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**Submitted via Regulations.gov**

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

Re: Docket No. FR-6123-P-02: Affirmatively Furthering Fair Housing (RIN 2577-AA97)

Dear Office of General Counsel:

This letter is written on behalf of the National Housing Law Project (NHLP) in response to HUD’s Proposed Rule, “Affirmatively Furthering Fair Housing,” dated January 14, 2020. NHLP is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income tenants and homeowners; and increasing housing opportunities for those groups protected by civil rights statutes, including the Fair Housing Act. Our organization provides technical assistance and policy support on a range of housing issues, including the obligation to affirmatively further fair housing, to legal services and other advocates nationwide.

NHLP writes in strong opposition to the adoption of HUD’s Proposed Affirmatively Furthering Fair Housing (AFFH) Rule.<sup>1</sup> For the reasons outlined in this letter, the Proposed Rule is neither a fair housing rule, nor is it an affordable housing rule. Instead, the Proposed Rule prioritizes the Administration’s deregulatory agenda at any cost – including at the expense of a meaningful, inclusive fair housing planning process consistent with the statutory obligation to affirmatively further fair housing. While the Proposed Rule does speak to important issues of affordable housing stock, housing conditions and habitability, and Voucher discrimination, among others, their inclusion need not necessitate the replacement of the 2015 AFFH Rule. These issues should

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<sup>1</sup> Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2,041 (Jan. 14, 2020) (hereinafter “Proposed Rule”).

instead be considered in the larger context of historic patterns of segregation, and discriminatory housing policies at the local, state, and federal levels. The 2015 AFFH Rule provided a framework that allowed for this type of analysis. In contrast, the Proposed Rule outlines minimal requirements, unclear standards for accountability, and limited focus on housing discrimination.

We therefore urge HUD to withdraw the Proposed Rule, and to instead focus on resuming full implementation of the 2015 AFFH Rule.

**A. The Proposed Rule Ignores Segregation and Depicts a Substantially Incomplete Picture Regarding Housing Discrimination within Our Nation’s Communities**

HUD’s Proposed Rule minimizes, or in many instances completely ignores, the enduring role of residential segregation, and how the vestiges of systemic housing discrimination continue to harm members of protected classes. Core fair housing considerations, such as explicitly connecting discriminatory housing policies to racial and other forms of discrimination, are left largely unmentioned, or are only mentioned in passing. In fact, the word “segregation” only appears in the Proposed Rule’s preamble description of the 2015 AFFH Rule. The Proposed Rule instead opts for an analysis that primarily focuses on expanding affordable housing supply.

This approach of minimizing the importance of housing segregation and discrimination is inconsistent with the statutory obligation to affirmatively further fair housing,<sup>2</sup> as well as case law interpreting the AFFH mandate. For example, the district court in *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County* rejected the County’s approach of ignoring racial discrimination under the then-existing framework of the analysis of impediments.<sup>3</sup> In evaluating a motion to dismiss by the County, the court said:

In the face of the clear legislative purpose of the Fair Housing Act, enacted pursuant to Congress's power under the Thirteenth Amendment as Title VIII of the Civil Rights Act of 1968, to combat racial segregation and discrimination in housing, an interpretation of “affirmatively further fair housing” that excludes consideration of race would be an absurd result ... [A]n analysis of impediments that purposefully and explicitly, “as a matter of policy,” avoids consideration of race in analyzing fair housing needs fails to satisfy the duty affirmatively to further fair housing.<sup>4</sup>

The Proposed Rule does not mention the *Westchester* case in the preamble, even though the case is directly relevant to the AFFH obligation of HUD program participants, specifically Community Development Block Grant (CDBG) grantees. Pretending that racial segregation is not a key fair housing issue that must be addressed is inconsistent with the concept of affirmatively furthering fair housing. In order to assist in ending discrimination and segregation, HUD must first acknowledge the role that discriminatory policies and practices have historically played, and continue to play, in our nation’s communities.

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<sup>2</sup> 42 U.S.C.A. § 3608 (West 2020).

<sup>3</sup> 495 F. Supp. 2d 375, 387-88 (S.D.N.Y. 2017).

