WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS

Comments of the Washington Lawyers' Committee for Civil Rights and Urban Affairs to Advanced Notice of Proposed Rulemaking, FR-6123-A-01 "Affirmatively Furthering Fair Housing: Streamlining and Enhancements"

Introduction

The Washington Lawyers' Committee for Civil Rights and Urban Affairs (the "Washington Lawyers' Committee" or the "Committee") submits these comments in response to HUD's Federal Register Advanced Notice of Proposed Rulemaking (the "Advanced Notice"), "Affirmatively Furthering Fair Housing: Streamlining and Enhancements." The Washington Lawyers' Committee is a non-profit 501(c)(3) organization that was established in 1968 to provide pro bono legal services to address discrimination and entrenched poverty in the Washington, DC metro area. We write to express our emphatic opposition to HUD's proposed Advanced Notice and any attempt to amend or alter the 2015 Affirmatively Furthering Fair Housing Rule ("AFFH Rule" or "Rule") for the reasons discussed below.

The AFFH Rule is an effective and well-balanced tool to further the mandate of the Fair Housing Act ("FHA") to overcome residential racial segregation and alleviate its attendant harms. The statutory duty to affirmatively further fair housing is explicitly set forth in the FHA, 42 U.S.C. §§ 3608(d) and 3608(e)(5), and arises from the recognition that housing segregation across the country has been fostered and maintained through decades of exclusionary policies at the federal, state, and local levels. Those intentional practices and policies, as well as their perhaps less intentional but fully predictable consequences, have entrenched segregation, seriously limited housing choice, and deprived African Americans of a critical foothold to economic and social mobility, as well as access to a wide range of services and benefits.

Remediation of the consequences of this pervasively harmful legacy requires active and equally intentional efforts to secure meaningful housing choice. The continued pattern of

segregated housing in our cities confirms that this work is far from done. Based as it is on extensive research, public comment, and deliberation, HUD's AFFH Rule provides a balanced framework for developing and evaluating strategies to achieve fair housing choice, while recognizing the need to tailor solutions to local conditions. The Committee strongly opposes efforts, such as those embodied in the Advanced Notice, to alter the Rule and eviscerate its framework.

I. Federal Government Policies Played a Significant Role in Creating and Maintaining Segregated Communities

In evaluating the continued importance of the AFFH Rule, it is useful to review the history of today's housing patterns. What that review makes abundantly clear is that today's continued patterns of racial segregation are the product of deliberate and comprehensive governmental policies regarding both rental housing and home ownership opportunities that profoundly constrained economic and social mobility of African Americans.

For example, the new public housing built or financed by the federal government to alleviate rental housing shortages during World War II was either segregated by race or excluded African Americans entirely.[1] Housing designated for African Americans was generally further from employment, educational, and other opportunities, imposing additional burdens and expense.[2] As government policy trapped African American workers in segregated, public rental housing, government programs that continued post-War to promote homeownership were unavailable to African Americans, preventing them from sharing in the development of wealth and prosperity associated with homeownership and the development of suburban America.[3] Shutting

[1] Rothstein, Richard, *The Color of Law: A Forgotten History of How Our Government Segregated America*, 18-24, 2017 [hereinafter "*The Color of Law*"].

[2] *Id.* at 31.

[3] Beginning before World War II and continuing thereafter, government agencies including the Home Owners Loan Corporation, Fannie Mae, and the Federal Housing Administration fueled the creation of suburban American through low cost mortgage loans. Beginning in the 1930s, the Federal Housing Administration and Fannie Mae began to insure mortgages at the developer and individual homebuyer levels, which greatly reduced the risk to banks. This translated

African Americans out of the post-War housing boom created a wealth gap that would later prevent African Americans from leaving inner-city ghettos in significant numbers, even after the FHA was enacted to prohibit racial discrimination.[4] And, in the burgeoning, virtually all-white suburbs, residents resisted, and continue to resist, affordable housing in their communities.

