part of a national network of public interest law centers. Our mission is to promote social, racial, and economic justice for all Texans. Our goal is to ensure that all families have the opportunity to live in safe and healthy neighborhoods with equal access to educational and economic opportunity.

Texas Low-Income Housing Information Service (Texas Housers), a non-partisan, nonprofit, 501(c)(3) corporation has worked in Texas with community leaders in neighborhoods of people of color living with low incomes to achieve affordable, fair housing and open communities for over 30 years. Citizen engagement, civil rights enforcement and fair housing are at the center of our work.

The proposed rule is essential to the long overdue implementation of Title VII of the Civil Rights Act of 1968 (Fair Housing Act) and to rooting out “[e]ntrenched disparities in our laws and public policies, and in our public and private institutions, [that] have often denied that equal opportunity to individuals and communities”<sup>1</sup> creating a fair and equitable country that benefits all Americans. We strongly support the frameworks HUD has put forward in the proposed rule. Following please find our specific comments based on our decades of work on Fair Housing issues.

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<sup>1</sup> President Joseph A. Biden, Executive Order 1398: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, January 20, 2021. 84 Fed. Reg. 7009 (Monday, January 25, 2021)

## General Comments on the Proposed Rule and Summary

1. **Require effective community engagement.** We have several general suggestions:
  - a. Set a minimum engagement timeline: establish a minimum engagement timeline of at least 100 days, including a three-week pre-plan stakeholder identification and initial engagement period, a 30-day public review of the proposed equity plan, then three-week notice of public hearings, reasoned response to public comments within fourteen days and fourteen-day opportunity to meet and discuss before plan submitted to HUD.
  - b. Outreach Process:
    - i. HUD needs to provide materials directed at low-income people and community organizations to explain fair housing and AFFH, why it is important, examples of how it can be achieved, what it means in the lives of members of protected classes.
    - ii. HUD needs to develop an on-line FH Equity Web portal with resources and examples of what activities to achieve equity in fair housing means that is presented in easy to access resources, including multilingual videos.
    - iii. Require jurisdictions and PHAs to view and promote the FH Equity Web Portal, especially to protected classes and residents of segregated subsidized and non-subsidized housing and include links to the portal on signs, publications, etc. and require HUD field staff and jurisdiction staff to familiarize with it and promote it.
    - iv. HUD should develop a team of community engagement experts who work (on request) with jurisdictions/PHAs and/or local fair housing groups to plan and carry out an engagement process.
2. **Fair Housing Initiative Programs (FHIP) should assist members of protected classes to participate in the Equity Plan development process.** HUD should train and require FHIPs to support the planning process and serve as a resource to identify, engage, and support members of protected classes to participate in the engagement process.
3. **HUD should retain the contributing factor analysis laid out in the AFFH Tools it proposed for the 2015 AFFH rule in sub-regulatory guidance as a set of recommended factors to be considered in the analysis.** The 2015 AFFH Rule used an Assessment Tool that contained approximately 100 questions program participants were required to answer in a prescribed format, as well as about forty contributing factors that program participants were required to consider for each fair housing issue they identified.” These questions and contributing factors should be

retained in sub-regulatory guidance on the proposed rule and program participants should be strongly encouraged to consider them. They are essential to understanding current fair housing issues and developing appropriate remedies.

4. **Engage local jurisdictions through enhanced training.** We agree with HUD's statement that jurisdictions' decisions to largely rely on consultants has not been good. Reliance on consultants is an indication that: 1) the people managing the grants at the local jurisdictions do not understand the concept of fair housing; and 2) too many administrators have not embraced compliance with the spirit of the law. Historically, AFFH compliance has been limited to producing a report that does not impact policy and checking boxes or making vague representations to get federal funding. However, HUD's Summary and the proposed rule focus too much on making the process simpler without dealing with the underlying problem that program participants do not invest the time and effort to understand fair housing and AFFH, have deprioritized it, and have farmed out the obligation to assess and address fair housing issues to paid consultants. The regulation must require program participants to take the time and make the effort to conduct a meaningful fair housing planning process and take significant steps to overcome the fair housing issues they identify. This process requires a more active involvement of governing bodies and other agencies in the development of the assessment and actions. The proposed rule is clear that AFFH is a whole of government obligation, not merely something that the agency administering HUD funds must deal with. To enable a consultant-free process undertaken directly by program participants HUD must provide adequate training and technical support for decision makers within the administering jurisdictions and PHAs.
5. **Make Equity Plans available publicly.** We strongly support HUD's commitment to "make all program participants' equity plans available on a HUD maintained webpage, allowing program participants to review other program participants equity plans that have been accepted by HUD" as well as HUD's commitment to make submitted and final Equity Plans and progress reports publicly available on a HUD-maintained webpage.
6. **The timeline for submission of the first Equity Plans is too long but HUD's review time and plan submission order is overly ambitious.** The proposed rule pushes back the timeline for submission of the first plans for several years. The citizens of the United States have been waiting since 1968 for HUD to implement the Fair Housing Act's mandate to overcome housing segregation and HUD should move forward more expeditiously. That said, we are concerned about the burden HUD is giving itself for review of the plans once it finally requires them to be submitted. One hundred days to review the plans is likely too ambitious unless substantial

additional staff resources are available for this work. HUD is also proposing to front stack the plans from the largest jurisdictions which should be the most lengthy and detailed plans. We feel HUD will collapse under the weight of trying to review the equity plans for all the major US cities within a 100-day period or end up giving them only cursory review.

7. **HUD has appropriately clarified that fair housing goals must be included in future planning documents including consolidated, annual and PHA plans.** We support the requirement that, “program participants incorporate the fair housing goals from their Equity plans into their consolidated plan, annual plan or PHA plan” and that incorporating these fair housing goals includes the allocation of resources necessary to achieving the goal(s).
8. **Plans under review should be publicly disclosed and public input accepted.** We strongly support that, “... the proposed rule will enable members of the public to have online access to all submitted equity plans, to provide HUD with additional information regarding Equity plans that are under HUD review, and to know how decisions on equity plan acceptance, and on program participants annual progress evaluations.”. The public possesses important information and insight that HUD should consider in reviewing the plans. The consideration of public comment at this point in the process will enhance the quality of the plans and minimize the number of administrative complaints filed after the Equity Plan is accepted by HUD.
9. **Requirement that program participants submit annual progress evaluations** We strongly support the proposed rule’s requirement that program participants conduct annual progress evaluations. HUD should regularly review these reports and consider public input and complaints when evaluating whether program participants are in compliance with their obligation to AFFH.
10. **Provide public notice and opportunity to comment on proposed equity plan revisions.** The proposed rule provides that a jurisdiction may submit, with HUD’s approval, a revised equity plan. There should be a provision requiring public notification of the filing of a revision and the opportunity for the public to comment and to provide HUD with information concerning the proposed revision.
11. **Creation of a robust process to accept and respond to AFFH complaints.** One of the most important things in the proposed rule is the provision creating a mechanism for members of the public to file complaints, and for HUD to further engage in oversight and enforcement.
12. **Establish a prompt and effective enforcement process.** The proposed enforcement approach is based on other enforcement processes using in civil rights and fair housing laws. We agree with this approach but are concerned that in enforcing existing violations under current laws it too often takes years for HUD to carry out

an investigation and enforcement action. While we agree that it is important that HUD have robust authority for enforcement, HUD must improve the speed of its existing processes.

13. **Emphasize use of R/ECAPs as an important unit of analysis.** HUD's explanation says that HUD will provide technical assistance in identifying racially and ethnically concentrated areas of poverty. There should be more detail on how a R/ECAP is defined demographically and economically in the rule. We wholeheartedly support a robust analysis that involves R/ECAPs as a starting point to define distressed and segregated areas.
14. **Publicly disclose both decisions and their basis.** HUD states that it will publish the equity plan submissions and acceptance decisions on a HUD webpage. This is essential. HUD should also commit to public disclosure of the basis for its decisions to accept or not accept a program participant's Equity Plan and along with publishing submissions it should also publish correspondence between the jurisdiction and HUD concerning the plan.
15. **The burden of segregation and discrimination on protected classes outweighs the burden on the jurisdictions on complying with the proposed process.** In discussing the cost to jurisdictions versus the benefits of the rule, HUD notes that segregation combined with the legacy of discrimination against protected class groups and long-standing, disinvestment of certain neighborhoods imposes and continues to impose substantial costs on protected class members and society in general. We strongly agree and note that the burden of this segregation and discrimination far outweighs the costs of complying with the proposed rule.
16. **HUD should not accept the kind of broad, non-specific fair housing issues and ineffective proposed remedies prevalent in past fair housing analyses.** Having reviewed many Analyses of Impediments and Assessments of Fair Housing, we note that many jurisdictions' analysis were largely based on a simplistic conclusion that the impediments to fair housing are the lack of affordable housing, lack of adequate incomes for members of protected classes, and/or a lack of public knowledge about fair housing. The remedies in these plans often consist simply of ill-defined commitments to build more housing (regardless of the location or affordability) and providing community education on fair housing. The proposed rule should make clear that HUD will require a higher standard of analysis and that fair housing goals must include initiatives that are achievable and that produce measurable progress to reduce segregation.
17. **Jurisdictions and PHAs should be supported by HUD if they propose solutions to address substandard legacy HUD subsidized housing in R/ECAPs.** The proposed rule should include guidance to jurisdictions and PHAs stating the importance of

assessing the role of older, distressed multifamily HUD subsidized properties located in R/ECAPs in maintaining segregation and depriving residents of fair housing choice. The rule should propose a process to support fair housing initiatives that offer tenants in these developments an option to receive Housing Choice Vouchers and mobility assistance if they wish. Participating jurisdictions and PHAs should be encouraged to work with existing owners and HUD to replace these properties with new housing in a manner that affirmatively furthers fair housing; offering tenants who wish to move an option to do so while not displacing tenants who wish to remain in their current neighborhoods. There are barriers at HUD itself that stand in the way of permitting it. Yet, it is one of the most significant fair housing initiatives that could be undertaken in many jurisdictions. It will require coordination with HUD divisions overseeing public and subsidized housing to transfer project-based subsidies and permit access to HCVs. It will also require coordination with states who may need to adjust LIHTC Qualified Allocation Plans to incentivize housing tax credit awards to provide financing to transform these distressed properties. The proposed rule should encourage states to take actions to make these local and PHA initiatives feasible.

18. **Strongly support HUD’s statement that exclusionary practices are not the product of choices of protected class members.** We strongly agree with the statement in the rule explanation that, “[a]mple research demonstrates that ongoing discrimination and exclusionary practices, not preferences among low income, families, and members of protected class groups, drives residential and income segregation today.” We suggest that this be included in the rule itself.
19. **Homeownership should be addressed in the plan with an explanation on how it must also be made available in well-resourced areas.** We support language that jurisdictions should address homeownership opportunities in the plan. However, this direction should be supplemented with a requirement that homeownership initiatives must not be made available exclusively in R/CAPS and under resourced neighborhoods but also in well-resourced areas in a manner consistent with the rule’s requirement of a ‘balanced approach.’”
20. **Plans should address actions to comply with VCAs and remedy civil rights/fair housing findings.** Equity Plans must address any civil rights findings against the program participant and any existing Voluntary Compliance Agreements and incorporate specific actions to remedy these findings and/or comply with these agreements in the plan. We request that if a VCA is agreed to, this will require an immediate revision of the plan to incorporate actions to carry out the terms of the VCA.