<sup>4</sup> *Id.*

Despite HUD’s statutory obligation to affirmatively further fair housing, the Regulatory Impact Analysis (RIA) for this rulemaking concedes, “It is difficult to predict the effect of the proposed regulatory changes on the advancement of fair housing. The difficulty of producing an estimate stems from not being able to accurately trace the impact of federal reporting requirements on local policy.”<sup>5</sup> Thus, even the RIA expresses uncertainty as to whether HUD’s proposed approach will qualitatively advance fair housing objectives. It is worth noting that the proposed approach has not been piloted or tested, nor has it been measured for its effectiveness in affirmatively furthering fair housing.

By requiring that jurisdictions and public housing authorities (PHAs) specifically consider fair housing issues such as segregation, the 2015 AFFH Rule ensures that HUD funding recipients are engaged in informed fair housing planning and goal-setting that incorporates HUD data, community input, and local historical context. Under the Proposed Rule, by contrast, a program participant could complete its AFFH certification without addressing (or even mentioning) the impact of historic patterns of housing segregation in a jurisdiction or region.

#### *The Jurisdictional Risk Analysis Omits Important Information Regarding Housing Discrimination*

HUD’s Proposed Rule paints a substantially incomplete picture of the prevalence of housing discrimination within jurisdictions and by PHAs. As written, HUD’s proposed “Jurisdictional Risk Analysis” treats the prevalence of housing discrimination in a jurisdiction or PHA service area as an afterthought – to be examined only in the context of being considered an “outstanding AFFH performer.” Furthermore, the “Risk Analysis” fails to account for the important role of private fair housing enforcement, as the analysis only considers findings of civil rights violations in cases brought by HUD or the U.S. Department of Justice. Ignoring lawsuits brought under the FHA by private parties against a jurisdiction does not present a complete picture about the state of fair housing in a given jurisdiction. Furthermore, fair housing cases where there has been a Voluntary Compliance Agreement, Conciliation Agreement, or other type of settlement are also excluded from this analysis.

HUD itself recognizes in the Proposed Rule preamble the possibility that only relying upon findings in adjudicated cases could incentivize preliminary settlement of fair housing cases.<sup>6</sup> Assuming a jurisdiction sought eligibility for HUD incentives, this structure incentivizes jurisdictions to settle fair housing cases because the jurisdiction’s “outstanding AFFH performer” ranking would not be impacted. The shortcoming of this metric also underscores the weakness of the requirements for a jurisdiction to become an “outstanding AFFH performer,” as a jurisdiction that engages in fair housing violations but settles cases before an adverse adjudication could still be eligible to be an “outstanding AFFH performer.”

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<sup>5</sup> Proposed Regulatory Impact Analysis, Affirmatively Furthering Fair Housing: FR-6123-P-02, at 16 (hereinafter “RIA”), accessed at: <https://www.regulations.gov/docket?D=HUD-2020-0011>.

<sup>6</sup> Proposed Rule, 85 Fed. Reg at 2,047.

These shortcomings of the Jurisdictional Risk Analysis are compounded by the fact that HUD is considering using the resulting rankings as the possible basis of regulatory relief, and selections in demonstrations such as Moving To Work (MTW), and the Rental Assistance Demonstration (RAD). Given the fair housing implications – particularly for tenants -- of participation in demonstrations such as MTW and RAD, it is very important for HUD not to ignore critical indicators of fair housing compliance – which oftentimes includes fair housing claims that have not been fully adjudicated, as well as lawsuits by private parties.

Accordingly, we support the approach in the current AFFH rule, which requires that jurisdictions and PHAs provide information about “any findings, lawsuits, enforcement actions, settlements, or judgments related to fair housing or other civil rights laws” in the AFH.<sup>7</sup>

