



UNITED STATES COMMISSION ON CIVIL RIGHTS

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VIA ELECTRONIC FILING

Office of the General Counsel
Regulations Division
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0001

RE: U.S. Commission on Civil Rights Comment in Opposition to FY-6123-P-02
Affirmatively Furthering Fair Housing
Docket ID: HUD-2020-0011

The U.S. Commission on Civil Rights, by majority vote, submits the following comments in opposition to the Department of Housing and Urban Development's (HUD) Notice of Proposed Rulemaking that seeks to roll back requirements for local jurisdictions to comply with the Fair Housing Act.¹ The Commission is an independent, bipartisan, fact-finding federal agency whose mission is to inform the development of national civil rights policy and enhance enforcement of federal civil rights laws.² Congress has charged the Commission to, among other duties, "make appraisals of the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws under the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice."³ For more than sixty years, the Commission and its state advisory committees have investigated and reported on the varied forms of discrimination that create barriers to civil rights equality in our country. The Commission has deep concern that the Proposed Rule will undermine the purpose of the Fair Housing Act and allow fair and affordable housing to remain out of reach for America's neediest people. The Commission requests that HUD consider and respond to the following comments and strongly urges HUD to restore the former Rule.

I. The Affirmatively Furthering Fair Housing requirement is a crucial provision of the Fair Housing Act.

Centuries of overtly discriminatory policies and practices left America's residential communities deeply segregated.⁴ In passing the Fair Housing Act, Congress not only prohibited discrimination – it required the government to take proactive steps to remedy entrenched segregation and disproportionate levels of opportunity between white Americans and Americans of color. The Fair

¹ U.S. Dep't of Housing and Urban Development, Proposed Rule, Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041 (Jan. 14, 2020), <https://www.federalregister.gov/documents/2020/01/14/2020-00234/affirmatively-furthering-fair-housing>.

² Mission, U.S. Commission on Civil Rights, <https://www.usccr.gov/about/index.php>.

³ 42 U.S.C. § 1975a(a)(2)(B).

⁴ U.S. Commission on Civil Rights, *Understanding Fair Housing* (1973), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11042.pdf>, at 3.

Housing Act accomplishes this requirement through its affirmatively furthering fair housing (AFFH) requirement. AFFH requires government agencies and recipients of federal funding (including state and local public housing authorities) to “administer their programs and activities relating to housing and urban development ... in a manner affirmatively to further the purposes of [the Fair Housing Act].”⁵

Persistent residential segregation in the decades after the Fair Housing Act made housing discrimination illegal illustrates the need for AFFH. The passage of the Fair Housing Act invalidated discriminatory practices, but the Commission found that residential segregation remained “widely prevalent” into the 1980s⁶ and recent Commission testimony, including from HUD itself, illustrates its persistence today. In 2018, then-HUD General Deputy Assistant Secretary for Fair Housing & Equal Opportunity Bryan Greene told the Commission: “Ongoing segregation in America, regular reports of sexual harassment in housing, and newly constructed properties inaccessible to people with disabilities, are just some examples that underscore that we have not yet conquered housing discrimination.”⁷

Moreover, the impact of housing segregation is felt even outside of the housing context. In our 2018 report on public education inequities, the Commission found that “[m]any students in the U.S. living in segregated neighborhoods and concentrations of poverty do not have access to high-quality schools simply because of where they live, and there is potential for housing policy to help provide better educational opportunities for these students.”⁸

In light of the continuing prevalence of residential segregation and obstacles to fair housing, HUD should not eradicate rules and programs that have the very objective of addressing that problem.⁹

II. The existing rule was written to address these problems, is necessary to ensure compliance with the FHA, and has not been given sufficient time to take effect.

The record of enforcement of the affirmative furthering fair housing requirements of the Fair Housing Act was plainly inadequate prior to the adoption of the 2015 Rule and would be diminished without it.¹⁰ The Commission also recently took in bipartisan testimony on the importance of an

⁵ 42 U.S.C. 3601 Sec. 808(d).