21. **Equity Plans should include a historical analysis of governmental policies and actions that contribute to residential segregation today.** Steps to dismantle any ongoing impacts of these should be proposed.
22. **A participant with the ability to create greater fair housing choice outside segregated, low-income neighborhoods should not rely on solely on place-based strategies.** We strongly support HUD’s statement that states, “... a program participant that has the ability to create greater fair housing choice outside segregated, low-income neighborhoods should not rely on solely on place-based strategies.”
23. **Equity plans need to address the equalization of public infrastructure like flood control, sidewalks, and street lighting between R/ECAPs and well-resourced areas.** This requirement should be emphasized and clarified in the rule. Examples of the type of infrastructure that should receive close attention should be included.
24. **State equity plans must address fair housing impact of state laws, regulations, and practices.** The proposed rule requires that the analysis area for states includes both entitlement and non-entitlement areas. We agree with this. There should also be language included stating that it is a state’s principal obligation to ensure that state policies, regulations and laws are consistent with the obligation to affirmatively further fair housing by the state and its subrecipients. We note in Texas the state agency that develops fair housing planning documents ignores policies and rules enacted by other state agencies administering HUD funds and laws enacted by the Legislature that create impediments to fair housing by claiming an inability of the agency staff to evaluate or raise such issues. The regulations should make clear there is no firewall between program administrators and the actions or inactions of other agencies or elected officials by which they may avoid addressing the resulting fair housing barriers.
25. **Jurisdictions should be required to establish fair housing goals in each of the seven areas or demonstrate definitively they are not applicable.** The rule provides it is acceptable to adopt a small number of goals if the goals could ultimately result in outcomes that have a significant impact. The key to this being successful is HUD’s review to determine goals proposed produce significant impact. We do not advocate establishing goals for the sake of having a long list of goals, but there should be adequate goals of significant impact to make progress.
26. **HUD should develop a data tool comparing subsidized multifamily housing locations and demographics of the populations residing in each development with their impact on patterns of segregation and R/ECAPs.** We strongly support HUD’s development of a data tool comparing the locations and demographics of residents of each subsidized housing development with patterns of segregation and R/ECAPs.

As this data may take some time collect, we urge HUD to prioritize a dataset for that housing receiving a HUD subsidy.

- 27. Program participants should give the highest priority to fair housing goals that would be most effective for achieving material positive change for underserved members of protected classes.**
- 28. Support the requirement that jurisdiction or PHA makes formal certification and assurance regarding their equity plan.** We support the proposed language that jurisdictions will make certifications and assurances about the equity plan.
- 29. Support HUD's commitment to help program participants with ambitious Equity Plans secure additional resources.** The proposed rule states that HUD will help jurisdictions that submit ambitious plans to secure additional resources. One example of this would be implementing our recommendation #18 to make HCVs available and otherwise facilitate and coordinate initiatives to replace existing segregated and distressed subsidized housing.
- 30. Support the requirement that a presidentially declared disaster triggers a plan revision.** Disaster events often are accompanied by the allocation of significant federal resources for housing and infrastructure repair and there is an obligation to ensure that these funds are used in a manner consistent with fair housing laws and policies.
- 31. Accept complaints and/or initiate compliance reviews regarding significant issues with the pace and methodology of carrying out the plan.** We understand the sentiment behind HUD's statement that, "... the complaint process should not be used to attempt to micromanage the pace and manner in which they are accomplished, so long as program participants are continuing to make efforts to comply." But this statement is too broad and would excuse the lack of any progress toward a goal if any effort, even if merely perfunctory was undertaken.
- 32. HUD should not dictate in advance the scope of comments or complaints citizens may present but should limit action on complaints it judges to be immaterial or inappropriate.**
- 33. Support the proposed process for enforcement in case of a rule violation.** HUD has asked if the enforcement of violations of the AFFH obligation is appropriate. It is.
- 34. Both private and publicly funded fair housing groups should be consulted in the development of the Equity Plan by the program participant.**
- 35. Support robust requirements to provide language access to LEP persons in the proposed rule.**
- 36. States should be instructed to produce an analysis of their administration of the LIHTC program, including the Qualified Allocation Plan (QAP) as a component of the Equity plan.** This analysis should include the geographic distribution of LIHTC



developments and the distribution of the inventory of units in well-resourced areas, R/ECAPs, the distribution of senior and family units, and the general levels of integration and segregation that has been produced by LIHTC under the QAP adopted by the state. Local governments should be instructed to assess their policies and actions regarding the LIHTC program as well.

- 37. When a complainant brings a complaint that results in a VCA the complainant should be involved in to be development of the VCA.**
- 38. In the definition of “community assets” include in the list of examples of factors “lower crime rates”**
- 39. In enumerating examples of public infrastructure include “drainage and flood control” among the examples.**
- 40. In the description of housing cost burden, require an analysis of the burden on various protected classes at the different percentages of median family income.**
- 41. Provide more guidance defining the demographic and economic characteristics of areas determined to be R/ECAPs.**
- 42. When jurisdictions or PHAs have associated subsidiary organizations or have financial relationships with third party owners or developers of affordable housing, require the jurisdiction or PHA to include such units in the Equity Plan analysis.**
- 43. In describing the required analysis of “local policies and practice impacting fair housing” require property location policies and practices be included.**
- 44. In describing the required analysis of “local policies and practice impacting fair housing” require an analysis of members of protected classes on a PHA’s wait list, comparing that to the characteristics of potentially eligible populations in the PHA’s jurisdiction and require the fair housing impact be assessed and addressed as necessary.**
- 45. The proposed rule states, “[p]rogram participants’ consideration of the reach and breadth of their own authority and spheres of influence must be taken into account when determining which goals to set.” Clarify that laws, regulations and policies adopted by a political governing body of an administering jurisdiction (city council, state legislature, etc.) are the responsibility of the jurisdiction or PHA to address in the plan. For example, if a state or local legislative body enacts a law or policy explicitly permitting HCV discrimination it is the obligation of the jurisdiction or PHA to note this as an issue and propose a remedy.**
- 46. Strongly support including the example in the proposed rule stating, “... where segregation of a development or geographic area is determined to be a fair housing issue, HUD expects the equity plan to establish one or more goals to reduce the segregation.”**

47. Require program participants to provide a complete and reasonable response to all comments received through the community engagement process.
48. Strongly support the requirement that “all written comments received and transcripts, or audio or video recordings of hearings, held during the development of the equity plan be submitted to HUD” and further suggest that responses from the jurisdictions to public comments also be submitted.
49. Strongly support the decision to permit the public to submit information related to the equity plan to HUD during the period of HUD’s consideration of the plan.
50. Strongly support the provision that, “... program participants must incorporate the fair housing goals from their equity plans into planning documents required in connection with the receipt of federal financial assistance from another federal executive department or agency. “
51. Regardless of HUD’s ultimate decision regarding the ability of jurisdictions to combine the equity analysis with other planning functions, there should be at least two separate public hearings on the equity analysis, and one separate public hearing on the equity plan prior to adoption. If there is only one hearing on the Equity Plan, the Equity Plan must also be considered in hearings on the Con Plan, Action Plan, CDBG needs assessment and PHA plans.
52. Program participants should be required to hold at least one virtual public hearing to allow persons who cannot travel or be present at an in person hearing to participate.
53. In the discussion of public hearings and public input, the rules should make clear that written or email comments shall be allowed and that in person testimony at a public hearing is not required.
54. We have observed that severe time limits on public input and testimony are often imposed by jurisdictions and PHAs in other planning and public comment processes. Severe time limits are inappropriate because an in-depth assessment of equity issues is required under the rule. For this reason, the rules should specify that jurisdictions must provide adequate time to members of the public for communications and presentations.
55. The rule should require that program participants record all public hearings, post those recordings on their websites, and share all written comments received on their websites along with the program participant’s responses to public comment.
56. Strongly support § 5.162 Review of Equity Plan as proposed in the rule.
57. Recommend that the deadline for revision of the plan following a presidentially declared disaster be accelerated to become due within six months of the declaration.
58. Support § 5.170 Compliance Procedures with regard to the complaint process

## Responses to Questions for Comments

**Question 1:** *Are there ways in which HUD can further streamline this proposed rule or further reduce burden, while continuing to ensure an appropriate and necessary fair housing analysis that would enable program participants to set meaningful goals that will affirmatively further fair housing?*

The AFFH regulation was designed to address burdens identified by both process reviews and grantees themselves, specifically, the lack of guidance and standardized format for Analyses of Impediments, and the cost of obtaining and analyzing data. The proposed rule addresses these concerns by providing program participants with data and setting out a clear and standardized process for complying with the AFFH obligation and provides program participants with an extended timeline and a submission and revision process.

HUD's main concern should be the costs and burdens that housing segregation and discrimination have imposed on Americans over multiple generations and the harm that has been disproportionately inflicted on members of protected classes. The importance of this regulation cannot be underestimated. While the proposed rule does impose administrative requirements and burdens on program participants, these are burdens that have in fact been in place for more than 50 years. Relative to the human, economic, and moral cost of continued segregation and discrimination, the burdens imposed by the proposed rule are minimal.

**Question 2:** *Does HUD's removal of the requirement to identify and prioritize contributing factors still allow for a meaningful analysis that will allow program participants to set goals for overcoming systemic and longstanding inequities in their jurisdictions? If not, how can HUD ensure that such an analysis occurs without imposing undue burden on program participants?*

We believe that HUD has struck the proper balance in the proposed rule.

While we are concerned that many jurisdictions, in the absence of detailed guidance, might struggle to understand the root causes and, therefore, the most effective way to address important fair housing issues within their communities, we agree that HUD should not include the admittedly overly lengthy list of questions included in the 2015 AFH Tool in the proposed rule.

We do believe that HUD must provide detailed sub-regulatory guidance, training, and technical assistance to program participants, particularly as they go through the Equity Plan process for the first time. Whether or not there is a specific detailed process for identifying contributing factors, fair housing issues do not emerge in a vacuum, and the Equity Plan process will require program participants to engage in a meaningful analysis that includes the causes of longstanding and systemic inequities and set meaningful goals to overcome them. We are confident that, with sufficient guidance and technical assistance, program participants will be able to conduct this analysis without having to answer over 100 specific questions.

**Question 3:** *HUD intends to continue to provide much of the same data it made available in connection with the implementation of the 2015 AFFH Rule through the AFFH-T, which is available at <https://egis.hud.gov/affht/>, while exploring possible improvements to the existing AFFH-T Data & Mapping Tool. HUD is also exploring other approaches to facilitating program participants' data analysis and making HUD-provided data as useful and easy to understand as possible for program participants and the public. HUD seeks comment on the following related questions:*

**Question 3.a:** *This notice of proposed rulemaking describes potential HUD-provided data, data and mapping tools, guidance, and technical assistance that may highlight some of the key takeaways from the HUD-provided data and help program participants identify likely fair housing issues. Should HUD also provide static data packages that include some of the data included in the AFFH-T and a narrative description of those data? If so, what data would be most helpful to include in these data packages and narrative descriptions? For which program participants would data packages and narrative descriptions be most useful?*

HUD should continue to provide data, data and mapping tools, guidance and technical assistance that relieves program participants of a significant data collection and analysis burden and makes data and analysis as easy to use and understand as possible. HUD should expect to see the data and analysis provided incorporated into submitted equity plans.

HUD should make the data itself available to program participants and the public, but whether it will be useful to program participants to duplicate HUD's analysis is a question for program participants themselves. The data will probably be useful primarily to large program participants with more resources to conduct data analysis and to academic and other researchers.

The data sets currently included in the AFFH-T are limited and the tool could be more useful to program participants if it incorporated more data sets and provided data and analysis and mapping of that data. Congress should ensure that HUD has sufficient resources to reduce this burden for subrecipients and the HUD budget should prioritize these data tools and guidance and technical assistance on how to use them because the Equity Plan affects how jurisdictions use funds and administer programs across all HUD program areas.