## **B. The Proposed Rule Substantially Weakens Language Regarding the AFFH Obligation**

In *N.A.A.C.P. v. Secretary of HUD*, the court noted that the Fair Housing Act’s legislative history “suggests an intent that HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to *assist in ending discrimination and segregation*, to the point where the supply of genuinely open housing increases.”<sup>8</sup> HUD’s proposed re-write of what it means to affirmatively further fair housing falls considerably short of this vision of the AFFH obligation. First, HUD actually eliminates the 2015 definition of “affirmatively further fair housing,” a change that will surely create confusion in the field as to what the concept of affirmatively furthering fair housing actually means. Instead, the Proposed Rule states, “[e]very recipient of HUD funding must affirmatively further fair housing by acting in a manner consistent with reducing obstacles within the participant’s sphere of influence to providing fair housing choice.”<sup>9</sup>

Taken together, the description of the AFFH obligation and the definition of “fair housing choice” do not provide any meaningful sense of what affirmatively furthering fair housing means, nor does the preamble to the Proposed Rule cite any legal authority supporting the new description of affirmatively furthering fair housing found in proposed § 5.150(a)(1). Within the description of AFFH, there is no mention of residential segregation, or what HUD grantees are supposed to address the ongoing impacts of decades of discriminatory housing policies, such as redlining or predatory lending. Rather, HUD simply says that AFFH “requires an effort that is in addition to, and not a substitute for, compliance with the specific requirements of the Fair Housing Act.”<sup>10</sup> However, this additional effort is not directly tied to the need to dismantle the vestiges of systemic discriminatory housing practices.

Furthermore, HUD does not adequately justify why the change to the definition of affirmatively furthering fair housing was necessary. For example, the preamble mentions that the proposed new framing of AFFH “would also alleviate the unintended consequences of discouraging the

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<sup>7</sup> 24 C.F.R. § 5.154(d)(1).

<sup>8</sup> 817 F.2d 149, 155 (1st Cir. 1987) (emphasis added).

<sup>9</sup> Proposed 24 C.F.R. § 5.150(a)(1).

<sup>10</sup> Proposed 24 C.F.R. § 5.150(b).

use of federal assistance in communities that need additional help instead of restrictions.”<sup>11</sup> However, the preamble does not mention the Final AFFH Rule’s emphasis on creating a balanced approach such that adopting place-based strategies were consistent with the obligation to affirmatively further fair housing,<sup>12</sup> or why the Final Rule’s approach to balancing both mobility and place-based strategies was insufficient.

The new language regarding the obligation to affirmatively further fair housing also includes language that could be read in a way that actually promotes exclusionary housing policies, while discouraging the approval of affordable housing development in jurisdictions that lack safe, decent, affordable housing options for individuals and families at all income levels. Specifically, “fair housing choice” is defined as providing individuals and families the opportunity and options “to live where they choose, *within their means*, without unlawful discrimination related to” membership in a protected class.<sup>13</sup> Including the phrase “within their means” could be read to mean that exclusionary zoning and other local policies that stand in the way of the construction of affordable housing are actually consistent with the AFFH obligation. This is particularly true in areas where housing costs are high, and where affordable multi-family housing stock has historically not been developed. The phrase conveys the idea that a jurisdiction that has not developed affordable housing in the past has no obligation to take any steps to increase affordable housing opportunities in the future. In turn, such exclusionary policies disproportionately impact members of protected classes. The inclusion of the phrase “within their means” also ignores the fact that current disparities in wealth can be traced back to the legacy of exclusionary and discriminatory housing policies by both government and private sector actors. We therefore urge HUD to remove such language from its framing of affirmatively furthering fair housing.

The Proposed Rule also states that “HUD *may* consider a failure to meet the duty to affirmatively [further] fair housing a violation of program requirements.”<sup>14</sup> However, such permissive language is inconsistent with the certification requirement for both jurisdictions and PHAs. Furthermore, as noted above, HUD has its own statutory obligation to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further” fair housing.<sup>15</sup> It is therefore unclear how -- given this statutory obligation, as well as the requirement that program participants certify compliance with the AFFH obligation -- a failure to affirmatively further fair housing would not be a clear programmatic violation. In proposing this weakened language regarding the AFFH obligation, HUD is sending a signal that it does not consider the AFFH obligation to be a key component of program compliance.

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<sup>11</sup> Proposed Rule, 85 Fed. Reg. at 2045.