II. Segregation and the Harm It Causes Persists in Most Cities in the United States

Since the passage of the FHA, segregation in America has only decreased by about a third. In 1960, the average "segregation index" for cities in the United States was 86.2. That means that 86.2% of African Americans would have had to change their place of residency to achieve total integration.[5] A study by the Brookings Institute that examined 2015 Census data determined that the average segregation index measured across 52 metropolitan areas—with populations greater than one million and African American populations exceeding 200,000—had decreased to roughly 60.[6]

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into lower home costs, lower interest rates, and longer terms, all of which combined to greatly lower payments and bring homeownership within reach of the working class. However, the Home Owners' Loan Corporation mapped out America's racial geography, drawing redlines around African-American neighborhoods marking them as off limits for the government insured mortgages. Both the Federal Housing Administration and Fannie Mae refused to provide mortgages to African Americans and further refused to insure any development project where the developers had not taken adequate steps to ensure that none of the homes would be sold to African Americans. As a result of these policies, between 1934 and 1962, 98% of all home loans were extended to white borrowers. *See The Color of Law* at 18-24; *see also* Baradaran, Mehrsa, *The Color of Money: Black Banks and the Racial Wealth Gap*, Chapter 4 ("The New Deal for White America"), 2017 [hereinafter "*The Color of Money*"]; Thompson, Brian, *The Racial Wealth Gap: Addressing America's Most Pressing Epidemic*, Forbes, Feb. 18, 2018.

[4] Between the end of World War II and the passage of the FHA, the United States experienced the largest sustained growth in real estate values ever before or since, from which African Americans were largely excluded. Levittown, NJ is an example: In the early 1950s, homes in this subdivision sold for approximately $75,000 in today's dollars – affordable to persons with working class incomes but only if they were white. By the time the FHA was passed, homes in Levittown were selling for the equivalent of over $200,000 in today's dollars, and thus out of reach for many African Americans in 1968. Today, homes in Levittown sell for nearly $400,000 and continue to exceed the resources of most African Americans. *See The Color of Law* at pages 18-24; *see also The Color of Money* at Chapter 4.

[5] Report of the National Advisory Commission on Civil Disorders, Chapter 6 The Formation of Racial Ghettos ("In other words, to create an unsegregated population distribution, an average of over 86 percent of all Negroes would have to change their place of residence within the city." Perfect integration exists where the percentage of African Americans living in a particular neighborhood is consistent with their percentage of the population in a larger geography, like the city or state).

[6] Frey, William H., Census Shows Modest Declines in Black-White Segregation, Brookings Institution, December 8, 2015 [hereinafter "Census Shows Modest Declines"].

Most urban areas remain highly segregated by race. For example, Milwaukee, New York, Chicago, and Detroit all have segregation indices that are greater than 75. Only seven urban areas had an index below 50, and none were below 40.[7] And while many cities may be integrated when viewed from a regional basis, they are extremely segregated when viewed at the neighborhood level.[8]

Those patterns mirror the segregation of old. The Washington, DC area is illustrative: In 1980, the population of most of the city's eastern census tracts and those in the near eastern suburbs was greater than 60% African-American, while the western part of the region had African-American populations under 20%.[9] Almost 40 years later, those proportions remain substantially the same in the city and eastern suburbs. Indeed, even as more African Americans are moving to the suburbs and some young whites are moving back to the city,[10] African Americans often continue to end up segregated, both in the city and in new suburban communities.[11] In sum, despite geographic shifts—shifts that often accompany the gentrification of many cities—people of color remain confined to specific, racially concentrated neighborhoods. Many of these same racially concentrated neighborhoods overlap with economically concentrated areas of poverty, which is part of why segregation has such a great social cost.

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[7] Census Shows Modest Declines, Excel Table.

[8] *See* https://fivethirtyeight.com/features/the-most-diverse-cities-are-often-the-most-segregated/.

[9] Shuetz, Jenny, *Metropolitan Areas are Still Segregated, but its More Complicated than "chocolate city, vanilla suburbs,"* The Avenue, Brookings Institution, December 8, 2017 [hereinafter "Metropolitan Areas Are Still Segregated"].

[10] Census Shows Modest Declines.