HUD should provide data, analysis, and mapping in the following areas:

- Concentration of environmental hazards: The only data on exposure to environmental hazards included in the AFFH-T is the National Air Toxics Assessment (NATA). There is an extensive body of research documenting the negative effects of air pollution - particularly traffic-related air pollutants - and the disproportionate burden of air pollution on communities of color, persons with disabilities, and low-income communities, including asthma, harm to the central nervous system, and premature death.<sup>2</sup> However, members of protected classes and underserved communities are disproportionately exposed to environmental hazards beyond air pollution. Local communities have, and continue to, permit, zone, and site toxic facilities near and in communities of color, states permit these environmental hazards and fail to enforce against industries that routinely violate their permits and state and federal law, and PHAs fail to mitigate exposure to lead paint and toxic mold . Exposure to environmental harms includes not only exposure to toxic materials and emissions, industrial accidents, heavy truck traffic, and the transportation of dangerous materials through residential neighborhoods. Proximity to environmental hazards also exacerbates the disproportionate harm to underserved communities

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<sup>2</sup> See, e.g.: 94 *Traffic Related Air Pollution and the Burden of Childhood Asthma in the Contiguous United States in 2000 and 2010*. <https://carteehdata.org/library/webapp/trap-asthma-usa>; *Global, national, and urban burdens of pediatric asthma incidence attributable to ambient NO<sub>2</sub> pollution estimates from global datasets*. <https://www.thelancet.com/action/showPdf?pii=S2542-5196%2819%2930046-4>; Environmental Defense Fund. *Finding pollution- and who it impacts most- in Houston*. Available at <https://www.edf.org/airqualitymaps/houston/findings;>; Bell ML, O'Neill MS, Cifuentes LA, et al. *Challenges and recommendations for the study of socioeconomic factors and air pollution health effects*. *Environ Sci Pol* 2005; 8:525–33; O'Neill MS, Jerrett M, Kawachi L, et al. *Health, wealth, and air pollution: advancing theory and methods*. *Environ Health Perspect* 2003;111:1861–70; Brender JD, Maantay JA, Chakraborty J. *Residential proximity to environmental hazards and adverse health outcomes*. *Am J Public Health* 2011;101:S37–52.; Chakraborty J. *Automobiles, air toxics, and adverse health risks: environmental inequities in Tampa Bay, Florida*. *Ann Assoc Am Geogr* 2009;99:674–97.; Gunier RB, Hertz A, Von Behren J, Reynolds P. *Traffic density in California: socioeconomic and ethnic differences among potentially exposed children*. *J Expo Anal Environ Epidemiol* 2003;13:240–46; Tegan K. Boehmer, Division of Environmental Hazards and Health Effects, CDC, *Residential Proximity to Major Highways – United States 2010*. Available at: <https://www.cdc.gov/mmwr/preview/mmwrhtml/su6203a8.htm>;

caused by natural disasters. HUD must include additional data and tools that document environmental justice issues. HUD should also require program participants to use EPA's EJScreen 2.1 tool, which allows users to map environmental, demographic, and index data, including the cumulative impact of higher pollution burdens on vulnerable populations.

- A full inventory of subsidized housing, including Public Housing and HUD-assisted housing that receives direct subsidies, low-income housing tax credit (LIHTC) funded housing, bond financed housing, housing securitized by government loans and loan guarantees, Project-Based Vouchers, government sponsored enterprises (GSEs), and housing receiving assistance from HUD categorical grants like CDBG, HOME, HOPA, Housing Trust Fund, and the FHA. This data set needs to include spatial location of the developments, the characteristics of the tenants who occupy the properties including protected class status, the economic characteristics of the tenant population (categories of percentage of median family income) as well as income restrictions by percentage of median family income. It should also include, to the extent available, occupancy by persons using Housing Choice Vouchers, households with Limited, English Proficiency, etc. We recognize that in most jurisdictions this full level of data is not available, but it is important to developing an Equity Plan – particularly for PHAs - and HUD should devote resources and attention to creating a process for the collection and reporting of this data. Siting decisions regarding new, assisted housing and decisions regarding targeting of either rehabilitation assistance or the demolition and relocation of existing subsidized housing to well-resourced areas are at the core of fair housing remedies. Until such information is fully available it is essential that the Equity Plans are informed by the best available combination of national data and locally available data in order to carry out the most robust analysis possible and set meaningful fair housing goals.
- HUD should provide data and information on demolition, disposition, conversion, and other loss of publicly supported housing in the program participant's geographic area of analysis.
- HUD should provide and direct program participants to other available data on the relative levels of basic public infrastructure and services between neighborhoods occupied by underserved communities (including rural communities) and well-resourced communities. Public infrastructure and services include drainage and flood control and mitigation, water and wastewater, sidewalks, street lighting, investment in schools and parks, public safety, emergency response, roads, public transportation, and public investment in economic development. Equity at its core is about all residents of a community receiving fair treatment from government in the provision of public infrastructure. HUD itself can provide data on program

participants' past and ongoing investment of HUD funds in infrastructure and public services. Much of the data on local expenditures for infrastructure may not be available at a national level, but there are usually adequate data sources available at the state and local levels. An adequate equity plan requires the identification and collection of these data sources by the jurisdictions and public housing authorities, and the identification of fair housing issues and goals addressing these issues. This is also an area in which HUD should collaborate with other federal agencies to compile and make these data available.

**Question 3.b:** *What additional data and tools could HUD provide to facilitate a regional analysis?*

In addition to the data discussed above, HUD should expand data in the portrait of subsidized housing database. Many (but certainly not all) of the most severe burdens of segregation are born by the residents of HUD subsidized housing. Subsidized housing developments are often located within R/ECAPS, environmental hazard areas, food deserts, areas with comparatively high crime rates, and other undesirable characteristics. Any serious effort to AFFH must consider how to address and remedy the problems of residents of these properties. These developments – including privately owned, HUD subsidized developments and units - are also largely older construction and have not been maintained and are more likely to be located in environmentally vulnerable areas. HUD should provide program participants, particularly PHAs, complete data and analysis on the demographics of the tenant populations of these properties and evaluations of the conditions of the properties and the economics of the developments. In addition to data, HUD must make technical assistance available to help program participants assess these properties, analyze data, and develop appropriate interventions and remedies to both improve housing units in underserved areas and demolish and relocate assisted housing to better resourced areas and safer areas.

Assessment of equity in the provision of housing at various income levels requires knowing the income characteristics and rent level needs of the various populations of members of protected classes. For example, if persons of color or persons with disabilities have incomes that disproportionately fall below 30% or 50% of AMI, a program participant could then use this information to appropriately establish levels of rent subsidy in affordable rental housing initiatives, including programs like density bonuses or tax abatements, in order to equitably serve these protected classes.

Additionally, it is important for program participants to have access to data on the number of cost-burdened households by income category and an inventory of the number of units

affordable and available to populations within each income category. This data and analysis of the latter is available, for example, in the National Low Income Housing Coalition's *Out Of Reach* and *The Gap* reports. Data on the location and condition of these units is also important. If the only housing affordable and available to the lowest-income households is substandard and unhealthy, or exclusively located in under-resourced communities, it is not affordable housing under the proposed rule. Further, HUD should continue to work to establish a national evictions database.

**Question 3.c:** *What types of data relating to homeownership opportunities should HUD consider providing? In addition to data on homeownership rates, which already are available in the consolidated planning data (CHAS) (which can be accessed at <https://www.huduser.gov/portal/datasets/cp.html>), including by protected class, what other data sources are reflective of disparities in homeownership opportunity?*

HUD must provide Home Mortgage Disclosure Act (HMDA) data on mortgage lending to enable program participants to identify potential discrimination and the disparate impact of the mortgage lending policies and practices of banks and other financial institutions. Other data HUD should make available includes homeownership rate at the Census tract level by protected class, home value appreciation rates over a 30-year period, foreclosure rates, indices of housing quality, rates of home sales over the past 30 years<sup>i</sup>, and expenditures of HUD funds on homeownership programs, including repair and preservation programs.

**Question 3.d:** *What other data sources should HUD provide for program participants to better identify the various types of inequity experienced by members of protected class groups that are the subject of the proposed rule's required analysis?*

HUD should work with other federal agencies to provide non-HUD data sets relevant to program participants' fair housing analysis, including:

- USDA Rural Housing Development
- Army Corps of Engineers data on existing proposed flood mitigation projects
- DOJ
- EPA data, including EJ Screen 2.1
- FEMA maps on HUD flood hazard areas
- HHS
- Department of Education data on Title I schools, civil rights complaints.
- CFPB data sets on predatory lending, algorithmic discrimination, and background screening, and its tenant complaint system
- Department of Transportation data and assessments
- CDC Social Vulnerability Index scores by census tract



HUD should also provide data identifying all census tracts within a geographic area of analysis that are “disadvantaged communities” based on the socioeconomic, environmental, and climate risk indicators under the Justice 40 Initiative Criteria along with an accessible summary of the potential and actual environmental hazards and climate resiliency concerns and historic preservation requirements applicable within that geographic area of analysis.

*Question 3.f: Should HUD consider providing data that are not nationally uniform if they are available for certain program participants even if such data are not available for all program participants? If so, please provide examples of data that would be useful to provide for which there is not nationally uniform data and the reasons why it would be useful for HUD to provide these data.*

Yes. The fact that certain data is not available nationally should not mean that it is not used to identify fair housing issues in jurisdictions for which it is available. See our response to question 3.a. for examples.

**Question 5:** *In what ways can HUD assist program participants in facilitating the community engagement process so that the Equity Plans program participants develop are comprehensive and account for issues faced by members of protected class groups and underserved communities that program participants may not necessarily be aware of? HUD specifically seeks feedback on the following:*

**Question 5.a:** *Should HUD require that a minimum number of meetings be held at various times of day and various accessible locations to ensure that all members of a community have an opportunity to be heard? Should HUD require that at least one meeting be held virtually?*

Yes. The three meetings required by the proposed rule should be a minimum. The engagement process for the Equity Plan should be an ongoing and iterative process that begins with public education on AFFH and the contents of the Equity Plan and the presentation of data and analysis identifying fair housing issues, and continues to solicit information and feedback from the public, particularly underserved communities and members of protected classes, on the identification of fair housing issues, identification and prioritization of fair housing goals, and strategies and actions to achieve these goals. Formal comment on the draft Equity Plan should be the last step in the community engagement process and public meetings and comment periods cannot by themselves constitute an adequate community engagement process. HUD should encourage program participants to

consider models like establishing an Equity Plan task force that were effective in jurisdictions that conducted an AFH under the 2015 AFFH rule. We recommend that HUD provide resources to community-based organizations and stakeholders, particularly those with deep connections to members of protected classes and underserved communities, to assist with the community engagement process.

HUD should require program participants to hold at least one meeting virtually or to hold hybrid in-person and virtual meetings. Virtual meetings reduce the burden of attending an in-person meeting on members of the public, for example transportation and childcare costs, and increase accessibility for persons with disabilities with certain types of disabilities. Virtual meetings also provide program participants with the option to provide real-time captioning, ASL interpretation, and real-time translation into multiple languages for LEP populations. We caution that virtual meetings are not a substitute for providing equitable access to in-person meetings. Equitable access would include physical and other forms of accessibility for persons with disabilities, simultaneous translation for LEP populations (which should be determined according to the LEP population of the jurisdiction or PHA and not solely by requests from the public), and the provision of assistance like transportation and childcare.

HUD should not allow program participants to combine the Equity Plan community engagement process with community engagement processes for other planning processes.

***Question 5.c:*** *Should HUD require program participants to utilize different technology to conduct outreach and engagement? If so, which technologies have proven to be successful tools for community engagement? Are these technologies usable by individuals with disabilities, including those who utilize assistive technology or require reasonable accommodations such as real-time captioning or sign-language interpreters?*

As described in our response to 4.b., using technology to conduct virtual and hybrid in-person and virtual meetings should be a required part of the community engagement process. The COVID-19 pandemic has demonstrated that virtual and hybrid meetings have been effective tools for public comment and community engagement. While the only options for public participation cannot be virtual, in part because members of certain protected classes are less likely to have access to broadband internet or the type of hardware that makes this kind of virtual participation feasible, members of the public should have the option to participate by phone, videoconference, in-person, or in writing. The Harris County Commissioners' Court, for example, has conducted public comment both in-person and by phone for several years. Any use of these tools must be usable and accessible for individuals with disabilities, and accessibility is another reason program

participants should provide the public with multiple ways to participate in the community engagement process.