<sup>12</sup> Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,278-42,280 (July 16, 2015) (preamble discussion of the balanced approach); *see also* 24 C.F.R. § 5.150 (“A program participant’s strategies and actions must affirmatively further fair housing and may include various activities, such as developing affordable housing, and removing barriers to the development of such housing, in areas of high opportunity; strategically enhancing access to opportunity, including through: Targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation.”).

<sup>13</sup> Proposed 24 C.F.R. § 5.150(a)(2) (emphasis added).

<sup>14</sup> Proposed 24 C.F.R. § 5.150(a)(1) (emphasis added).

<sup>15</sup> 42 U.S.C.A. § 3608(e)(5) (West 2020).

HUD should therefore retain the current language in the 2015 AFFH Rule, including the definition of “affirmatively furthering fair housing.”

### **C. The Proposed Rule Eliminates Important Opportunities for Specific Community Engagement Regarding Fair Housing Issues**

NHLP strongly opposes HUD’s proposed elimination of public engagement that specifically focuses on fair housing issues. The AFH process created by the 2015 AFFH Rule emphasizes local public engagement on important fair housing issues such as segregation, disparities in access to opportunity, and disproportionate housing needs. Strong community participation ensures that program participants’ resulting analysis and goals reflect the input of local stakeholders, including residents who are members of protected classes. As HUD itself states in the *AFFH Rule Guidebook*, “Community participation can have many benefits, including cost-effectiveness, instilling ownership and support of fair housing planning in the broader community, and building trust and relationships throughout the community.”<sup>16</sup>

However, the RIA underscores what is lost when the Proposed Rule does not require robust, inclusive outreach specific to fair housing issues. The RIA states that “additional efforts” that would no longer be required “include web postings, certain outreach to people with disabilities or those with limited-English proficiency” related to the Assessment of Fair Housing process.<sup>17</sup> The RIA failed to point out that the outreach to persons with disabilities and LEP individuals stems from the jurisdiction or PHA’s obligations under Section 504 of the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act of 1964. Furthermore, the RIA notes that jurisdictions “will no longer be required to consider all comments, including data analysis, which the public provides” in the AFH process.<sup>18</sup> The RIA concludes, “jurisdictions *that value public input* can still continue extensive outreach regardless of HUD’s changes and will be able to do so in a way that is most convenient for them.”<sup>19</sup> In other words, whether a jurisdiction will consider public input specifically on fair housing issues depends on whether that jurisdiction wants and values such input from the public. This ignores the whole point of the AFH public participation requirement: to ensure that those HUD grantees are accountable to the residents that they serve with respect to advancing fair housing. It stands to reason that the jurisdictions that are intent on maintaining exclusionary, discriminatory policies would be the least receptive to public feedback highlighting that fact. The RIA seems unconcerned about this loss of public input, noting, “There could be some loss of information from these reduced outreach requirements, but it is difficult to provide an estimate of the value of that information.”<sup>20</sup>

Community participation that focuses on fair housing issues must remain distinct from community participation requirements in other planning processes. The Consolidated Plan and the PHA Plan serve a broader set of purposes than evaluating fair housing issues. It thus makes

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<sup>16</sup> HUD, *AFFH Rule Guidebook*, Version 1, at § 3.4 (Dec. 31, 2015).

<sup>17</sup> RIA at 11.

<sup>18</sup> RIA at 11.

<sup>19</sup> RIA at 11 (emphasis added).

<sup>20</sup> RIA at 11.

sense to have separate community participation and consultation processes specific to fair housing planning. Otherwise, jurisdictions and PHAs will likely fail to adequately analyze and adjust policies and practices that create or perpetuate discriminatory housing practices. We support the 2015 Rule's approach to community engagement because important issues regarding housing discrimination must receive due consideration.