[11] Diep, Francie, *The New Housing Segregation in America: An Analysis of United States Census Data Since 1990 Uncovers how Infrequently Black and White Americans Live Together Today*, Pacific Standard, Aug. 4, 2015. (In the metropolitan Washington, DC area, for example, large sections of Prince Georges County, just east of DC's city limits, have become segregated African-American communities over the last generation.) The fact that Prince Georges County, Maryland is contiguous to low-income, primarily African American areas of DC underscores the importance of including regional perspectives and strategies into efforts to affirmatively further fair housing.

Segregation significantly harms communities of color. The neighborhood where a person lives plays a critical role in determining the types of opportunities to which that individual will be exposed.[12] Higher levels of Black/white segregation correlate with lower incomes and educational attainment and higher rates of homicide for African Americans.[13]

Thus, the national mission to ensure equal housing opportunity, for which the FHA is an indispensable tool, remains unfulfilled. The same intentional approach that restricted fair housing choice for African Americans must underlie government planning and engagement to ensure fair housing choice going forward. This is why the AFFH Rule is so important.

III. Recognizing the Need for Intentionality, The FHA Established a Statutory Duty to Affirmatively Further Fair Housing

Congress's purpose in passing the FHA[14] was "to provide, within constitutional limitations, for fair housing throughout the United States." To achieve that goal, its sponsors recognized that discrimination would have to end and racial ghettos would have to be replaced with "truly integrated and balanced living patterns."[15] Achievement of this goal required more than a passive prohibition against discrimination; therefore, Sections 3608(d) and (e)(5) of the Act impose a duty on HUD and program participants (localities and public housing authorities or public housing agencies ("PHA") that participate in HUD programs) to ensure that their housing policies affirmatively further fair housing.[16]

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[12] Metropolitan Areas Are Still Segregated.

[13] Gregory Acs, Rolf Pendall, Mark Trekson, Amy Khare, *The Cost of Segregation, National Trends and the Case of Chicago 1990-2010*, Metropolitan Housing and Communities Policy Center, Urban Institute, March 2017.

[14] 42 U.S.C. § 3601.

[15] *See* 114 Cong. Rec. 3422 (1968) (remarks of Sen. Walter Mondale, one of the FHA's sponsors). Similarly, Senator Edward Brooke stated that one of the FHA's purposes was to "remedy weak intentions that have led to the federal government's sanctioning of discrimination in housing throughout this Nation."

[16] 42 U.S.C. § 3608(d) & (e)(5).

Early court cases held that Section 3608 required HUD to analyze the impact of housing projects that it was required to approve by, *inter alia,* examining the racial concentration of the affected communities and to reject proposals that would have reinforced existing patterns of segregation.[17] Over the next several decades, there were fitful efforts to provide guidance on how participants in HUD programs should affirmatively further fair housing, but none proved to be particularly effective or satisfactory. It was not until 2013 that HUD undertook an effort to promulgate a regulation that would give program participants clear guidance regarding the scope of their statutory obligation and tools to satisfy that obligation. The effort took years and engaged a variety of stakeholders, including program participants, housing advocacy and fair housing organizations like the Equal Rights Center—a full service private fair housing center serving the greater Washington, DC metro area—and community members. The process produced drafts for the current AFFH Rule, a carefully crafted balance of varying interests and perspectives that was vetted internally at the agency and field-tested in 74 jurisdictions. The result of this input led HUD to implement a final rule that achieves clear and consistent standards, fairness to participants who face different circumstances and communities, and the ability to collect reliable information to inform the choices of HUD and program participants as they work to overcome segregative housing patterns and work toward inclusive and integrated communities.

[17] *Shannon v. Department of Housing and Urban Development*,436 F.2d 809 (3d Cir. 1970) (remanding HUD's approval of a change in nature of an urban renewal project so that HUD could consider whether this change would lead to increased minority concentration in the inner city); *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973) (holding that under Title VIII "action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase in segregation"); *Clients' Council v. Pierce*, 711 F.2d 1406, 1409-23 (8th Cir. 1983)*(*holding that even if facts do not establish a constitutional violation by HUD, they still establish a violation of affirmative duty under Title VIII);. *N.A.A.C.P. v. Secretary of HUD*, 817 F.2d 149 (1st Cir. 1987) (holding that to affirmatively further the Act's fair housing policy requires more of HUD than simply to refrain from discriminating itself or purposely aiding the discrimination of others); *c.f. Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211, 34 L. Ed. 2d 415, 93 S. Ct. 364 (1972) *(*identifying the goal of Title VIII as replacing ghettos with truly integrated and balanced living patterns).