Section 5.158 requires program participants to “employ communication methods designed to reach the broadest possible audience” but includes examples like publishing a summary of documents on its official government website and in a newspaper of general circulation. It is, frankly, hard to think of a method of communication less likely to reach members of the general public and members of protected class groups than publication in the legal notices section of a newspaper. Program participants should use a variety of communication methods, including radio, television, email, websites, and text. Most jurisdictions have Facebook pages or other social media accounts that they use to convey information to the public. The most effective communications tools, however, remain partnering with community-based organizations that are directly connected with and comprised of members of protected classes and stakeholders, including non-housing related organizations, that work directly with protected class populations and underserved communities. Examples of these types of organizations include social service providers, legal aid providers, churches, fair housing organizations, civil rights groups, and community organizing groups.

PHAs should be expected to conduct direct outreach to their tenants and tenant-based voucher and Housing Choice Voucher recipients.

All public notices should be in plain language, translated into the appropriate languages, and in forms accessible to individuals with multiple types of disabilities.

***Question 5.d:*** *Has HUD sufficiently distinguished the differences between community engagement and citizen participation or resident participation such that program participants understand that HUD expects a more robust engagement process for purposes of the development of the Equity Plan than has previously been required for purposes of programmatic planning? How can HUD ensure that these important conversations are fully had within communities while not significantly increasing the burden on program participants and the communities themselves? Are there ways in which HUD can reduce any unnecessary burden resulting from separate requirements to conduct community engagement and citizen participation (for consolidated plan program participants) or resident participation (for PHAs)?*

The proposed rule does not sufficiently make clear the more robust engagement process it intends. We strongly object to combining the fair housing equity planning process with other public hearings and engagement around long-established programs like the

consolidated plan, action plan, and PHA plan. Fair housing equity planning will simply be lost in this process, and it is far more than can be expected of citizens to be able to participate in a public process that requires a knowledge of each of these complex areas. Further, it muddies the clear distinction the proposed rule makes between the Equity Plan and subsequent program plans. The Equity Plan and its goals are the basis for other plans that must incorporate those goals; those planning processes cannot be conducted simultaneously, and the Equity Planning process cannot be limited to the type of community engagement program participants are accustomed to providing for program plans.

The truth is that community engagement and participation often fail to actually inform program and policy decisions. The process is too difficult, the issues too opaque, and the timeline too short to actually solicit informed public comment. The Equity Plan process is both new and involves issues that have not historically been part of HUD program planning processes. The proposed rule is clear that both the identification of fair housing issues and the process of setting goals to remedy the identified issues must include meaningful and informed public input and that the program participant “must proactively facilitate” this engagement. 5.158 (4) explicitly and appropriately requires program participants to “[m]ake available to the public data and information demonstrating the existence of fair housing issues” and 5.158 is clear that the community engagement process “must allow for sufficient opportunity for the community to have the in-depth discussions about fair housing issues required by this section.” This will require providing information about fair housing planning not only to members of the public and community leaders but also to elected officials and staff of the participating jurisdiction or PHA.

Because this will be a new process for many jurisdictions, and to reduce the burden on program participants, we recommend that HUD produce community engagement materials on fair housing and the Equity Plan process to be circulated to the stakeholders prior to formal engagement rather than leaving hundreds of jurisdictions across the country to develop these materials from scratch. Participating jurisdictions could then rely on these resources, modify the HUD materials or simply use them as a reference in creating their own.

We also encourage HUD to create an Equity Plan Web Portal for data, research, information, and examples of successful activities that meaningfully addressed segregation and inequity, so that both program participants and the public can gain a deeper understanding of fair housing principles, the harms of residential segregation and historical discrimination and disinvestment and engage directly with research and data on these issues in their own communities.

**Question 5.e:** *Are there specific types of technical assistance that HUD can provide to assist program participants in conducting robust community engagement, including how community engagement can inform goal setting, implementation of goals, and progress evaluations? If so, please specify the types of technical assistance that would be most useful.*

HUD should provide a model community engagement plan and provide materials that explain fair housing and AFFH, the Equity Plan process, and provide data analysis and mapping that presents data in a way that is understandable to members of the general public. HUD should provide intensive and ongoing technical assistance to program participants throughout the community engagement process and must ensure that these technical assistance providers, whether staff or contractors, have expertise in both fair housing and community engagement.

In addition to providing technical assistance to program participants, we encourage HUD to provide technical assistance to community groups, resident associations, and fair housing organizations that request it.

HUD should also provide training for program participants and officials and staff of participant jurisdictions and PHAs on fair housing and AFFH, the requirements of this rule and the planning process, and examples of fair housing goals and activities that would support the program participant's eligibility for federal funding. This training should be required as part of the planning process.

If resources for technical assistance are limited, HUD should prioritize providing intensive technical assistance to program participants across a range of geographic areas. This would allow HUD to establish and test best practices for the Equity Plan community engagement process. The techniques developed and the resources generated by the provision of intensive technical assistance to a limited number of program participants would be available to all program participants and constituent groups. Ideally, of course, HUD would have the resources to provide intensive technical assistance to all program participants that need or request it.

We recommend that HUD create an on-line fair housing portal where it posts materials, trainings, model plans, best practices, and specific examples of analyses indemnifying fair housing issues, potential fair housing goals for common fair housing issues and examples of activities and strategies designed to make meaningful progress and achieve those goals.

**Question 5.f:** *Should HUD require the community engagement process to afford a minimum amount of time for different types of engagement activities (e.g., public comments on proposed Equity Plans, notice before public meetings)? If so, what should the minimum amount of time be in order to afford members of the community an equal and fair opportunity to participate in the development of the Equity Plan?*

Yes. We suggest a minimum of 100 days for the community engagement process, including:

- A three-week pre-plan stakeholder identification and initial engagement period;
- A 30-day public review of the proposed equity plan;
- Three weeks of notice for public hearings;
- Reasoned response to public comments by the program participant within 14 days; and,
- A 14-day opportunity to meet and discuss, notice and opportunity.

**Question 6:** *HUD seeks comments on whether the definition of “Affordable Housing Opportunities” is sufficiently clear. HUD also seeks comment on whether the definition should apply to both rental and owner-occupied units. Are there other categories of affordable housing that should be explicitly referenced in this definition?*

We recommend that HUD clarify that housing “affordable to low- and moderate-income households” means that there is housing available to families at all income levels, including 0-30% AMI, 31-50% AMI, and 51-80% AMI, at rents that do not require them to spend more than 30% of their income on housing costs and in locations that promote integration and provide access to opportunity and well-resourced areas. The definition should apply to both owner- and renter-occupied housing.

**Question 7:** *HUD has provided a new definition of “Geographic Area of Analysis,” which is intended to provide program participants and the public a clear understanding of the types and levels of analysis that are needed by different types of program participants. Does this definition clearly articulate the geographic areas of analysis for each type of program participant and are the levels of analyses for the types of program participants appropriate to ensure Equity Plans are developed and implemented in a manner that advances equity?*

HUD’s definition recognizes that different geographic areas will be relevant to various parts of the analysis under 5.154. The definition is fairly clear about the geographic areas of analysis that states and insular areas should use but should be clarified for local governments and PHAs.

For local governments, the expected area of analysis **must** include lower levels of geography such as neighborhoods, ZIP codes, census tracts, block groups, housing developments, or portions thereof – Houston's overall diversity, for example, should not be used to mask its high level of segregation and concentration of disadvantage in specific neighborhoods - **and** circumstances outside the jurisdiction that impact fair housing issues within the jurisdiction. Confining the analysis to jurisdictional boundaries would ignore the longstanding pattern of extreme segregation between urban areas and suburbs – of which Detroit is perhaps the best example – and now between inner and outer suburbs. The pattern of majority White areas seceding from more diverse school districts is another example of why a broader regional analysis is always necessary to identify fair housing issues.

Similarly, PHAs must analyze lower levels of geography, in particular their own housing developments, and issues outside their service areas that impact fair housing issues within the service area.

**Question 8:** HUD requests commenters provide feedback on new § 5.154, which sets out the content of the Equity Plan. HUD specifically requests comment on the following:

**Question 8.a:** *Are the questions in this proposed rule at § 5.154 effective for purposes of how to assess where equity is lacking and to facilitate the development of meaningful goals that are designed and can be reasonably expected to overcome the effects of past or current policies that have contributed to a systemic lack of equity? Put differently, do the proposed questions clearly elicit from program participants an assessment of the fair housing issues that exist and their causes so that goals can be appropriately tailored to address the identified fair housing issues?*

Generally, the questions in the proposed rule are effective for the purposes of assessing where equity is lacking and facilitating the development of meaningful goals. However, they are not sufficient. While we do not suggest incorporating the full set of questions in the 2015 Assessment of Fair Housing Tool into the proposed rule, we do recommend that HUD provide guidance and training materials that suggest detailed and granular questions that will help jurisdictions recognize barriers to fair housing choice and equitable access to resources and opportunity and how they have been created and reinforced.

The most critical question in each of the seven areas of inquiry that program participants must, at minimum, analyze, is “[w]hat public or private policies or practices, demographic shifts, economic trends, or other factors may have caused or contributed to the patterns described” in the data analysis. Understanding the historical causes of segregation and inequality is essential

to connecting documented disparities to meaningful actions to AFFH. Segregation is not natural, and it is not a matter of free choice. It was deliberately created and perpetuated by government policy at the federal, state, and local level, from refusing GI Bill home loans to Black GIs and requiring that the post-World War II suburbs created with government subsidies have restrictive racial covenants, to local exclusionary zoning and failure to provide communities of color with standard levels of infrastructure and public services. Government created segregation, and it is responsible for dismantling it and alleviating its impacts on protected classes under the Fair Housing Act. The proposed AFFH Rule is a critical tool to help governments and PHAs understand both the causes and impacts of segregation, select ways to remedy the inequities they created, and take meaningful steps to do so.

Program participants also need to understand how the fair housing issues they identify are interrelated and reinforce each other. For example, the deliberate siting of highways through communities of color not only destroyed local economies and displaced entire neighborhoods, but it has also continued to depress property values, cut communities of color off from resources, and inflict severe health consequences from asthma to early death, on adjacent communities. The most efficient and effective way to incorporate this analysis may be to have program participants include a history of public actions contributing to segregation in the jurisdiction as a separate section of the analysis. This would provide program participants with both historical context for existing conditions and identify many of the ongoing laws and policies that fail to AFFH. In the City of Austin, for example, the City's 1928 plan to create a "Negro District" on the east side of the city, the actions the city took, including withholding city services and access to schools, to force families of color to move, and the construction of I-35 that reinforced the boundary between the majority Black and Latinx east side and the rest of the city are critical context to understanding contemporary demographics, living patterns, and disparities in access to resources. This kind of analysis is also important to identifying laws and policies which appear facially neutral but are in fact rooted in and perpetuate segregation and inequality.

Section 5.154(d)(7) requires program participants to connect local and state "laws, policies, ordinances, and other policies" to segregation/integration, R/ECAP/non R/ECAP areas, access to affordable housing opportunities in well-resourced areas, and equitable access to homeownership and other asset building and economic opportunities but does not explicitly require this analysis regarding access to community assets. HUD should modify 5.154(d)(7) to:

- Standardize throughout the section that local program participants are expected to analyze the effect of both local and state policies and practices as specified in the section heading. HUD makes clear in other sections of the rule that program participants should incorporate barriers presented by other levels of government or other entities into



analysis, but it should make this explicit in this particular section. Program participants, including states and insular areas, should also consider the effect of federal laws and policies as well.