⁶ U.S. Commission on Civil Rights, *A Sheltered Crisis: The State of Fair Housing in the Eighties (Presentations at a consultation sponsored by the United States Commission on Civil Rights)* (Sept. 1983), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12f133.pdf>, at 5.

⁷ Written Testimony of Bryan Greene, General Deputy Assistant Secretary, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Nov. 2, 2018 (on file) at 3.

⁸ U.S. Commission on Civil Rights, *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (2018), <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf> at 106.

⁹ Taking such action is especially concerning given that HUD recently weakened another important tool for achieving inclusive communities: last year HUD proposed to amend its disparate impact rule to substantially diminish disparate impact liability’s effectiveness at combatting housing discrimination.

¹⁰ U.S. Commission on Civil Rights, *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (2018), <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf> at 99; James A. Kushner, “An Unfinished Agenda: The Federal Fair Housing Enforcement Effort,” *Yale Law & Policy Review*, vol. 6, no. 2, Article 8 (1988), pp. 348-360, <https://digitalcommons.law.yale.edu/ylpr/vol6/iss2/8/>; U.S. Government Accountability Office, GAO-10-905, *Housing And Community Grants: HUD Needs to Enhance its*

AFFH rule for securing the FHA goal of housing integration: Kim Kendrick, former HUD Assistant Secretary for Fair Housing & Equal Opportunity, told the Commission in 2018 that local jurisdictions need guidance from HUD in order to carry out their AFFH requirements.¹¹

A 2010 Government Accountability Office (GAO) report emphasized how ineffective local jurisdictions and HUD had been at carrying out the AFFH requirement in the absence of a Rule.¹² The overall lack of AFFH compliance has also been highlighted by several of the Commission's Advisory Committees. The Commission's DC Advisory Committee described in a 2011 report DC's struggles with carrying out its own AFFH requirement.¹³ A 2005 analysis of impediments showed several impediments to fair housing in DC: lack of compliance with fair housing laws by the real estate and housing industry (mortgaging/lending, insurance/appraisals, etc.); decreasing numbers of affordable housing units for low- and moderate-income households; information on availability of affordable housing across many DC neighborhoods not accessible to individuals and families seeking homes; and low levels of home-buying literacy among protected classes.

In 2010, DC reported to HUD that it had taken a number of actions aimed at AFFH. According to the DC Advisory Committee to the Commission, "substantially all" of the actions described processes and not results. Among the "results" DC did present was an increase in the number of affordable housing units; however, the DC Advisory Committee found that these units were not necessarily located in the right areas or adequately marketed to the right populations of people to be properly considered "fair" housing.¹⁴

In 2015, the Vermont Advisory Committee to the Commission convened a briefing and prepared a memorandum describing the issues Vermont has faced in affirmatively furthering fair housing, finding that housing discrimination continues to occur in Vermont and that the "supply of affordable housing, especially affordable and accessible housing, in Vermont is 'inadequate.'"¹⁵

To address the deficiencies in AFFH compliance, HUD in 2015 promulgated its existing Rule, which included a definition of "affirmatively furthering fair housing" and provided "an effective planning approach to aid HUD grantees in taking meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination."¹⁶

Requirements and Oversight of Jurisdictions' Fair Housing Plans (Washington, DC, 2010), <http://www.gao.gov/new.items/d10905.pdf>.

¹¹ *Are Rights a Reality? Evaluating Federal Civil Rights Enforcement* Briefing before the U.S. Comm'n on Civil Rights, Washington, DC, Nov. 2, 2018, transcript, <https://www.usccr.gov/calendar/2018/11-02-Evaluating-Federal-Civil-Rights-Enforcement.pdf> at 265-67.

¹² U.S. Government Accountability Office, GAO-10-905, *Housing And Community Grants: HUD Needs to Enhance its Requirements and Oversight of Jurisdictions' Fair Housing Plans* (Washington, DC, 2010), <http://www.gao.gov/new.items/d10905.pdf> at 2 *et seq.*

¹³ DC Advisory Committee to the U.S. Commission on Civil Rights, *Affirmatively Furthering Fair Housing in the District of Columbia*, June 2011, https://www.usccr.gov/pubs/docs/07-13-11_DCSAC.pdf.