#### **D. The Proposed Rule Declares Local Protections as Inherent Fair Housing Barriers Without Context or Explanation**

NHLP strongly opposes HUD's proposal to designate certain locally adopted resident protections as "inherent barriers to fair housing choice."<sup>21</sup> Among these "inherent barriers" are "certain types of rent control,"<sup>22</sup> "[a]rbitrary or unnecessary labor requirements," and "[u]nduly burdensome wetland or environmental regulations."<sup>23</sup> These designations in particular appear to prioritize promoting the Administration's overarching deregulatory agenda, rather than increasing affordable housing opportunities for members of protected classes. The word choice of "inherent barriers" denotes that HUD has made a predetermination of the validity these resident protections. Such a designation appears inconsistent with HUD's language in the preamble to the Proposed Rule that, "[j]urisdictions can advance fair housing in ways that HUD officials cannot predict because HUD lacks the extensive localized knowledge of State or local officials," adding that "[t]he inherent nature of fitting jurisdictions into pre-determined categories and methods rather than evaluating jurisdictions based on results and achievements could discourage innovation and inhibit HUD's ability to evaluate a jurisdiction's improvement."<sup>24</sup> While jurisdictions are not required to select HUD's pre-selected sixteen "inherent barriers," many jurisdictions will be incentivized to do so because no explanation regarding how the selected course of action is affirmatively furthering fair housing is required when one of the pre-selected "barriers" is chosen by a jurisdiction.<sup>25</sup> This will leave local residents and other stakeholders without any explanation as to how certain goals would address fair housing issues in their communities and in response to local circumstances.

Furthermore, HUD fails to define key terms (e.g., "labor requirements," "certain types" of rent control), and includes terms that are inherently subjective ("unnecessary," "unduly burdensome"). The lack of explanation, or definition of these terms makes the designation of such resident protections as "inherent barriers" to fair housing choice confusing, unhelpful, and counterproductive. For example, what does HUD mean by "certain types of rent control"? Does this include rent stabilization policies that have been adopted as a means of preventing displacement of members of protected groups, such as communities of color and persons with disabilities?

We urge HUD to reject this approach of designating locally adopted resident protections as

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<sup>21</sup> See e.g., Proposed 24 C.F.R. § 91.225(a)(1)(i) (local jurisdictions).

<sup>22</sup> Proposed 24 C.F.R. § 91.225(a)(1)(i) (local jurisdictions). Regulations for states and consortia use the language "rent controls." Proposed 24 C.F.R. § 91.325(a)(1)(i)(I) (states); Proposed 24 C.F.R. § 91.425(a)(1)(i)(A)(9) (consortia).

<sup>23</sup> Proposed 24 C.F.R. § 91.225(a)(1)(i).

<sup>24</sup> Proposed Rule, 85 Fed. Reg. at 2,043.

<sup>25</sup> See e.g. Proposed 24 C.F.R. § 91.225(a)(1)(i) (local jurisdictions).

“inherent” barriers to fair housing choice. Instead, HUD should instead continue implementing the 2015 AFFH Rule, which takes the general approach of examining fair housing issues, contributing factors, and fair housing goals within local context and with the benefit of strong local community engagement.

**E. HUD’S Proposed Rule Minimizes the Critical Role of PHAs in Expanding Housing Opportunities for Members of Protected Classes, and Fails to Ensure that PHAs are Meaningfully Analyzing Their Own Policies**

The 2015 AFFH Rule rightly requires PHAs to conduct a an assessment of fair housing to determine the extent to which their policies and practices were consistent with the PHA’s overall AFFH obligation. Furthermore, the 2015 Rule requires that PHAs devise goals to address identified fair housing issues and contributing factors. PHAs play a critical role in providing housing opportunities to members of protected classes, and have a statutory obligation to certify that they are affirmatively furthering fair housing.<sup>26</sup> Housing authorities set Voucher payment standards, evaluate reasonable accommodation requests, adopt admissions preferences, serve limited English proficient individuals and families, and serve survivors of domestic and sexual violence – among many other functions. Such decisions and policies, and how the public housing and the Housing Choice Voucher programs are administered, directly affect participating families, including members of protected classes.