- Add a subsection requiring an analysis of how laws, policies, and ordinances impede or promote equitable access to community assets, resources, and opportunity, including education, employments, transportation, environmentally healthy neighborhoods, and adequate infrastructure and services.

We also recommend that HUD include infrastructure investment and government services in the list of community assets at 5.154 (4)(i).

**Question 8.c:** *What additional areas of analysis, if any, should HUD include in § 5.154 that are not currently included in this proposed rule?*

As recommended in our response to Question 7.a, HUD should require some historical analysis. While this analysis will be necessary in order to effectively answer the questions in 5.154 (d), making it an explicit requirement and providing sub-regulatory guidance on how to conduct this analysis will make the process easier for program participants.

**Question 8.d:** *Should the section on Fair Housing Goals (§ 5.154(g)) be modified, improved, or streamlined so that program participants can set appropriate goals for overcoming systemic issues impacting their communities?*

It is integral to AFFH compliance that program participants' fair housing goals are meaningful and can be reasonably expected to result in material positive change. We also recognize that segregation, discrimination, and historical disinvestment have become structural, mutually reinforcing, and often invisible, and that there may be significant opposition to even identifying fair housing issues much less taking meaningful action to address them. However, jurisdictions cannot fail to identify fair housing issues or design goals to overcome them because these actions may meet with resistance. HUD has provided a way for jurisdictions to balance different challenges to different types of fair housing goals in § 5.154(g)(f) by including both short-term goals where "material positive change is readily achieved" and long-term goals where material positive change takes place over a longer, but reasonable, period of time and this balance is incorporated in its definition of Fair Housing Goals in 5.152. While HUD allows program participants to consider "the reach and breadth of their own authority and spheres of influence" when setting goals, the "program participant" is the entire local government, state, or insular area, not solely whatever entity administers one or more HUD programs.

HUD's inclusion of examples of fair housing goals in (g)(3)(i) clarifies what a goal "designed and reasonably expected to result in material positive change" should look like and will be incredibly helpful to program participants as they go through the Equity Plan process. We appreciate the inclusion of an example goal related to overcoming inequitable access to high-performing schools, and that the example goal is clear that, like all other fair housing goals, these types of goals must include both opening exclusionary areas to all children and increasing funding for schools in R/ECAPS. We strongly recommend including additional examples of potential goals, particularly in the categories of disparities in access to opportunity and addressing inequitable distribution of local resources which program participants may be less used to thinking of as fair housing issues.

We suggest that, particularly for program participants' first submission of an Equity Plan, an appropriate goal would be to conduct a study or otherwise gather data on fair housing issues in order to clarify and quantify specific disparities in access to community assets and in other fair housing goal categories. For example, communities of color in Houston had long identified lack of adequate drainage in their communities as an equity issue, but the city repeatedly asserted that open ditch drainage was present in all areas of the city and, therefore, not a problem it needed to address. When the city conducted a comprehensive drainage study using CDBG-DR dollars following Hurricane Ike, however, 80% of the city's open ditch drainage was found to be in areas with majority BIPOC populations and over 40% of that drainage was inoperable. Similarly, Harris County's laudable efforts to include equity in evaluating drainage projects funded by a \$2.5 billion bond passed following Hurricane Harvey have been hampered by the fact that it does not have a comprehensive overview of the condition of drainage infrastructure across the county (the county is currently conducting that review). Participants' fair housing goals cannot be limited to information gathering but neither can lack of data be used to justify ongoing failures to address serious fair housing issues. Lack of data does not necessarily mean lack of discrimination. HUD should ensure that program participants cannot use this as an excuse for complying with their obligations to AFFH.

**Question 8.e:** *This proposed rule does not currently identify which specific maps and tables contained in the HUD-provided data program participants should rely on in answering specific questions provided at § 5.154. Should HUD require the use of specific data sets when responding to these questions in § 5.154, and if so, what benefit would that have? How can HUD ensure that program participants, in using the HUD-provided data, identify the fair housing issues and underlying reasons for what the data show in order to assess where equity is truly lacking in their geographic areas of analysis?*

HUD should include, along with the data it provides, the questions the data is relevant for assessing while not limiting jurisdictions and PHA to apply the data only for the purposes HUD suggests.

**Question 8.f:** *What is the proper regional analysis program participants should undertake in order to identify fair housing issues and set meaningful fair housing goals? Should different program participants have different required regional analyses (e.g., States vs. local governments; non-statewide PHAs)?*

Fair housing issues are not constrained by political-geographic boundaries and a regional analysis is critical to producing a meaningful analysis of fair housing issues. In Southeast Texas, for example, segregated housing patterns exist both within major cities and between virtually all White smaller cities adjacent to or near the larger cities of Beaumont, Port Arthur and Orange. The City of Port Arthur is a majority BIPOC city (42.8% Black, 32.2% Latinx, 6.5% Asian) surrounded by White bedroom communities like Bridge City (0% Black), and Nederland (4% Black). An Equity Plan that looked solely at demographics within one of these jurisdictions would not provide an accurate picture of fair housing issues or allow for the selection of meaningful action steps to increase fair housing and equal opportunity. HUD's definition of a region in 5.152 sets out the appropriate area of analysis for different types of program participants.

We recognize that any analysis that includes circumstances, laws, and policies outside the jurisdiction may be more politically fraught for some program participants than others. PHA's who seek to locate public or other supported housing in Whiter and higher-income areas may face reprisals from the local government, for example, as has happened in Galveston and Houston. HUD should not change these requirements, but this is a reason that community engagement, and particularly the fact that HUD will accept information directly from the public during its review of submitted equity plans, is so important.

**Question 8.g:** *Does HUD need to more specifically explain the required level of geographic analysis, whether in this rule itself or in sub-regulatory guidance, for purposes of the development of the Equity Plan, including how different levels of geographic analysis would facilitate the setting of fair housing goals that would result in material positive change that advances equity within communities? For example, should HUD require certain types of program participants to conduct an analysis at the following levels of geography for each fair housing issue: Core-Based Statistical Area, Metropolitan Statistical Areas, Block Groups, Census Tracts, and counties?*

HUD's definition of geographic area of analysis appropriately specifies that jurisdictions must use lower levels of geography "where necessary to identify fair housing issues" but HUD should clarify when analysis at lower levels of geography is required. At a state level, for example, comparing Area Median Income by county or MSA instead of by Census tract would elide high levels of inequality within counties. At the local jurisdiction level, failing to look at demographics at the Census Block Group or neighborhood level could elide segregation and inequality within smaller geographic areas and affecting protected classes with smaller populations. At minimum, HUD should provide specific sub-regulatory guidance about when analysis at different levels geography is necessary to identify specific fair housing issues.

**Question 8.i:** *Has HUD sufficiently explained how to prioritize fair housing issues within fair housing goal categories for purposes of establishing meaningful fair housing goals? What additional clarification is needed, if any?*

We recommend that HUD further clarify and emphasize that the prioritization of fair housing issues in a program participant's equity plan must constitute a balanced approach. § 5.154 (g) (2) does state that the goals "taken together" should be "consistent with a balanced approach", but the language in (3) stating that "a program participant may prioritize implementation of particularly goals over others" may be confusing even though the requirement that "any prioritization will result in meaningful actions that affirmatively further fair housing" also mandates a balanced approach. HUD should explicitly state that for any prioritization to "result in meaningful actions that affirmatively further fair housing" participants cannot prioritize one approach over another; they **must** pursue a balanced approach when prioritizing issues and developing fair housing goals.

**Question 8.j:** *In new § 5.154(e), the required analysis for Public Housing Agencies (PHAs), has HUD sufficiently tailored the analysis required for these entities, in particular for small or rural PHAs, while still ensuring the PHA's Equity Plan is developed and implemented in a manner that advances equity for members of protected class groups, particularly those the PHAs serves or who are eligible to be served by the PHA? How can HUD continue to streamline the required analysis for PHAs while also ensuring an appropriate fair housing analysis is conducted and meaningful fair housing goals are established and implemented?*

HUD should more specifically clarify the analysis required for PHAs to explicitly require them to review their own policies, practices, and procedures including tenant assignment plans, tenant selection policies, ways to de-concentrate or relocate legacy projects in under-resourced areas, and conditions in PHA-administered or supported housing. We suggest further areas of analysis in our response to k. below.

**Question 8.k:** *Are there areas of analysis that HUD should include for PHAs that it has not included in this proposed rule that would better assist PHAs in meeting their obligation to affirmatively further fair housing? This may include analysis addressed to PHA-specific programs, such as public housing, vouchers, Moving To Work, or other PHA programs, as well as by type of PHA, such as troubled or qualified PHAs.<sup>3</sup>*

HUD should explicitly require PHAs to review their own policies and procedures for fair housing issues, including:

- Tenant assignment policies that segregate tenants by development,
- Inequitable maintenance in developments segregated with people of color,
- Lack of initiative to improve and demolish and relocate obsolete and severely distressed properties,
- Failure to market HCVs in better resourced neighborhoods,
- Waiting lists that largely underrepresent some categories of persons of color, etc.
- Siting of housing developments
- Policies around background checks and tenant selection policies related to re-entering citizens.

**Question 8.m:** *Since HUD has removed the requirement to identify and prioritize contributing factors, as was required by the Assessment Tool under the 2015 AFFH Rule, do the questions in § 5.154 appropriately solicit responses that would include the underlying causes of the fair housing issues identified?*

As laid out in our responses to earlier subsections of Question 7, we believe HUD should be explicit that the identification of fair housing issues requires a historical analysis. Program participants cannot accurately identify fair housing issues or set or prioritize goals without understanding the causes of current conditions. Because many program participants – in part because of the federal government’s longstanding failure to enforce the AFFH mandate of the Fair Housing Act – will not have experience with either the Equity Plan process or the concept of AFFH HUD must provide detailed, substantive, and accessible sub-regulatory guidance.

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<sup>3</sup> Section 2702 of title II of the Housing and Economic Recovery Act (HERA) introduced a definition of “qualified PHAs” to exempt such PHAs, that is, PHAs that have a combined total of 550 or fewer public housing units and Section 8 vouchers, are not designated as troubled under section 6(j)(2) of the 1937 Act, and do not have a failing score under the Section Eight Management Assessment Program (SEMAP) during the prior 12 months, from the burden of preparing and submitting an annual PHA Plan. See Public Law 110-289, 122 Stat. 2654, approved July 30, 2008, see 122 Stat. 2863.

**Question 8.n:** *Are there specific questions HUD should ask that it has not proposed in § 5.154 of this proposed rule?*

HUD should require a specific analysis of exposure to environmental hazards including which groups and communities are disproportionately located near and exposed to environmental hazards, how this disproportionate exposure has changed over time (e.g. because of the increased concentration of hazardous uses in a particular area, or a decision to rezone an area adjacent to a residential areas for industrial uses), and what public or private policies or practices, demographic shifts, economic trends, or other factors may have caused or contributed to the patterns of disproportionate exposure to environmental hazards.