IV. HUD Should Preserve the AFFH Rule

A. The AFFH Rule Provides Needed Clarity and Guidance with respect to AFFH

The AFFH Rule should be preserved because it provides much needed clarity and guidance to program participants. Previously, the obligation to affirmatively further fair housing was only loosely defined as the product of the Analysis of Impediments ("AI") process.[18] The AFFH Rule eliminates ambiguity with a clear definition of "affirmatively furthering fair housing." It states:

> Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development. (24 CFR §5.152.)

The definition contains a clear goal, and identifies actions to realize the goal. It makes plain that affirmatively furthering fair housing extends to all of a program participant's activities. It requires that participants go beyond simply combating discrimination by taking actions that will meaningfully address identified barriers to housing choice. In so doing, the AFFH Rule makes clear that mere lip service to the obligation without concrete implementable actions will not satisfy a program participant's statutory duty to affirmatively further fair housing.

Relatedly, the Rule provides clear explanations of key terms helpful to participants seeking to provide meaningful "fair housing choice"[19] and to reduce and eliminate "disproportionate housing needs"[20] in their communities. For example, "disproportionate housing needs" refers to

[18] Fair Housing Planning Guide, Definition of Affirmatively Furthering Fair Housing.

[19] 24 CFR § 5.152 (defining "fair housing choice").

[20] *Id.* (defining "disproportionate housing needs").

instances where significant disparities exist in the proportion of members of a particular race (or any other protected class) who are experiencing greater cost burden or substandard housing conditions. The specificity of the definition thus may guide a program participant to focus on tools that it can use to increase affordable housing stock and improve the quality of existing affordable housing. The definitional clarity provided in the Rule should also prompts the participant to simultaneously consider how "disproportionate housing needs" intersect with existing patterns of residential racial segregation. In other words, based on the guidance provided under the AFFH Rule, in areas where residential racial segregation exists, a jurisdiction seeking to reduce the cost burden to African Americans in a city or county would be more apt to choose to site new affordable housing in areas that are not racially concentrated, thus reducing two barriers to fair housing choice with one strategy.[21]

While the current Rule provides much needed guidance to program participants, it does not mandate that a jurisdiction or a PHA pursue particular issues or goals. Instead, the regulations provide for and require robust community engagement where stakeholder views are solicited, considered, and reflected in the Assessment of Fair Housing ("AFH"). Based on that local or regional input, jurisdictions and PHAs can then identify their most pressing fair housing problems, set their own goals and priorities, and design their own strategies for achieving those goals. The AFFH Rule thus combines a uniform structure through which fair housing issues are consistently analyzed, while preserving flexibility to accommodate local conditions, needs, and priorities.

[21] The regulations that address the certification requirements further stress the comprehensive nature of affirmatively furthering fair housing. Through the AFH process, program participants are not only required to set goals and take actions to meet those goals, but they must also certify that they are not taking any actions that are "materially inconsistent with the [the program participant's] obligation to affirmatively further fair housing." 24 CFR § 5.160(e) and § 5.166(a) (referring to 24 CFR § 91.225(a)(1); 24 CFR § 91.325(a)(1); 24 CFR § 91.425(a)(1), among other related provisions).

B. Early Analyses of the Rule's Implementation Indicate that It is Working

The experiences of jurisdictions that have gone through the AFH process indicate that the rule is working and on its way to being successful. Activities in three large cities that were among the first 22 jurisdictions that were required to submit AFHs are promising. Philadelphia has started to focus on its eviction crisis that disproportionately plagues its low-income renters of color, and Kansas City has agreed to distribute tenant-based Housing Choice Vouchers (formerly "Section 8" vouchers) more evenly around the region, thereby facilitating housing choice. In New Orleans, stakeholders say the process has been more inclusive and transparent than was expected.[22]

The experiences of jurisdictions that submitted early AFHs indicate that the new rule is working. While it is true that HUD rejected 35% of the first 49 submissions, that is a decrease from 2009 when HUD found a higher number of AIs unacceptable. Further, HUD provided feedback regarding potential improvements to the jurisdictions whose AFHs it rejected. Subsequently, the majority of those rejected AFHs were improved and ultimately accepted. This is precisely how the Rule was envisioned to work.