¹⁴ *Id.* at 8.

¹⁵ Vermont Advisory Committee to the U.S. Commission on Civil Rights, *Housing Discrimination in Vermont: A Handshake and a Smile*, September 2018, <https://www.usccr.gov/pubs/2018/09-21-VT-Housing.pdf> at 12.

¹⁶ HUD Exchange, *Affirmatively Furthering Fair Housing (AFFH)*, <https://www.hudexchange.info/programs/affh> (last visited Feb. 25, 2020).

The major component of the 2015 AFFH Rule was a requirement that jurisdictions perform an Assessment of Fair Housing (AFH) with the use of an Assessment Tool maintained by HUD. The Assessment Tool consisted of a series of questions designed to help grantees identify issues such as:

- Patterns of integration and segregation;
- Racially or ethnically concentrated areas of poverty;
- Disparities in access to opportunity; and
- Disproportionate housing needs.¹⁷

Under the AFFH Rule, jurisdictions were required to use the Assessment Tool to carry out an AFH, submit the AFH to HUD for approval, and then incorporate the AFH findings into subsequent community development plans.

In early 2018 after only 49 jurisdictions had submitted their AFHs, HUD withdrew the Assessment Tool and effectively suspended the AFFH Rule. In doing so HUD claimed that the rule “proved ineffective, highly prescriptive, and effectively discouraged the production of affordable housing.”¹⁸

With its Proposed Rule, HUD plans to substantially reduce the requirements for local governments and PHAs to comply with AFFH. The Proposed Rule will effectively eliminate affirmative planning requirements, purportedly in an effort to “improve affordable housing choices.” But, as recognized by the Commission’s Vermont Advisory Committee, “AFFH focuses not just on the importance of affordable housing but also the importance of creating inclusive communities...”¹⁹ The Proposed Rule also removes a requirement that jurisdictions allow public participation in the creation of their housing and community development plans.

The Proposed Rule rolls back these crucial provisions despite the fact that fair housing continues to be out of reach for many people in many parts of the country. In 2019, the Illinois Advisory Committee to the Commission took in testimony about the continuing barriers that impacted the availability of fair and affordable housing:

“Local governments often intentionally or sometimes unintentionally uphold segregation sometimes because of ambivalence to fair housing issues or more directly perhaps by using their home rule authority to thwart fair and affordable housing efforts. This really creates a patchwork of compliance, and this harms the County and the State’s ability to comprehensively address these issues and comprehensively affirmatively further fair housing.”²⁰

¹⁷ HUD Exchange, The Assessment of Fair Housing, <https://www.hudexchange.info/programs/affh/overview> (last visited Feb. 25, 2020).

¹⁸ U.S. Department of Housing and Urban Development, “HUD Issues Improved Fair Housing Rule,” Press Release, Jan. 7, 2020, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_002.

¹⁹ Vermont Advisory Committee to the U.S. Commission on Civil Rights, *Housing Discrimination in Vermont: A Handshake and a Smile*, September 2018, <https://www.usccr.gov/pubs/2018/09-21-VT-Housing.pdf> at 9.

²⁰ Fair Housing Briefing before the Illinois Advisory Committee of the U.S. Comm’n on Civil Rights, May 3, 2019, transcript, at 95.

A survey conducted between 2015-2017 demonstrated the “patchwork of compliance” across over 60 municipalities in Cook County, Illinois, showing that only a third of municipalities conducted annual reviews of local ordinances for impediments to fair housing, while only 20% provided any incentives to promote development of affordable and accessible housing.²¹ The Illinois Advisory Committee also received testimony explaining that the existing Rule required jurisdictions to work to identify impediments to fair housing and develop measurable goals and benchmarks to be assessed periodically with progress tracked over time. Without this requirement, it is difficult to evaluate whether or not jurisdictions are moving in the right direction.²² Panelists also discussed the problem of insufficient funding for, and inadequate supervision of, various Illinois public housing authorities.²³