**Question 10:** *HUD has included several new definitions in this proposed rule and requests feedback on whether they should be drafted differently, whether there may be additional definitions that are not included that would be useful, and whether any definitions included in this proposed rule are unnecessary.*

- *Affirmatively Furthering Fair Housing* The definition of AFFH remains the centerpiece of the existing and proposed regulation.
- *Affordable Housing Opportunities* We recommend that HUD clarify that housing “affordable to low- and moderate-income households” means that there is housing available to families at all income levels, including 0-30% AMI, 31-50% AMI, and 51-80% AMI at 30% of their income and in well-resourced areas. The inclusion of housing stability in this definition is appropriate and important. HUD should make it explicit that this definition applies to both owner- and renter-occupied housing. HUD should further define “accessible to individuals with disabilities.” What makes housing “accessible” will be different for people with different types of disabilities.
- *Balanced Approach* We appreciate that HUD has included in this definition that place-based investment must be accompanied by preservation of affordable housing stock. What we are seeing in the City of Houston, and as a pattern nationally, is government facilitated gentrification and displacement in historical neighborhoods of color not only by providing tax incentives and other public resources to developers to improve infrastructure but by directly intervening to prevent affected communities from negotiating community benefits agreements with those developers that would have preserved affordable housing units and ensured that current residents could benefit from new investments in community resources. HUD should remove the last sentence of this definition. Program participants are required to take a balanced approach; they cannot assert that they are unable to create

greater fair housing choice outside segregated, low-income areas in order to justify an exclusively place-based strategy.

- *Community Engagement*. This definition appropriately includes “a process for incorporating such views and recommendations into planning processes, decisions, and outcomes.” Soliciting community input and recommendations alone is not engagement.
- *Data/Local Knowledge* HUD should consider whether these two categories of information would be more accurately described as *Quantitative Data* and *Qualitative Data*. In the alternative, HUD should modify the definition of the Equity Plan to include “the analysis of fair housing data” and “local knowledge.”
- *Equity Plan 1.i* should read “The analysis of fair housing data and local knowledge and identification of fair housing issues required by the fair housing goal category;”
- *Fair Housing Choice* “Realistic housing options” must include “in good condition” as well as “affordable and attainable.”
- *Fair housing strategies and actions* We appreciate that this definition makes it clear that “subsequent planning documents” includes plans relating to education infrastructure, environmental protection, etc., and not just subsequent plans related to HUD funding.
- *Integration* A definition of integration that rests solely on geographic concentration is incomplete and may have unintended negative consequences, particularly for members of protected classes. A gentrifying neighborhood may look more integrated, but that integration is not meaningful if newcomers seek to erase the history and culture of the existing community and if government policies are facilitating displacement. Similarly, protected class households who move to historically exclusionary communities may be met with hostility that denies them full access to community assets. Individuals with disabilities may have access to housing in integrated settings (as defined in the context of *Olmstead*) but if that neighborhood does not have sidewalks, for example, individuals that use wheelchairs will be unable to access community assets. In 2016 New York City high school students created a new definition of school integration that included not only numerical diversity but also the equitable distribution of resources and relationships across group identities, among other factors. While we acknowledge the impossibility of providing data sets and mapping that captures a more nuanced vision of integration, HUD should encourage program participants to use local knowledge to examine these issues how its policies and practices may be encouraging or impeding a more holistic picture of integration and segregation.
- *Local Knowledge* This definition appropriately specifies that local knowledge includes “historical information on why current conditions within the geographic

areas of analysis exist and persist” and “information provided to the program participant during the community engagement process.”

- *Siting Decisions* The definition of “siting decisions” should be expanded to include zoning and land use decisions about the siting of environmental hazards and industrial uses.
- *Underserved Communities* The definition should specifically include immigrants, colonias, environmental justice communities, sexual assault survivors, and individuals with criminal histories as examples of underserved communities.
- *Well-resourced areas* This definition appropriately identifies that well-resourced areas have and continue to benefit from public investment. Just as majority White areas are just as segregated as majority-BIPOC areas, concentrated advantage is just as much a result of deliberate government policy and resource allocation decisions as concentrated disadvantage.

**Question 11:** *Has HUD appropriately captured the types of populations—based on the characteristics protected by the Fair Housing Act—that have historically been underserved and continue to be underserved today in communities in the new definition of “Underserved Communities,” and if not, which additional types of populations or groups should HUD consider adding to this definition?*

HUD should specifically include immigrant communities, colonias, environmental justice communities, sexual assault survivors, and persons with criminal histories in its definition of Underserved Communities.

**Question 12:** *HUD requests feedback on whether including the definition of “Balanced Approach” is helpful in understanding how to connect funding decisions to advancing equity within communities and how this definition can be modified or improved in order to more clearly make that connection.*

It is important that HUD make clear that by “balanced approach” it is not implying that housing opportunities for protected classes should be “balanced” simply by creating equal levels of subsidy in distressed and segregated living environments. We fear that, absent additional information many participating jurisdictions will interpret the word “balanced” as giving safe harbor to automatically authorize 50 percent of housing development funds in R/ECAPs and other traditional areas where HUD funds have been almost exclusively directed to produce the extreme segregation that this rule is intended to start to correct. More elaboration is needed to explain the intent and a better term than “balanced approach” should be employed.



We appreciate that HUD's definition of balanced approach points out the importance of anti-displacement measures when jurisdictions are making place-based investments. The historical disinvestment that has created concentrated disadvantage in historical neighborhoods of color has also put these communities at risk of displacement and destruction when they become attractive for investment. Too often these investments, whether local tax abatements, infrastructure investments, or tax incentives like Opportunity Zones benefit outside investors and not the underserved community, or worse, accelerate and facilitate displacement. Any racial or economic integration is a transitional state, and the end result is a community that has become a well-resourced area just as it resegregates as majority White. The final rule must explicitly mandate that investment in historically disinvested areas must be accompanied by anti-displacement and cultural preservation strategies.

**Question 13:** *HUD has changed the way submission deadlines are determined from the way submission deadlines were established under the 2015 AFFH Rule and requests feedback on whether the new submission deadlines provided in § 5.160 are clearer and are the appropriate way to create tiers for the submission by entities of different sizes. HUD welcomes feedback on different cutoffs for this section that are accompanied by explanations of why different cut offs should be used instead of those in this proposed rule. HUD also welcomes comment on whether the timeframes set out in § 5.162 are appropriate and what, if any, obstacles might these new timeframes present with respect to the development of the Equity Plan and compliance with other programmatic requirements?*

We suggest that HUD move the timelines for submission of the initial Equity Plan forward by at least six months. As HUD notes in the proposed rule there are serious harms imposed on people who are entitled to protection under the Fair Housing Act by the perpetuation of segregation, and we would note, by the ongoing and improper use of HUD and other public funds by program participants. HUD must move aggressively to implement this rule and not allow its first implementation to be further delayed for years.

Regardless of whether it has been enforced, program participants have been required to AFFH as a condition of eligibility for federal funds for over half a century. The proposed rule does not impose a new obligation, it provides a clear and considered process for demonstrating compliance with an existing requirement, once which program participants have repeatedly requested. We also note that the sooner a percentage of program participants have gone through the Equity Plan process the sooner there will be models for other program participants that can help them with their own processes.

We strongly agree with the requirement that jurisdictions that are not required to submit Equity Plans within twenty-four months of the effective date of the final rule must update their current fair housing plans and submit them to HUD for publication and potential review or, if they have updated their existing plans within the past three years, must submit those plans to HUD for publication and potential review. HUD should accept information from the public during its review of existing fair housing plans and information received from the public should automatically trigger a review of an existing fair housing plan.

The timeframes set out in 5.162 are a significant improvement on the 2015 AFFH rule which deemed fair housing plans accepted without giving HUD sufficient time to actually review the majority of those plans. The best scenario for both HUD and program participants is that any deficiencies that might result in future ineligibility for federal funds, including the obligation to repay funds, are identified and remedied at the planning stage so that future enforcement is unnecessary. HUD has also provided procedures for program participants that enable them to meet consolidated plan or PHA plan deadlines even if their Equity Plans have not yet been formally accepted by HUD.

**Question 14:** *HUD seeks comment on whether it should require new program participants to engage in any specific planning process or other actions to meet their obligation to affirmatively further fair housing prior to the submission of their first Equity Plan.*

Eligibility for the receipt of funds by new program participants should be subject to and conditioned on their submission of an equity plan and HUD's approval of the plan. We see no point in having program participants go through two different planning processes.

**Question 15:** *HUD requests specific feedback on new sections §§ 5.170 through 5.174 and whether the compliance procedures and procedures for effecting compliance can be further clarified and improved.*

Throughout the rule, HUD is clear and explicit that compliance with the AFFH obligation is a condition of eligibility for federal funds and that the Secretary must terminate or refuse to grant or continue funding if a program participant is violating federal law and refuses to remedy those violations. This clarity is an important corrective to decades of non-enforcement that have led many program participants to regard the AFFH certification as boilerplate contract term rather than a substantive legal requirement. These provisions of the proposed rule do not impose any new substantive requirements on program participants. As HUD notes in its Summary of the rule, lays out the same complaint and

compliance procedures that exist under both the Fair Housing Act and other Federal civil rights statutes. We agree that these provisions benefit program participants because they provide additional compliance and enforcement tools that allow voluntary resolution of complaints without immediately triggering a challenge to the program participant's certification or HUD's obligation to suspend or terminate funding.

While we understand HUD's reluctance to withhold funds because of the potential impact on underserved populations and members of protected classes, the continuation of this funding does not necessarily benefit these communities in a way that justifies allowing a program participant to continue to spend federal funding in a discriminatory way or otherwise violate its residents' civil rights. We share HUD's belief that the Equity Plan process and the compliance process and procedures laid out in the proposed rule provide multiple opportunities to avoid non-compliance and remedy violations on a voluntary basis. However, because HUD has largely failed to enforce the AFFH obligation for over 50 years, it may in fact be necessary for HUD to suspend or terminate funding to program participants who refuse to comply with the AFFH obligation that renders them eligible for federal funding and it should not hesitate to do so.

We also note that HUD has the option to place PHAs into receivership and continue to operate its programs for the benefit of residents; HUD does not need to terminate funding to obtain compliance from PHAs.

We strongly endorse the compliance procedures in sections 5.170 through 5.174. Although these sections do not create new legal mandates or remedies, their inclusion clearly spells out these compliance procedures. We appreciate that the proposed rule clears up any confusion about whether failure to comply with the requirements of the proposed rule and actions that are materially inconsistent with the obligation to AFFH is sufficient basis for an administrative complaint under the Fair Housing Act. Although we believe that HUD has always had the authority to accept and investigate complaints about the failure to AFFH on the same basis as other complaints under the Fair Housing Act, it has historically declined to do so, requiring complainants to allege violations of other sections of the Fair Housing Act, Title VI of the Civil Rights Act of 1964, or other civil rights laws, or as HUD notes, to file litigation under the False Claims Act or other laws. While violations of the AFFH obligations are almost always in and of themselves or accompanied by violations of other civil rights laws, the proposed rule's explicit recognition and provision of a process for complaints related to AFFH obligations allows complainants to focus on specific AFFH issues without having to file a broader complaint, reduces the investigative burden on HUD and program participants, and affirms that complaints can be voluntarily resolved without requiring HUD

to challenge the program participant's certifications. The complaint and compliance review process provides a way for complainants to flag non-compliant Equity Plans for HUD review as HUD is unlikely to have the full complement of resources it needs to carefully review each submitted Equity Plan. We note that many program participants, particularly during the initial implementation of the proposed rule, will not be deliberately non-compliant or intentionally violating civil rights requirements, and the complaint and compliance review process allows those jurisdictions to correct any issues before they become more serious civil rights violations. Setting out an AFFH complaint and compliance review process is highly likely to facilitate AFFH compliance.

HUD should modify 5.170 to include a specific timeframe for reaching a voluntary resolution before it issues a Letter of Findings similar to those in 5.172.

HUD's assertion that it does "not intend the complaint process to be used to relitigate decisions made by program participants in the planning process after opportunity for community input and HUD's acceptance of an Equity Plan" contradicts the language in 5.162(3) of the proposed rule. Section 5.162(3) states that HUD's acceptance of an Equity Plan only means that HUD has found that the program participant has complied with the required elements of 5.154 and "does not mean that the program participant has complied with its obligation to affirmatively further fair housing . . . [and] does not limit HUD's ability to undertake an investigation pursuant to 5.170." While we hope that HUD will have the resources to both provide technical assistance to program participants and to carefully review all submitted Equity Plans, the rule requires HUD to accept the Equity Plan within 100 days of receipt unless the Responsible Civil Rights Official extends the deadline or notifies the program participant that the plan is not accepted and must be revised. The suggestion that what is currently a relatively weak community engagement requirement and HUD acceptance of an Equity Plan might constitute some kind of safe harbor for program participants is incorrect and not supported by the actual language of the proposed rule.