An analysis conducted by Massachusetts Institute of Technology's Professors Justin Steil and Nicholas Kelly is also informative. They compared the first 28 AFHs (as modified in response to HUD's comments on initial submissions) to the AIs previously conducted by the same jurisdictions.[23] According to their analysis, the final AFHs included more quantifiable goals and specific policies aimed at achieving those goals.[24]

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[22] Blumgart, Jake, *Fair Housing Still Has a Chance Under Trump*, Metropolis, March 14, 2017, http://www.slate.com/articles/business/metropolis/2017/03/the_affirmatively_furthering_fair_housing_rule_is_still_working_under_trump.html.

[23] Justin Steil and Nicholas Kelly, "*Survival of the Fairest? An Analysis of Affirmatively Furthering Fair Housing Compliance*," *forthcoming*, Housing Policy Debate.

[24] *Id.*

Thus, early analyses of the operation and impact of the 2015 Rule indicate that it is a vast improvement over the AI process that it replaced and that it appears to be an effective mechanism to help a wide variety of program participants implement meaningful efforts to affirmatively further fair housing.

C. The AI Process that the 2015 AFFH Rule Replaced was Ineffective

Studies conducted by HUD and the Government Accounting Office (GAO) into the AI process indicate that the AI process was not effective in affirmatively furthering fair housing. In 2009, HUD closely examined 45 AIs as a way of evaluating the process.[25] It found that the AIs were not accessible to the public, outdated, developed without meaningful stakeholder engagement, and lacked key elements recommended for inclusion in HUD's Fair Housing Planning Guide.[26] Based on the study, HUD concluded that it needed to: 1) provide better guidance and assistance to program participants; 2) find other revenue streams that jurisdictions could use to fund the development of their AIs; 3) update the Fair Housing Planning Guide; and 4) require AIs to be made publicly available.

In 2010, the GAO conducted a more in-depth study, which looked at over 400 AIs, and came to similar conclusions.[27] The GAO found that the primary reasons for weaknesses in the AI process were limited regulatory requirements and lack of effective oversight.[28] Based on its study, the GAO recommended that HUD: 1) establish standards for grantees to follow; 2) require program participants to include timeframes for implementing the recommendations included in their AIs;

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[25] *Nat'l Fair Hous. Alliance v. Carson*, LEXIS 139679 (D.D.C. 2018).

[26] *Id.*

[27] U.S. GOV'T ACCOUNTABILITY OFFICE ("GAO"), RPT. [*15] NO. GAO- 10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 2 (2010) ("GAO 2010 REPORT"), available at: *https://www.gao.gov/assets/320/311065.pdf*.

[28] *Id.*

3) have AIs be signed by key government officials; 4) require AIs be submitted periodically to HUD for review; and 5) ensure AIs were made publicly available.

The District of Columbia experience illustrates the weaknesses identified by the HUD and GAO studies. In 2005 and 2012, the District submitted comprehensive AIs that identified various barriers to fair housing choice, squarely acknowledged the city was segregated by race which had resulted in a dual housing market (for African Americans and whites), and recommended ways to reduce segregation, including through the siting of affordable housing. Although the obstacles and recommendations may have been thoughtfully developed, the lack of a tie between the AIs and subsequent planning efforts—a connection which is incorporated in the AFFH Rule (*see* 24 CFR § 5.160(e))—resulted in a failure by the District to meaningfully address the identified obstacles and take concrete actions to overcome these through its 2016 Consolidated Plan. What's more, during the intervening period between submission of the AIs and the District's Consolidated Plan, the city gained tens of thousands of residents and experienced a significant affordable housing crisis, which should have led the District to rethink its analysis of how to continue taking meaningful actions to overcome previously identified obstacles to fair housing choice in its subsequently planning. Focusing on the failure to implement its identified obstacles to fair housing, the Washington Lawyers' Committee, joined by other concerned stakeholders, challenged the District's certification, in conjunction with its submission of its Consolidated Plan, that it was complying with the FHA's duty to affirmatively further fair housing.

Without an affirmative obligation under the AI process to reflect the conclusions of a jurisdiction's AI in concrete strategies to overcome obstacles to fair housing choice embodied in the Consolidated Plan, the duty to affirmatively further fair housing remained hollow and largely unfulfilled. The current Rule is designed to overcome the ineffectiveness of the prior AI process

and has taken into account the recommendations included in the HUD and GAO reports. There is simply no reason based in experience or theory that supports jettisoning a promising approach to a complex and persistent national problem.

V. HUD's Questions:

A. Community Participation

The existing community participation and consultation requirements as outlined for the affirmatively furthering fair housing obligation and for the Consolidated Plan in 24 CFR § 5.158 should remain intact and continue to be implemented as two separate processes.

The affirmatively furthering fair housing obligations and the creation of the Consolidated Plan serve two distinct, yet vital, functions. The affirmatively furthering fair housing obligations require localities to assess fair housing in their area, address historic and systemic barriers to access to housing for African Americans and members of other protected classes, take definitive action to create inclusive communities, as well as extend true housing choice to areas and populations where it does not meaningfully exist. The Consolidated Plan requires localities to assess affordable housing, identify areas for investment, and propose methods to fund initiatives to expand affordable housing options.

While there may be some overlap, the issues, concerns, insights, and questions involved are different for each of these obligations. Most importantly, the stakeholders involved in each of these processes are different. African Americans have been overwhelmingly disadvantaged by the discriminatory practices outlined above. Therefore, it is imperative that those most affected are involved in the process designed to remedy the wrong. By contrast, the community consultation processes around the Consolidated Plan issues tend to draw those who have a financial, urban planning, or other, somewhat technical background or interest. A forum that emphasizes those

technical inquiries may not give adequate attention to the more qualitative concerns of community members, or may not be seen by residents as a forum designed to elicit their concerns.

Combining these processes will almost certainly result in conflating the distinct issues involved in affirmatively furthering fair housing and compiling a Consolidated Plan, and by extension, likely leave necessary stakeholders out of the process. More community involvement is the key to insuring that localities are able to consider their unique circumstances in the planning process.

B. Data Collection

Adherence to a uniform data set, to which participants may add information regarding their own experiences, benefits both HUD and program participants. The availability of consistent data from all program participants enables HUD and those participants to identify common fair housing obstacles and effective strategies and emerging trends, which, in turn helps separate the purely idiosyncratic from approaches or conclusions that may have more widespread applicability. A uniform data set is likely to reduce controversy and second-guessing about whether particular localities are making meaningful efforts, or have a coherent framework to examine their efforts, to affirmatively further fair housing. It fosters efficiency, as data collection systems can be developed prospectively and thereby conserve administrative resources for collection and analysis.

Multi-jurisdictional data assists planning at the federal and local levels, as it likely provides measurable evidence of the effectiveness of particular affirmatively furthering fair housing strategies. The cross-jurisdiction comparisons a uniform data set permits contributes to a greater understanding for HUD as well as program participants, of obstacles to, and opportunities for, ensuring meaningful housing choice. Requiring a uniform data set does not prevent program participants from fashioning affirmatively furthering fair housing priorities, goals, or strategies

that will suit their local circumstances. It simply helps foster that process by asking jurisdictions to consider a common core set of information, as they consider obstacles and opportunities presented in their communities. Collection of the same core data from all program participants also enhances the real and perceived fairness of HUD evaluations of individual affirmatively furthering fair housing efforts, reducing the opportunity for challenges based on bias or other impermissible criteria. As insistence on "evidence-based" practices—as opposed to anecdotal or highly subjective impressions —has become a basic norm for assessing efficacy across industries and professions, it would be anomalous indeed for HUD to turn its back on the value of systematically collected data as overly "data-centric" in favor of "experiences" and conclusions that cannot be effectively validated.