Under the Proposed Rule, by contrast, PHAs are not required to undertake a meaningful fair housing analysis to be submitted to HUD, nor are they required to devise their own goals and strategies to combat segregation and housing discrimination. Instead, the Proposed Rule would require PHAs to certify that they are affirmatively furthering fair housing, and “that they have consulted with the jurisdiction on how to satisfy their [common] obligations to AFFH.”<sup>27</sup> Only PHAs that have been subject to HUD letter of finding or have had a negative adjudication in a HUD or DOJ FHA matter within the last two years would be required to outline steps the PHA is taking to address the violation.<sup>28</sup> (In certain circumstances, a PHA facing a certification challenge by HUD may also have to provide further explanation about its policies that AFFH to HUD.) Otherwise, as a matter of course, PHAs are generally not required to provide analysis or explanation of how they are affirmatively furthering fair housing in their policies and practices, including within their Administrative Plans or their Admissions and Continued Occupancy Policies – even though the Proposed Rule says that these policies must comply with the PHA’s “plans to affirmatively further fair housing.”<sup>29</sup>

The AFH framework under the existing 2015 AFFH Rule requires PHAs to examine their own policies and practices, and develop concrete goals to address identified fair housing issues and barriers. For example, the Philadelphia AFH process (which was a collaborative AFH between the City and the PHA) resulted in PHA goals and strategies being developed, such as enhancing

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<sup>26</sup> 42 U.S.C.A. § 1437c-1(d)(16) (West 2020).

<sup>27</sup> Proposed 85 Fed. Reg. at 2,045; *see also* Proposed 24 C.F.R. § 903.7(o) (“The PHA must certify that it has consulted with the local jurisdiction on how to satisfy their obligations in common to affirmatively further fair housing, ... and that it will affirmatively further fair housing in its programs and in areas under its direct control.”).

<sup>28</sup> Proposed 85 Fed. Reg. at 2,050.

<sup>29</sup> Proposed 24 C.F.R. § 903.15.

and expanding Voucher mobility through the implementation of Small Area Fair Market Rents, and expanding access to PHA programs through reviewing and enhancing admissions policies for persons with criminal records and persons who are formerly incarcerated.<sup>30</sup> For both goals, the PHA was the lead agency in charge of the goal, and segregation and Racially and Ethnically Concentrated Areas of Poverty (R/ECAPs) were identified as fair housing issues (among others) the selected goals were addressing. HUD's proposal discounts the importance of analyzing PHA policies and how such policies can be analyzed in the context of affirmatively furthering fair housing, as the focus of the local government consultation requirement with PHAs centers on how the jurisdiction can affirmatively further fair housing with respect to PHA programs, not how the PHA itself can affirmatively further fair housing objectives.

Simply requiring that a PHA consult with the local jurisdiction will not be sufficient to get the PHA to engage in a meaningful examination of its own policies and practices. We support the approach of the 2015 AFFH Rule, which requires that PHAs, pursuant to their AFFH obligation, analyze their own policies and practices and develop goals to address areas where PHA policies may be perpetuating segregation or disparities in access to opportunity for members of protected groups.

#### **F. The Proposed Rule Does Not Provide a Framework that Ensures Effective Goal-Setting**

One of the hallmarks of the 2015 AFFH Rule was developing a planning framework that resulted in goals that included “metrics and milestones for determining what fair housing results will be achieved.”<sup>31</sup> Importantly, the need for concrete, actionable goals stemmed from the general lack of meaningful goal-setting from the analysis of impediments (AI) process. While the Proposed Rule preamble says that jurisdictions will be “required to submit at least three measurable, concrete goals it plans on reaching in the upcoming years or obstacles to fair housing choice it plans to address, within its scope of influence, to increase fair housing choice,”<sup>32</sup> taken together with the rest of the Proposed Rule, it is unclear how HUD would practically determine that the submitted goals address real fair housing concerns within the jurisdiction, or actually affirmatively further fair housing.

There are several reasons why this is the case. First, while HUD states that it would expect jurisdictions “to provide a brief and direct explanation of how pursuing each goal or alleviating each obstacle would further fair housing choice in their jurisdiction,”<sup>33</sup> it then provides an exception for jurisdictions that select one of the “inherent barriers,” such that no additional explanation regarding affirmatively furthering fair housing would be required. This is despite the fact that HUD repeatedly acknowledges that each jurisdiction faces a different set of circumstances. It is therefore unclear why no explanation would be required as to how the removal of such a barrier is advancing fair housing in a particular jurisdiction, given that

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<sup>30</sup> City of Philadelphia and the Philadelphia Housing Authority, Assessment of Fair Housing, at 319, 325 (Dec. 23, 2016), available at: <http://www.pha.phila.gov/media/176930/afh-2016-for-web.pdf>.