We are also concerned by language in the Summary stating that "HUD does not view the complaint process as a vehicle for general complaints about the activities of the HUD program participants that lack nexus to the AFFH requirements" and that "it generally would be insufficient for a complainant to allege that a routine decision made, or routine action taken by a program participant does not affirmatively further fair housing." Most, if not all of a HUD program participant's activities have a nexus to the AFFH obligation, and it is often "routine" decisions and actions that fail to AFFH or actively discriminate against members of protected classes. The point of the AFFH provisions of the Fair Housing Act is

that federal, state, and local government and private actors have routinely made decisions that created, enforced, and perpetuated segregation and concentrated disadvantage in underserved communities, and that it will require affirmative efforts to overcome these longstanding and deeply entrenched policies and practices. HUD should clarify which activities of a HUD program participant do not have a nexus with the AFFH requirement and what constitutes a “routine” action or decision that would be an insufficient basis for a complaint. This clarification is perhaps more important for program participants than for potential complainants.

While the public’s ability to file fair housing complaints based on AFFH is critical to the implementation of the rule, the process for resolving these complaints often excludes complainants and directly impacted persons from that resolution process. We do not dispute that voluntary resolution of these matters is the best outcome, however, the exclusion of complainants and directly impacted persons from the voluntary resolution process often results in a Voluntary Compliance Agreement or other resolution inadequate to remedy violations of the Fair Housing Act, Title VI of the Civil Rights Act of 1964, and other civil rights and fair housing laws. This is not an issue unique to HUD or to AFFH, but meaningful community engagement must take place **at all stages** of the AFFH and Equity Plan process, including compliance and enforcement. We recommend the following changes to §5.170:

- §5.170(b)(3) Any attempt to reach a voluntary resolution of a complaint under this section should include complainants in the voluntary resolution process.
- HUD should solicit feedback from directly affected persons and groups on any resolution of a matter being investigated under §5.170, including on remedies to be included in a Letter of Findings under §5.170(b)(4).
- HUD should provide complainants with a copy of any Voluntary Compliance Agreement or other voluntary resolution when it is approved.
- If complainants are not involved in the voluntary resolution process, they should have the right to challenge the Voluntary Resolution Agreement under the same process laid out in §5.170(b)(4) and (5) for Letters of Findings.

HUD should provide specific timeframes, as it does in 5.172, for effecting compliance under the voluntary resolution process.

Additionally, § 5.174 is silent as to the public’s right to access hearings required by 5.172. Where a hearing is provided in accordance with § 5.174, the rule should provide that such a hearing is open to the public, and any party who has filed a complaint related to the relevant hearing should be provided with notice of the hearing and an opportunity to appear at the hearing.

We recommend that 5.172 include that a potential penalty for non-compliance is the obligation to repay federal funds obtained under false certifications. Jurisdictions should not be allowed to retain the benefit of public funds that they have used in a discriminatory manner and then effectively reject funding when their obligation to comply with federal law is enforced by refusing to comply with the proposed rule.

While we share HUD's hope that the Equity Plan, complaint, and compliance review processes will result in voluntary resolutions, the major compliance and enforcement issue for the AFFH obligation that the proposed rule needs to address is the lack of compliance and enforcement for over 50 years, and the serious harms that have resulted from those failures.

**Question 16:** *This proposed rule provides a stronger link between the regulatory requirements for implementing the AFFH mandate and program participants' subsequent planning processes in order to better ensure that all programs and activities are administered in a manner that affirmatively furthers fair housing, including by taking into account how to allocate funding to effectuate that obligation. HUD requests comments on how HUD can further ensure that program participants are adequately planning to carry out activities necessary to advance equity in their communities. Specifically, are certifications and assurances requirements in this proposed rule, along with the new regulatory provision at § 5.166 sufficient to achieve this objective, and if not, what additional regulatory language can be added that would achieve this objective?*

We appreciate that the proposed rule is clear that the Equity Plan process is separate from the consolidated plan or other program planning processes and that the fair housing goals in the Equity Plan must be incorporated into and guide the program and funding decisions contained in those program plans. The Equity Plan is not limited to activities carried out with HUD program funds or by the entity responsible for administering HUD-funded programs. The program participant is the local jurisdiction, state, or insular area and the Equity Plan is a comprehensive analysis and set of goals that includes not only housing but access to community resources and opportunities. The proposed rule affirms this in 5.156(c) which requires program participants to "incorporate the fair housing goals from their Equity Plans into planning documents required in connection with the receipt of Federal financial assistance from any other Federal executive department or agency." The obligations attached to Federal financial assistance under Title VI of the Civil Rights Act of 1964 and its implementing regulations effectively require jurisdictions to engage in the kind of analysis contained in the Equity Plan; ensuring broad participation in the process and a compliant Equity Plan will streamline program participant compliance with civil rights requirements attached to other sources of Federal funding.

The certifications and assurances are essential tools. Ultimately, however, HUD must be prepared to move far more quickly to suspend or withhold funds if the activities, including plans and implement action are not carried out within the permitted timeframes.

**Question 17:** *Has HUD adequately incorporated the need to assess any lack of homeownership opportunities for protected class groups in this proposed rule? If not, in what ways should access to homeownership be further incorporated? Is there specific data that HUD could provide to further facilitate this analysis?*

HUD should state that when homeownership opportunities are made available, they use be made available not exclusively in economically distressed area but must also be affirmatively marketed to underrepresented members of protected classes in advantaged neighborhoods. Program participants should also analyze the impact of rising costs, displacement due to economic pressures including property taxes, selective code enforcement, and other impediments to preserving existing levels of homeownership by members of protected classes. HUD should provide HMDA data.

**Question 18:** *Are there other types of “Community Assets,” that should be included in the new definition and the analysis of disparities in access to opportunity for purposes of the Equity Plan? If so, which assets should be included that are not currently included in this proposed rule?*

Vulnerability to and protection from natural or man-made disasters should be included in the list of community assets. Generally, HUD should require a more specific and detailed analysis of disparities in exposure to environmental hazards in the Equity Plan.

**Question 19:** *How can HUD best facilitate receiving feedback on Equity Plans submitted for its review from members of the public in order to inform the review process and how should HUD consider such feedback? HUD seeks comment on whether changes to the regulatory text are necessary, and specifically whether the new definition of “Publication” at § 5.152 and the provisions in § 5.160 achieve this objective.*

The definition of Publication at 5.152 to include public posting on a HUD-maintained web page that includes the Equity Plan, annual progress evaluations, related notifications from HUD, and a dashboard to track the status of a program participant’s AFFH planning and implementation along with additional detail about which documents and notices will be published at 5.154(j) and 5.162 is a prerequisite to receiving public feedback. We do

recommend that 5.154(j)(2) be revised to require program participants to publish their HUD-reviewed Equity Plans on their own official websites.

We strongly agree with the requirements at 5.160 (d) that jurisdictions that are not required to submit Equity Plans within twenty-four months of the effective date of the final rule must update their current fair housing plans and submit them to HUD for publication and potential review or, if they have updated their existing plans within the past three years, must submit those plans to HUD for publication and potential review. HUD should clarify that it will accept public comments on the existing fair housing plans for 60 days from the date of publication and that information received from the public will trigger a review of an existing fair housing plan.

**Question 20:** *there ways that HUD could better clarify how the fair housing goals from an Equity Plan are incorporated into subsequent planning processes? If so, how can HUD clarify this requirement such that program participants will be able to implement their fair housing goals and achieve positive fair housing outcomes in their communities?*

HUD could potentially provide examples of how fair housing goals should be incorporated into subsequent planning processes, for example, by showing how the example fair housing goals in 5.154(g)(3) might be incorporated into a consolidated or PHA plan. We strongly recommend that HUD do exactly this in sub-regulatory guidance; provide an example how to identify neighborhood segregation, provide examples of fair housing goals designed to overcome this segregation, metrics, and timelines, and provide examples of how these goals could be incorporated into subsequent planning processes.

**Question 21:** *What forms of technical assistance could HUD provide that would better position program participants and their communities to develop their Equity Plans and ultimately implement and achieve the fair housing outcomes set therein?*

Please see our responses to Question 4.

**Question 22:** *HUD specifically solicits comment on the proposal to publish submitted plans that it is reviewing but has not yet accepted or non-accepted. HUD seeks comment on both the benefits of this proposal and concerns with it.*

Publication of plans under review is essential. The public has a right to know how the program participant responded to and/or incorporated public comment on the draft Equity Plan into the version submitted to HUD. The public can only make relevant information



available to HUD if it knows what the program participant has submitted to HUD about its fair housing issues, goals, and proposed actions. The submission of public comments directly to HUD is critical to ensuring that Equity Plans are compliant with the proposed rule, particularly where members of protected classes may fear retaliation for providing public comment directly to the program participant, or where the program participant may face retaliation for identifying certain fair housing issues. This also allows HUD and program participants to identify and address issues with submitted Equity Plans before a formal complaint is filed.

**Question 23:** HUD specifically asks for input on the following proposals for reducing burden on small program participants:

**Question 23.a:** HUD notes that some pieces of the analysis may not always be relevant to some small program participants, depending on the local circumstances. If specific parts of the proposed analysis are not applicable to a small program participant's local circumstances, should HUD permit the program participant to respond to that specific piece of the analysis with "not applicable"? If so, please identify the specific parts of the analysis that might not always be applicable and the circumstances under which it would not be applicable. If HUD were to permit this, are there procedures it should follow to ensure that program participants still conduct an appropriate fair housing analysis, such as requiring an explanation of why the piece of the analysis is not applicable, with reference to HUD-provided data, local data, and local knowledge, including information gained from community engagement? HUD seeks comment on the extent to which it can achieve significant burden reduction for smaller program participants (and in particular small PHAs) by clarifying expectations in this manner rather than altering the proposed questions. In responding to this request for comment, to the extent a commenter contends that a particular program participant can or cannot reasonably conduct the analysis set forth in the proposed rule, please describe the relevant local circumstances for the program participant, including any demographic patterns, number of units or consolidated plan program allocations, and local infrastructure, as well as the analysis the commenter believes the question is requiring.

Despite the diversity of states and jurisdictions across the country, the creation and perpetuation of segregation and concentrated disadvantage and the resulting harms look remarkably similar everywhere. It is unlikely that there are pieces of the analysis in the current proposed rule that are "not applicable" to a significant group of jurisdictions, particularly because the required analysis includes regional conditions that affect fair housing issues within a jurisdiction. The criteria for "not applicable" should be strict and

require the program participant to provide an explanation of why the piece of the analysis is not applicable, with reference to HUD-provided data, local data, and local knowledge, including information gained from community engagement. HUD should clarify for program participants that their analysis must include circumstances outside the jurisdiction or service areas that impact fair housing issues within the jurisdiction or service area.