C. Reporting and Submission

PHAs should report their affirmatively furthering fair housing plans and progress following the same robust requirements mandated for jurisdictions (local governments and states) that receive federal funds for programs such as Community Development Block Grant, Emergency Solutions Grants, HOME Investment Partnerships or Housing Opportunities for Persons with AIDS. A detailed report of the analysis performed by the PHA, rather than a summary of goals, should remain the baseline for submissions because it will ensure a greater understanding by HUD of the strategies and actions each PHA is proposing to affirmatively further fair housing, overcome obstacles that further or perpetuate residential racial segregation or which inhibit fair housing choice. Permitting PHAs to provide a mere summary would effectively eliminate HUD's ability to adequately assess whether the PHA has meaningfully identified such obstacles and disparities in access to opportunity, much less assess whether the PHA has undertaken sufficient steps to overcome these obstacles.

PHAs should continue to report their affirmatively furthering fair housing plans and progress based on the schedule set forth under the current rule at 24 CFR 5.160 (a)(D)-(E). A PHA (other than a "qualified PHA") should submit its affirmatively furthering fair housing plans and progress through the AFH which is due to HUD no later than 270 calendar days prior to the start of the PHA's fiscal year that begins on or after January 1, 2018 for which a new 5-year plan is due. *See* 24 CFR 903.5. "Qualified PHAs" should continue to submit their plans and progress as part of the AFH due to HUD no later than 270 calendar days prior to the start of the PHA's fiscal year that begins on or after January 1, 2019 for which a new 5-year plan is due. *See* 24 CFR 903.5. Maintaining uniformity of timing across PHAs will ensure that PHAs are on equal footing in their efforts to assess the obstacles to fair housing in their respective communities, as well as with respect to their analyses of the methods by which to overcome such obstacles. Further, maintaining the same timeframe for submission across PHAs will do away with any perceived notions of unfairness afforded to one PHA over another based on disparate timelines for submission.

Finally, planning and/or results should not be integrated into existing reporting structures, such as the Consolidated Plans and Consolidated Annual Performance and Evaluation Reports since those processes are designed to address distinct housing concerns, as discussed in response to question 1 (*see* HUD's Questions at Section A.).

D. Obstacles to be Evaluated

This question (Question 4) posits a false dichotomy. The AFFH Rule should continue to require each jurisdiction's AFH to identify areas for analysis where obstacles to fair housing may arise in the respective jurisdiction, as outlined in 24 CFR § 5.154(d)(2), as well as require participants to identify local and/or regional-specific circumstances that present obstacles within each of the four areas already outlined in the Rule. Areas where common obstacles may exist in

jurisdictions include: (1) patterns of segregation and trends based on various protected classes; (2) the existence of racially or ethnically concentrated areas of poverty within the jurisdiction and region; (3) significant disparities in access to opportunity for any protected class within the jurisdiction and region; and (4) disproportionate housing needs for any protected classes within the jurisdiction and region. 24 CFR § 5.154(d)(2)(i)-(iv). Many obstacles to housing choice and factors that perpetuate segregation recur in community after community, city after city; further, obstacles in one jurisdiction often have spillover effects with respect to patterns of residential racial segregation and disparate access to housing opportunities throughout a larger region. It is therefore useful to HUD and to program participants to assess the existence and magnitude of such common obstacles and share strategies to overcome them. Collection of information regarding specific obstacles is also important to foster some regional collaboration, which the existing Rule already encourages. The insights and experiences gained by others may facilitate collaborations among program participants or help HUD identify best practices that can be disseminated broadly, but further regional collaboration need not be additionally intentionally incentivized through changes to the Rule. Instead, such collaborations can be furthered through the existing framework.