The continuing struggle of these and other jurisdictions across the country to affirmatively further fair housing choice for their residents strongly counsels against weakening the only source of guidance available to jurisdictions regarding the FHA’s AFFH requirement. According to the press release accompanying the publication of the existing Rule: “HUD’s final rule responds to the recommendations of the 2010 Government Accountability Office report as well as stakeholders and HUD program participants who asked for clearer guidance, more technical assistance, better compliance and more meaningful outcomes.”²⁴ Commission research demonstrated, however, that “[the prior] rule provide[d] clarification about HUD program participants’ obligations under the law, and provide[d] clear guidelines to meet those obligations in the use of HUD funds, in order to make it easier for grantees to incorporate fair housing goals into the local planning process.”²⁵

Moreover, the Commission also received testimony that the previously existing rule had already been benefitting communities.²⁶ According to Poverty & Race Research Action Council (PRRAC) testimony to the Commission in 2018: “The AFFH rule established a valuable oversight mechanism and planning framework to help HUD grantees meet their statutory duty to take proactive steps to dismantle entrenched patterns of segregation, discrimination, and disinvestment. This rule has already benefitted many communities around the country. Unfortunately, the suspension of the AFFH rule in January of this year and HUD’s intent to revise the rule undermine this critically important tool for advancing fair housing. While the rule is suspended, there is little HUD oversight

²¹ *Id.* at 104-05.

²² *Id.* at 125-26.

²³ *Id.* at 143-47.

²⁴ U.S. Department of Housing and Urban Development, “HUD Announces Final Rule on Affirmatively Furthering Fair Housing,” HUD Archives: News Releases, Jul. 8, 2015, <https://archives.hud.gov/news/2015/pr15-084.cfm>.

²⁵ U.S. Commission on Civil Rights, *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (2018), <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf> at 101; U.S. Department of Housing and Urban Development, “HUD Rule on Affirmatively Furthering Fair Housing,” July 2015, https://www.huduser.gov/portal/affht_pt.html#final-rule.

²⁶ See Furman Center Comment Letter (March 2018), The Potential Costs to Public Engagement of HUD’s Assessment of Fair Housing Delay, available at <http://furmancenter.org/news/press-release/nyu-furman-center-responds-to-huds-assessment-of-fair-housing-delay>; https://prprac.org/pdf/37-1_Supplemental_Declaration_of_Justin_Steil.pdf.

of fair housing planning. Keeping the rule intact and restoring its implementation is critically important to achieving the aims of the Fair Housing Act.”²⁷

PRRAC pointed to the testimony of Justin Steil, Professor of Law and Urban Planning at MIT, who conducted a study comparing the Analyses of Impediments (AIs) created before the 2015 rule with AFHs created pursuant to the rule of 28 jurisdictions of varying sizes across the country. He found that across the board, the AFHs contained more actionable and measurable goals than the pre-rule AIs.²⁸

The proposed rule, by effectively eliminating the AFH and community participation requirements, represents a significant backward step toward achieving inclusive communities.

III. The proposed rule does not adequately address the issues that motivated the creation of the existing rule, and is inconsistent with HUD’s own mission to “create strong, sustainable, inclusive communities, and quality, affordable homes for all.”²⁹

HUD accomplishes its mission through help from and collaboration with jurisdictions and local public housing authorities. The statutory requirement of affirmatively furthering fair housing has existed since the Fair Housing Act was enacted in 1968; as discussed above, the lack of specific requirements for how a jurisdiction fulfills this requirement, in the absence of a rule or guidance for local jurisdictions, restricted progress towards the integrated communities envisioned by the FHA.

Modern-day policies and practices in housing that tend to result in discriminatory effects and entrenched residential segregation persist.³⁰ Any proposal to weaken protections against covert forms of discrimination ignores this reality and undermines HUD’s mission to “create strong, sustainable, inclusive communities and quality affordable housing for all.”³¹

The proposed rule effectively allows jurisdictions to disregard the AFFH requirement, by leaving it up to jurisdictions to determine what is “within their control or influence.” This is language of encouragement rather than requirement, with no consequence behind the encouragement – and this nation has experienced just how difficult it is to dislodge discrimination in the face of toothless aspiration rather than meaningful enforcement.