**Question 23.b:** *HUD intends that the burden of analysis for many of the questions in the proposed rule will be lower for smaller program participants that have fewer people, places, and geographic areas to analyze and seeks comment on this topic. Do the questions proposed in § 5.154 appropriately scale with the size and complexity of a program participant, such that it would be easier for smaller program participants to complete the analysis than larger program participants? For example, does the fact that smaller program participants often operate in smaller communities with fewer people, fewer community assets, and less public infrastructure make the analysis easier to complete? If so, how can HUD make explicit that the same question is expected to result in a less burdensome analysis for smaller or less complex program participants? What other mechanisms could be utilized to minimize the burden for all program participants, but particularly smaller program participants, while ensuring an appropriate analysis is conducted to meet the proposed requirements in this rule?*

Yes. The analysis set out at 5.154 will be easier for smaller program participants to complete because of the scale of the analysis. HUD does not need to make this explicit in the rule, it can do so through sub-regulatory guidance and technical assistance. We note that HUD encourages joint equity plans that would distribute the analysis between multiple jurisdictions. HUD should not focus exclusively on the burden on program participants when the burden of harm caused by segregation and discrimination is borne by members of protected classes. The burden of data analysis is not comparable to the burden of, for example, a cancer cluster caused by a jurisdiction's choice to zone land next to a community of color for heavy industrial use or a PHA's refusal to build public housing in safer, lower-poverty, and better resourced areas.

**Question 23.c:** *Are there other ways in which HUD can alter the required analysis for small program participants that meaningfully reduce burden while ensuring an appropriate AFFH analysis such that these program participants can establish meaningful fair housing goals?*

We believe many of these concerns about the burden on program participants of all sizes are based on an inaccurate view of what an AFFH analysis requires and an assumed unwillingness of program participants to engage in the planning process. The most effective way for HUD to address concerns about administrative burden is to provide sub-regulatory

guidance and technical assistance. We recommend that HUD create sample Equity Plans for different program participants and different sizes of program participants that provide program participants with a realistic picture of what their Equity Plan should look like in terms of form and type of analysis.

**Question 23.d:** *To what extent, if any, should small program participants have modified community engagement requirements, such as requiring fewer in-person meetings and allowing different formats for meetings? Are there other ways this proposed rule could modify community engagement requirements to reduce burden on small program participants, while ensuring that underserved communities and groups who have historically not participated in this type of engagement have the opportunity to be part of the process? For purposes of small program participants, are there other ways they may be able to receive equivalent input from the community, aside from those contemplated in the community engagement process set forth in the proposed rule, that would reduce their burden in obtaining local data and local knowledge, while still ensuring they have the necessary information to produce a well-informed and meaningful analysis?*

Three in-person meetings is not a demanding requirement; HUD should in fact consider requiring additional meetings for larger program participants. We strongly recommend that HUD require at least some of these meetings to be hybrid and allow the public to participate remotely.

For further recommendations, please see our responses to Question 4.

**Question 23.e:** *Would it be appropriate to modify the goal-setting requirements for smaller PHAs and consolidated plan participants and, if so, what modification would be appropriate? The proposed rule does not specify the number of goals that program participants must set. It does provide that program participants must set goals that collectively address each of the seven fair housing goal categories (which may require fewer than seven goals, since a goal can address more than one category), unless no fair housing issue is identified for any category, in which case no goal is required to address that category. HUD seeks comment on whether any modification of this requirement is appropriate for smaller entities.*

No modification of the requirement is appropriate. Fair housing equity issues are often just as severe in smaller jurisdictions as they are in larger jurisdictions and the proposed rule accounts for differences between jurisdictions as laid out in the question above.

**Question 25:** HUD seeks comment on whether it is necessary to establish a definition of “small PHA” or “small consolidated plan participant” and, if so, how HUD should define these terms.

We do not believe this is necessary.

**Question 26:** Program participants who collaborate and conduct a joint Equity Plan may benefit from pooling resources to overcome fair housing issues. Are there further incentives HUD should or could offer to program participants that submit joint Equity Plans to HUD?

HUD should consider offering additional time to program participants conducting a joint Equity Plan and ensure that it makes technical assistance specific to a regional analysis and plan available.

**Question 27:** Proposed § 5.164 sets out the minimum criteria for when an Equity Plan must be revised. HUD seeks comment on whether the proposed § 5.164 properly captures the circumstances under which a program participant should revise its Equity Plan, and in particular on the circumstances under which a disaster should or should not trigger the need for such revision.

Proposed 5.164 captures the minimum criteria for when an Equity Plan must be revised. While we agree that any presidentially declared disaster should trigger an Equity Plan revision, we recommend that any disaster impacting a program participant’s jurisdiction that affects more than 500 housing units should trigger an Equity Plan revision, regardless of whether there is a Presidential declaration. However, the time frame for these required revisions is too long, particularly since the revision might not require the submission of an entirely new Equity Plan but focus on the specific change, for example, the loss of affordable housing units. In the case of a Presidential disaster declaration that results in an allocation of CDBG-DR funding, the Equity Plan revisions will give the jurisdiction a head start on the required Action Plan.

**Question 28.a:** Is 365 days an appropriate time limit? Are there specific considerations that argue for a longer or shorter time limit?

Whether 365 days is an appropriate time limit depends on how HUD defines the last incident of the alleged violation. In the context of AFFH, for example, each time the program participant signed an AFFH certification when it was not in compliance with the obligation to AFFH is a new incident of discrimination.

**Question 28.b:** *What specific circumstances might constitute “good cause,” under which the Responsible Civil Rights Official might be justified in extending the proposed 365-day deadline (e.g., the conduct constituting the alleged violation was not known or made public within the 365-day period)? Are there specific concerns that mitigate against a good cause exception (e.g., a concern about inconsistent application)?*

Specific circumstances that would constitute “good cause” include; that the conduct constituting the alleged violation was not known or made public within the 365-day period, that the jurisdiction withheld or otherwise failed to disclose data that revealed an alleged violation, and that members of protected classes feared retaliation if they filed a complaint at an earlier date. We do not believe there are any mitigating factors against an exemption.

**Question 29:** *A large amount of Federal funding flows through States to local jurisdictions, and HUD is interested in hearing about how States can utilize those funds to affirmatively further fair housing. HUD recognizes the unique planning responsibilities of States, as well as the wide variation in data, including with respect to the varying sizes and geographies of States (e.g., urban and rural areas). HUD specifically seeks comment on the data needs and tools that may be useful to States in conducting their Equity Plans.*

**Question 29.a:** *How can States encourage broader fair housing strategies at the State level and in localities, and what changes, if any, are needed to the proposed rule that could improve its effectiveness as a tool for States to further fair housing goals?*

There are two principal ways that states can affirmatively further fair housing. First, by creating a state legal and regulatory framework to support fair housing choice and equal access to opportunity, and second, by allocating resources and ensuring that local jurisdictions allocate resources (including LIHTCs, disaster recovery funding, transportation funding, Clean Water grants, and other and state and federal funds) in a manner that affirmatively furthers fair housing.

States, like other program participants, need to be clear that the AFFH obligation does not just apply to HUD funds but to other federal and government funding and activities. When our organizations filed a fair housing complaint against the State of Texas over its proposed allocation of CDBG-DR funds for recovery from Hurricanes Ike and Dolly in 2009, one of the major barriers to resolving the complaint was one state agency’s refusal to recognize that the AFFH obligation applied to non-housing activities.

**Question 29.c:** *Is there additional information HUD could provide to States, such as, for example, identifying regional issues where metropolitan areas cross State borders?*

In addition to identifying regional issues where metropolitan areas cross State borders, HUD should provide states with examples of state laws that enhance fair housing opportunities and examples of state laws that are impediments to fair housing, especially from states with demographic or other similarities.

**Question 29.d:** *How can HUD best display or provide data to States given their varied sizes and geographies in order to facilitate the analysis required by § 5.154?*

HUD should provide the same data and mapping it provides to other program participants.

**Question 29.e:** *Given the unique role that States play, does the analysis and content required in the Equity Plan provide States with sufficient opportunities to coordinate both within the State (e.g., across various departments, offices, or agencies as well as with local jurisdictions) and, as appropriate, with neighboring States?*

States have a critical role to play in ensuring that jurisdictions within their boundaries are complying with their AFFH obligations, particularly given their role as pass throughs for federal funding. HUD should set some benchmark initiatives for states to commit to in their equity plans.

One of the most important of these is to ensure that local jurisdictions and not discriminating against protected classes in the provision of the basic public infrastructure services that local governments provide, services like flood control, streetlights, sidewalks, parks, etc. HUD should require state to develop a methodology for and implement a statewide equity assessment of public infrastructure that identifies inequities in public infrastructure across neighborhoods in the state.

**Question 31:** *Certain definitions in this proposed rule contain language explaining how the defined term applies to the analysis required by § 5.154 and the type of analysis that HUD expects to be included in an Equity Plan. HUD seeks comment on whether the inclusion of this type of language in the regulations is helpful and provides additional clarity regarding how the defined term should be used for purposes of developing an Equity Plan.*

Yes, the inclusion of explanatory language is helpful and provides additional clarity. Not only are many jurisdictions unfamiliar with the dual mandates of the Fair Housing Act and the concept of AFFH generally, but there is also a large amount of misinformation about both AFFH generally and what the proposed rule means. The clearer HUD can be about the actual content of the proposed rule and how jurisdictions can comply with the AFFH obligation the more helpful it will be to program participants and the public.

**Question 32:** *As explained in this preamble, the proposed rule would take a different approach than the 2015 AFFH Rule did as it relates to circumstances in which HUD has not accepted a program participant's fair housing plan prior to the date HUD must accept or reject its programmatic plan (i.e., consolidated plan or PHA Plan). Under the 2015 AFFH Rule, HUD was required to disapprove a program participant's programmatic plan under such circumstances, putting the program participant's continued funding at risk. This meant HUD had only two options: (a) accept a fair housing plan despite deficiencies or (b) terminate the program participant's funding. In practice, although HUD rejected some program participants' fair housing plans on initial review and required them to be revised and resubmitted, HUD then accepted every resubmitted plan before the program plan was due, and thus never invoked the only available remedy of rejecting a programmatic plan. In this proposed rule, HUD sets out a more flexible framework that would enable HUD to take additional steps that do not put funding immediately at risk but give a program participant a reasonable opportunity to address deficiencies and submit an acceptable fair housing plan. Under the proposed framework, HUD can reject a program participant's Equity Plan but accept its programmatic plan, allowing funding to continue so long as the program participant signs special assurances prepared by the Responsible Civil Rights Official that require the program participant to submit and obtain HUD acceptance of an Equity Plan by a specific date. The proposed rule provides that the program participant must commit to achieving an Equity Plan that meets regulatory requirements within 180 days of the end of the HUD review period for the programmatic plan and to amend its programmatic plans to reflect the Equity Plan's fair housing goals within 180 days of HUD's acceptance of the Equity Plan in order to continue to receive Federal financial assistance from HUD. A program participant's failure to enter into special assurances will result in disapproval of its funding plan. Those program participants that submit special assurances but do not fulfill them within the timeline provided will face enforcement action that includes the initiation of fund termination and a refusal to grant or to continue to grant Federal financial assistance. Consistent with the increased transparency this proposed rule provides, HUD will publicly post all executed special assurances, and subsequently publicly post Equity Plans submitted pursuant to the special assurances and HUD's decision to accept the plans or not. HUD requests specific feedback on this special assurance framework in general and on revisions that would better effectuate the purposes expressed here and throughout this preamble. In particular, HUD asks:*

**Question 32.a:** *Does the special assurance framework, which would make program participants that enter into special assurances subject to the remedies set out in §§ 5.172 and 5.174, provide sufficient incentive for program participants to develop and submit*

*compliant Equity Plans in a timely manner? Are there changes that can be made to this proposed rule that would further incentivize timely and sufficient submissions?*

While we do not object to some level of flexibility, we are concerned that allowing jurisdictions to access federal funds when they are not substantively in compliance with the AFFH obligation may increase the need for enforcement and the termination or refusal of continuing funding. Under the proposed rule, program participants have a year to submit a compliant Equity Plan and revise their programmatic plans to reflect their fair housing goals. This is too long.

Thank you for your consideration of our comments.

Sincerely,

Madison Sloan, Texas Appleseed

[REDACTED]

John Henneberger, Texas Housers

[REDACTED]

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<sup>i</sup> Some of this data may be available from firms that track home sales like Zillow.