Question 4 also posits the highly unlikely hope that a jurisdiction could be free of "material obstacles" to a truly inclusive community, free of discriminatory barriers to housing choice. In the first instance, "material obstacles" is a term that unnecessarily confuses the existing AFH process, has no grounding in the FHA or AFFH case law, and which should not lead to alterations in the current Rule's requirement that each jurisdiction affirmatively further fair housing by "taking meaningful actions . . . that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics." 24 CFR § 5.152. Even accepting the premise that the term "material obstacles"

could be understood and applied in assessing the validity and sufficiency of a jurisdiction's AFH, in the 50 years since the passage of the FHA, the vast majority of jurisdictions remain segregated along racial and economic lines. It is highly unlikely that any jurisdiction is now, or will be, in the foreseeable future, free of "material obstacles" to meaningful housing choice, thus obviating any utility to a standard by which a jurisdiction *could itself* determine it was free of such obstacles. HUD must accordingly continue its role in carefully and objectively analyzing the AFHs from each program participant. It must discharge its role to ensure that the program participant has given due consideration to the unique circumstances existing in that locality and that each jurisdiction's AFH lives up to the Rule's definition of affirmatively furthering fair housing. Only in continuing to do so can HUD be sure that a locality has actually rid itself of obstacles to housing choice or which perpetuate residential racial segregation.

E. Deference

The current Rule affords jurisdictions and regional collaborations ample deference in establishing priorities and objectives to assess and respond to impediments to fair housing. This level of deference is appropriate; it recognizes the importance of tailoring solutions to local or regional challenges but also ensures that all jurisdictions consider a baseline set of consistent requirements and avoids significant problems of arbitrary differences among them in the absence of such a baseline. Thus, jurisdictions should be afforded limited deference to establish objectives that address obstacles to identified fair housing goals that are unique to their community's needs and experiences or identified obstacles to fair housing choice as well as prescribe metrics and milestones for measuring progress that are meaningfully related and directly responsive to the identified obstacles to fair housing in the particular jurisdiction. Such deference should not, however, serve as a substitute for each jurisdiction's continued requirement to meet the minimum

elements of the AFH under the current rule: (1) a summary of fair housing issues and capacity; (2) an analysis of data; (3) an assessment of fair housing issues; (4) identification of fair housing priorities and goals; (5) discussion of strategies and actions; (6) a summary of community participation; and (7) a review of progress to date (if the jurisdiction or PHA has submitted a prior AFH). *See* 24 CFR 5.154 (d) (1)-(7).

F. HUD Program Evaluation

HUD should evaluate the affirmatively furthering fair housing efforts of program participants by carefully considering the participants' AFH to ensure the jurisdiction provides evidence of the concrete steps it has taken or will take to respond to identified obstacles to fair housing choice that conform with the definition of affirmatively furthering fair housing under 24 CFR § 5.152 (to meaningfully take actions to overcome such obstacles) and ensure that a jurisdiction's AFH is not "substantially incomplete," as outlined in 24 CFR § 5.162(b).[29] Further, HUD should seek to ensure that the AFH demonstrates that the participant has elicited up-to-date information from the community and other sources of data, identified substantive fair housing issues and obstacles affecting communities within the jurisdiction, and developed tailored responses that are reasonably calculated to address and rectify those issues and obstacles.

G. Required Effort for Compliance

[29] The 2015 Rule provides examples of instances where a jurisdiction's AFH may be "substantially incomplete":

> (A) The AFH was developed without the required community participation or the required consultation;
>
> (B) The AFH fails to satisfy a required element in §§ 5.150 through 5.180. Failure to satisfy a required element includes an assessment in which priorities or goals are materially inconsistent with the data or other evidence available to the program participant or in which priorities or goals are not designed to overcome the effects of contributing factors and related fair housing issues.

The rule should not attempt to specify the level of effort that would satisfy an obligation to affirmatively further fair housing. Local conditions are variable, dynamic, and subject to change over time. Generic safe harbors cannot take into account these local conditions and would, ironically, undercut the effort of the existing Rule to ensure that goals and priorities retain a local focus and respond to specific local or regional needs. Actions that further fair housing in one jurisdiction may not adequately address issues and impediments in another.

H. Other Revisions

The Washington Lawyers' Committee believes the AFFH Rule should not be revised because, as written, the regulations provide sufficient clarity and direction, as well as impose meaningful and enforceable obligations, on program participants that further enshrine and realize the duty to affirmatively further fair housing.