<sup>31</sup> 24 C.F.R. § 5.154(d)(4)(iii).

<sup>32</sup> Proposed Rule, 85 Fed. Reg. at 2045.

<sup>33</sup> Proposed Rule, 85 Fed. Reg. at 2045.

jurisdiction's individual circumstances. Second, HUD only commits to reviewing "goals or obstacles for completeness" and verifying the use of "concrete and measurable standards."<sup>34</sup> Because no required analysis, data evaluation, or fact-finding by the jurisdiction is required, it is unclear what HUD would be measuring in terms of completeness. Furthermore, the annual performance reports regarding progress on the jurisdiction's goals or obstacles will be reviewed by HUD under a rational basis review standard, a very deferential standard of review. Given this deferential standard of review, a jurisdiction could simply set the metrics such that they could be easily met without actually meaningfully advancing fair housing objectives – such as committing to holding a series of meetings to study a particular fair housing issue, without any real progress being made on that issue. As written, the Proposed Rule is proposing a process where HUD declines to meaningfully and critically evaluate a jurisdiction's progress toward affirmatively furthering fair housing.<sup>35</sup>

Additionally, it is worth noting that while the 2015 AFFH Rule requires goal-setting, HUD did not require that a jurisdiction achieve specific outcomes. We support the approach that HUD outlined in the preamble to the 2015 rule:

HUD agrees with the commenters that the AFH process, to be effective, should have benchmarks and outcomes, but HUD agrees with the latter commenters that the final rule should not specify the benchmarks or mandate certain outcomes. The final rule *provides for the establishment of benchmarks, but established by the program participant and not by HUD*. However, as part of the AFH review process, HUD will include review of benchmarks and outcomes, as reflected in a program participant's goals.<sup>36</sup>

The 2015 AFFH Rule is not overly prescriptive, nor does it mandate any particular outcomes. However, the AFFH Rule does include HUD oversight to ensure that the goals and benchmarks proposed by both jurisdictions and PHAs are meaningful and logically connected to HUD-provided data, local data, and public participation. We therefore support retaining HUD's current AFFH Rule and the withdrawal of the Proposed Rule.

## **H. Additional Comments**

NHLP offers the following additional comments regarding the Proposed Rule:

- The Proposed Rule's Preamble downplays the strong support for the existing AFFH Rule among housing advocates.
- By ranking jurisdictions in the Jurisdictional Risk Analysis, the Proposed Rule is more likely to pit local jurisdictions against one another as they are now competitors, rather

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<sup>34</sup> Proposed Rule, 85 Fed. Reg. at 2045.

<sup>35</sup> The Eleventh Circuit has previously observed that HUD has an obligation to "assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply." *N.A.A.C.P. v. Secretary of HUD*, 817 F.2d 149, 156 (11th Cir. 1987).

<sup>36</sup> AFFH Rule, 80 Fed. Reg. at 42,287 (preamble).

than collaborators. The 2015 AFFH Rule allows (and in fact encourages) program participants to engage in joint or regional collaborations for completing and submitting their Assessments of Fair Housing. HUD previously (and correctly) recognized that fair housing issues do not stop at geographic boundaries, and require a regional approach.<sup>37</sup> The Proposed Rule fails to adequately incentivize local jurisdictions to collaborate regionally to tackle a range of fair housing issues.

- As proposed, the Jurisdictional Risk Analysis provides no mechanism for public feedback on the scoring that HUD assigns to a given jurisdiction. While the jurisdiction has an opportunity to appeal the ranking, members of the public have no means to directly convey to HUD their view on whether a jurisdiction’s ranking is appropriate, or whether there is local information that supplements or contradicts the ranking.
- The “inherent barriers” to fair housing choice list included in the AFFH certification explicitly mention only one protected class – persons with disabilities<sup>38</sup> -- but make no further attempt to directly connect disparities in access to housing opportunities with longstanding patterns of segregation and discrimination against other protected classes, or to more fully explore housing barriers faced by persons with disabilities.
- Prior to suspending the AFFH Rule and the Assessment Tools, HUD did not fully utilize the Assessment Tool inserts designed to respond to the needs of smaller program participants, such as small PHAs and small jurisdictions, that collaborated with larger lead program participants in completing an AFH. The Assessment Tool for Local Governments included inserts for PHAs with 1,250 or fewer (combined public housing and Housing Choice Voucher) units, and local governments receiving \$500,000 or less in CDBG funds. The inserts included a streamlined set of questions for the fair housing analysis portion of the assessment, if the program participant chose to collaborate with a lead program participant that used the “main” Assessment Tool. HUD should withdraw the current Proposed Rule and further explore whether these inserts for small program participants could be a solution that would maintain the current AFH structure while also streamlining smaller program participant involvement and encouraging collaboration among program participants.
- The existing AFFH Rule has been used to identify policies and practices that displace or otherwise result in the lack of housing support for survivors of domestic violence, sexual assault, and stalking.<sup>39</sup> For example, survivors of domestic violence face a heightened risk of eviction due to municipal ordinances that penalize tenants from seeking police or emergency assistance—often known as “crime-free” or nuisance ordinances. Such laws may disproportionately impact survivors of domestic violence in violation of the Fair Housing Act. Under the existing AFFH Rule’s Assessment Tools, jurisdictions must examine such policies and their disparate impact on members of protected classes, including women. Elimination of nuisance and crime-free ordinances can be a strategy of

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<sup>37</sup>AFFH Rule, 80 Fed. Reg. at 42,305 (noting that the AFFH obligation “requires a regional analysis,” and noting the *HUD v. Thompson* case).

<sup>38</sup> See e.g., Proposed 24 C.F.R. § 91.225(a)(1)(i)(B) (local jurisdiction certification).

<sup>39</sup> City of Ithaca, NY, *Goal Summary: Assessment of Fair Housing 2017*, <http://www.cityofithaca.org/DocumentCenter/View/7134/Ithaca-Assessment-of-Fair-Housing-AFH-Goal-Summary-Table-32918?bidId=>.

affirmatively furthering fair housing.<sup>40</sup> Under the Proposed Rule, however, jurisdictions and PHAs will be able to complete their AFFH certifications without analyzing whether a jurisdiction or PHA’s policies and practices discriminate against survivors of domestic violence.<sup>41</sup>

- The designation of jurisdictions as “outstanding” AFFH performers would be unwarranted under the proposed framework, given the Proposed Rule’s lack of focus on taking affirmative steps to dismantle decades of segregation.

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In closing, we reiterate our strong support for HUD’s 2015 AFFH Rule and urge HUD to withdraw its proposed replacement of the 2015 Rule.

The 2015 AFFH Rule provides HUD program participants with much-needed guidance and direction, while ensuring flexibility that is responsive to residents and local conditions. HUD must ensure that meaningful fair housing analysis, informed by data and community participation, as well as the goal-setting resulting from that analysis, continue. Instead of focusing agency resources on implementing a new, substantially less effective Rule, HUD should instead resume full implementation of the 2015 AFFH Rule.

If you have any questions about these comments, please contact Renee Williams of our staff, [rwilliams@nhlp.org](mailto:rwilliams@nhlp.org).

Sincerely,

/s/

Shamus Roller  
Executive Director

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<sup>40</sup> U.S. Department of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services, at 13 (Sept. 13, 2016).

<sup>41</sup> The Proposed Rule maintains the Housing and Homeless Needs Assessment, with one of the categories being victims of domestic violence, dating violence, sexual assault, and stalking. Proposed 24 C.F.R. § 91.205(b)(1)(ix). However, this needs assessment focuses on the number and characteristics of individuals needing housing, The Housing Needs Assessment does not require an analysis that examines and devises goals to address systemic policies and practices that discriminate against particular groups, such as domestic violence survivors. Furthermore, while the PHA Plan itself does provide for a discussion about PHA policies that assist survivors, there is no analysis required that examines how women survivors are discriminated against or denied housing opportunities.