²⁷ Poverty & Race Research Action Council, Written Statement for the *Are Rights a Reality? Evaluating Federal Civil Rights Enforcement* Briefing before the U.S. Commission on Civil Rights, Nov. 2, 2018, available at https://prrac.org/pdf/usccr_testimony_11-02-2018.pdf.

²⁸ *National Fair Housing Alliance, et al. v. Ben Carson, et al.*, Third Declaration of Justin Steil, Dkt. 37-1, Case No. 1:18-cv-01076-BAH (D.D.C. Jun. 26, 2018), available at https://prrac.org/pdf/37-1_Supplemental_Declaration_of_Justin_Steil.pdf at 2-3, et seq.

²⁹ U.S. Department of Housing and Urban Development, *Strategic Plan 2014-2018* (April 2014, Washington, DC), <https://portal.hud.gov/hudportal/documents/huddoc?id=hudstrategieplan2014-2018.pdf>.

³⁰ *Are Rights a Reality? Evaluating Federal Civil Rights Enforcement* Briefing before the U.S. Comm’n on Civil Rights, Washington, DC, Nov. 2, 2018, transcript, <https://www.usccr.gov/calendar/2018/11-02-Evaluating-Federal-Civil-Rights-Enforcement.pdf> at 232-37; 265-67; see also Written Testimony of Kim Kendrick, former HUD FHEO Assistant Secretary, Nov. 2, 2018, at 7 (on file).

³¹ U.S. Department of Housing and Urban Development, Mission, <https://portal.hud.gov/hudportal/HUD?src=/about/mission>.

To justify its reversal of the existing Rule, HUD leans on its existing measures – including “imposing site and neighborhood standards for HUD-funded development, requiring affirmative marketing of housing units to promote integrated neighborhoods ... designing its programs to be consistent with its AFFH obligation,” and disparate impact liability – to claim that the 2015 rule is unnecessary to satisfy its AFFH obligation.³² This rationale seems to disregard the fact that, as the Commission has found in its investigations and HUD itself testified to the Commission³³: “residential segregation persists today, caused and perpetuated by both socioeconomic conditions and ongoing instances of discrimination in the housing market, which diminishes housing, employment, financial, and educational opportunity, particularly for low-income individuals and people of color.”³⁴

The Commission urges HUD to remain mindful of the long, structural, and corrosive history of discrimination in the United States that preceded the enactment of the Fair Housing Act, and that, unfortunately, has survived it too, largely following from insufficient enforcement of its terms. Racial and socioeconomic segregation was so deeply entrenched in American society by the 1960s that a law prohibiting discrimination could not, by itself, bring about the inclusive communities HUD touts in its mission. Undoubtedly, the 90th Congress was well aware of this when it made the decision to codify the AFFH requirement. Without a rule that actually holds government entities to account, AFFH remains aspirational and powerless against the many challenges still standing in the way of ensuring fair housing for all.

³² U.S. Dep’t of Housing and Urban Development, Proposed Rule, Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041 (Jan. 14, 2020), <https://www.federalregister.gov/documents/2020/01/14/2020-00234/affirmatively-furthering-fair-housing>.

³³ Written Testimony of Bryan Greene, General Deputy Assistant Secretary, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Nov. 2, 2018 (on file) at 3.

³⁴ U.S. Commission on Civil Rights, *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (2018), <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf> at 99; Robert G. Schwemm, “Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s ‘Affirmatively Further’ Mandate,” *Kentucky Law Journal*, vol. 100, no. 1 (2001-2002), pp. 125-176; Margery Austin Turner, Rob Santos, Diane K. Levy, Doug Wissoker, Claudia Aranda and Rob Pitingolo, *Housing Discrimination Against Racial and Ethnic Minorities 2012*, U.S. Department of Housing and Urban Development (Washington, DC, 2013) https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf.