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Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, SW, Room 10276
Washington, DC 20410-0500

Submitted electronically via www.regulations.gov

RE: Affirmatively Furthering Fair Housing Proposed Rule. Docket No. FR-5173-P-01

To Whom It May Concern:

The National Council of State Housing Agencies (NCSHA) thanks you for the opportunity to comment on HUD's proposed rule implementing Title VIII of the Civil Rights Act of 1968. NCSHA and its member state housing finance agencies (HFA) are committed to providing quality affordable housing opportunities for low- and moderate-income individuals and families free from discrimination. Central to our vision of an affordably housed nation is the goal of removing obstacles that impede anyone from accessing the affordable housing of their choice.

We are deeply committed to helping HFAs administer programs and allocate resources in a nondiscriminatory manner to create greater housing choice and opportunity. NCSHA welcomes the opportunity to work with HUD to strengthen its regulations to advance this objective and appreciates the spirit in which the regulations are being proposed to reduce the risk of litigation for program participants. We also thank HUD for the public briefings it has held and participated in since releasing the proposed rule, and we hope HUD will provide additional opportunities for discussion and input prior to adopting a final rule.

NCSHA represents the HFAs of the 50 states, the District of Columbia, New York City, Puerto Rico, and the U.S. Virgin Islands. HFAs administer a wide range of affordable housing and community development programs, including HOME Investment Partnerships (HOME), Section 8, Emergency Solutions Grants (ESG), Community Development Block Grants (CDBG), and Housing Opportunities for Persons with AIDS (HOPWA). HFAs also administer down payment assistance, homebuyer education, loan servicing, state housing trust funds, and the Low Income Housing Tax Credit (Housing Credit) and issue tax-exempt private activity bonds (Housing Bonds) to finance affordable housing for renters and home buyers.

NCSHA is a national nonprofit, nonpartisan Washington, DC-based association that represents the interests of state HFAs before the Administration and the Congress. In addition to its policy and advocacy work, NCSHA provides HFAs education and training and facilitates best practice exchange among them.

We appreciate that the current process of requiring program participants to prepare a planning document, known as an Analysis of Impediments (AI), to identify obstacles to fair housing choice contains weaknesses and should be improved. We seek to ensure that the final rule recognizes that many of its provisions will affect states differently than they affect local jurisdictions, provides sufficient administrative flexibility, and minimizes the burden of implementation on a statewide level. We applaud HUD's goal of minimizing legal challenges that may result from a lack of clear guidance. We do, however, seek to ensure clarity about the rule's application to preserving the existing affordable housing stock and creating new opportunities. Our specific comments are as follows:

**HUD Review of the Assessment of Fair Housing (AFH)**

NCSHA appreciates that HUD is attempting to replace the AI with an AFH that will improve compliance with the Affirmatively Furthering Fair Housing (AFFH) requirements of the Fair Housing Act (The Act) and HUD's oversight of program participants' fair housing plans. The rule provides HUD with 60 days to complete its review of a program participant's AFH. It does not, however, specify which division of HUD will be conducting such review. NCSHA strongly encourages HUD to include experienced staff with strong program knowledge in whatever team it assembles.

**Definition of Racially or Ethnically Concentrated Areas of Poverty (RCAP/ECAP)**

The proposed rule establishes a threshold for racial/ethnic concentration. Under the rule, an RCAP or ECAP must have a non-white population of 50 percent or more and a poverty rate that exceeds 40 percent.

NCSHA urges HUD to carefully consider the implications of its racial and ethnic concentration definitions. Public dissemination of data which labels certain communities in this way could have a number of unintended consequences, including exacerbating NIMBY issues and further complicating efforts to provide housing choice to minority populations. Furthermore, as demonstrated by HFAs that have tested these definitions within their jurisdictions, the addition of just a few low-income housing units to a non-concentrated area can flip a census tract from a non-concentrated area to one of concentration, potentially further hampering efforts to provide affordable housing opportunities in non-concentrated areas.

The definition may also inappropriately label rural communities as "racially/ethnically concentrated areas of poverty," which could discourage state/local investment of resources in those areas. This is a particular concern for communities with high numbers of farmworkers

(who are disproportionately low-income and Hispanic) and Native Americans (who are also disproportionately low-income and minorities). The rule should make clear that it does not apply to Native American Reservations and Tribal Lands, since those areas are by design minority concentrated areas.

The definition focuses heavily on poverty and the rule in general seems to emphasize anti-poverty strategies to the point of treating low-income persons as a protected class. Since poverty is not a protected class under The Act, the rule appears to move beyond the scope of the AFFH obligation. While there is significant correlation between poverty and protected classes, not all protected classes are poor and a significant share of the poor are not among the protected classes.

Similarly, proximity to amenities, employment, and schools may be beneficial, but failure to provide access to these facilities is not per se a violation of The Act. Proximity to these features may be one measure out of many for program participants to consider when evaluating applications for funding. They should not, however, be viewed by HUD as proxies for assessing fair housing violations against protected classes.

Finally, we recommend that HUD consider the outcome of *Mount Holly v. Mt. Holly Gardens Citizens in Action Inc.*, currently pending before the U.S. Supreme Court, before finalizing this rule. The central question in that case is whether disparate impact claims are cognizable under The Act. The Court's ruling may clarify the appropriate definitions to be used in interpreting The Act.

**Applicability**

The rule clearly applies to program participants receiving CDBG, HOME, ESG, and HOPWA formula funding. Section 903.2 describes a Public Housing Agency's (PHA) burden to affirmatively further fair housing through its "development related activities," but it is unclear, whether or how the rule applies to voucher-only PHAs. Considering the constrained fiscal environment in which PHAs are operating and the lack of fee income generated by voucher-only PHAs, HUD should consider limiting the rule's applicability to PHAs with development programs. Past actions, such as setting higher payment standards in higher cost suburban locations are no longer feasible. Alternatively, in the event that HUD deems the rule is applicable to voucher-only PHAs, we request specific guidance regarding what further steps such PHAs can take to affirmatively expand housing opportunities.

**Public Participation Requirements**

Section 91.115 requires the state to adopt a citizen participation plan that sets forth the state's policies and procedures for participation from citizens, residents, and other interested parties. It also suggests states publish a summary of the proposed AFH and/or the proposed consolidated plan in one or more newspapers of general circulation and make copies available

at libraries, government offices, and public places. States that have conducted such outreach in the past have found these to be expensive exercises yielding little, if any, individual citizen participation. To minimize the cost of these requirements, we recommend that HUD be flexible in its citizen and resident participation and publication requirements, including allowing states to utilize their websites to publish the AFH and related documents and to solicit input.

Finally, we recommend HUD create a section on its website to house all AFH documents in a publicly searchable database, further enhancing transparency in the process and allowing program participants to learn from each other.

**State Certification**

Section 570.487 requires the state to certify to the satisfaction of HUD that it will affirmatively further fair housing. The certification specifically requires the state to assume responsibility of fair housing planning by, "…not taking actions that are materially inconsistent with its obligation to affirmatively further fair housing."

NCSHA urges HUD to exercise flexibility in interpreting this provision, especially since no definition of "materially inconsistent" is provided in the rule and HUD has not identified what criteria it will use to review and approve AFHs. On the contrary, recognizing the difficulty in pinpointing exactly what it means to affirmatively further fair housing, the rule states, "HUD recognizes there is significant uncertainty associated with quantifying outcomes of the process, proposed by this rule, to identify barriers to fair housing, the priorities of program participants in deciding which barriers to address, the types of policies designed to address those barriers, and the effects of those policies on protected classes."

NCSHA strongly supports efforts to preserve the existing stock of affordable housing. We recommend that, at the very least, the final rule clarify that developments sited in high minority, high poverty census tracts that have the purpose of preserving assisted housing, revitalizing distressed communities, or rehabilitating substandard housing are not inconsistent with the goal of affirmatively furthering fair housing. Due to the scarcity of affordable housing and the lack of resources to develop as much new housing as is needed, many policy-makers and program administrators aspire to preserve as much affordable housing as possible. Preserving existing affordable housing improves the living conditions of low-income households living in those properties, allows residents to remain in their communities of choice, and contributes to neighborhood and community development.

We recognize that due to previous siting and development decisions, preserving some existing affordable housing in areas of concentrated poverty raises questions about perpetuating segregation or limiting integration. HFAs strive to carefully balance these concerns against the value of preservation to the residents of such housing and their communities. The value of specific developments and the legitimate government interest in

preserving them as affordable housing should be an important consideration in evaluating whether preserving such developments violates The Act.

Section 5.150 of the proposed rule states that "program participant's strategies and actions may include strategically enhancing neighborhood assets (e.g. through targeted investment in neighborhood revitalization or stabilization) **or** promoting greater mobility and access to areas offering vital assets such as quality schools, employment, and transportation, consistent with fair housing goals" (emphasis added). HUD should make clear in its final rule that both strategies are permissible, either separately or together.

The certification also requires states to assure "that units of local government funded by the state comply with their certifications to affirmatively further fair housing." State program participants have neither the resources nor, in many cases, the authority to assure that units of local government are in compliance with their certifications to affirmatively further fair housing. For example, as noted in the GAO report referenced in the rule, some of the most commonly cited impediments to fair housing are local zoning and building regulations over which state HFAs have no control. The rule, furthermore, does not provide any guidance as to how a state program participant would meet this requirement.

Finally, the rule is silent as to the consequences of a state's failure to meet these requirements to HUD's satisfaction.

**HUD Questions for Commenters**

Data Analysis

*Are the nationally uniform data that HUD is providing to assist in the assessment of segregation, concentration of poverty, and disparities in access to community assets appropriate?*

HUD's prototype geospatial tool, which employs HUD-provided data, seems unworkable when utilized at a state or county level. The data points disappear when zoomed out beyond a certain level making it impossible to look at a state and discern the impact of the data.

Specifically, the tool should delineate the boundaries between entitlement and non-entitlement jurisdictions. This would be helpful for state program participants whose funds are limited to distribution amongst non-entitlement jurisdictions. The tool should display block group boundaries when displaying dot maps thus, making it easier to visualize the geographic extent of the dot density. This includes the Children, Elderly, Non-Elderly Adults, Living Alone and Race Ethnicity (2010) layers. Currently, it is difficult to interpret data values from the Community Assets and Stressors layers. Also, there are too many color gradients (10 classes) and no consistency (sometimes darker gradients are high values and sometimes low

values). It would be helpful to make this a clickable layer to identify values. The data box should be made moveable. Currently, the box covers the data.

In addition, states that have reviewed the HUD-provided data for their jurisdictions have found large margins of error in certain datasets, such as education and transportation, rendering the data too unreliable to use as a measure on a statewide basis. Furthermore, it is unclear from the data if multifamily developments with both HUD funds and Housing Credits have been double-counted, which would lead to an even greater impression of concentration than might actually be true. We strongly recommend that HUD make available the data used in the geospatial tool so as to facilitate further analysis by program participants.

The relationship of the geospatial tool with that of the Consolidated Plan mapping tool HUD unveiled last year is unclear. NCSHA recommends that HUD provide a clear explanation of the relationship between the two and how program participants are expected to utilize both together. To the extent there is overlap between the two data systems, HUD should synchronize the two systems.

We would appreciate the opportunity to give additional comment as the tool and the datasets are refined. Given HUD's goal in making the data a critical influencer of how program participants should concentrate their resources and encourage greater citizen participation and planning, we urge careful construction of the tool and the opportunity for comprehensive feedback as the tool and the data are finalized.

*To what extent, if at all, should local data, for example on public safety, food deserts, or PHA-related information, be required to supplement this nationally uniform local and regional data?*

HUD should not require local data to supplement its datasets. At present, local data on public safety, food deserts and other potentially helpful metrics is not available on a consistent basis across the country or from a single, reliable source. Where states are able to access quality data to inform their funding decisions they can do so but this should not be mandated by the rule.

Additional Data Issues:

Section 5.154(d)(2) requires analysis of data "to identify integration and segregation patterns and trends across protected classes within the jurisdiction and region." It is unclear whether this provision would require every program participant to conduct a regional analysis or is limited to those instances where a program participant has made the decision to pursue a regional plan. If the former, then HUD should define whether "region" would mean the state and its surrounding states, or all the regions within a state. We encourage HUD to modify the language to make it clear that an AFH analysis applies only to the program participant's jurisdiction unless it chooses to conduct a regional AFH, in which case the "region" would be only those areas covered by the program participants that are participating in the regional plan.

Section 5.154(d)(3) requires program participants to utilize a HUD-provided assessment tool to identify the "primary determinants influencing conditions of integration and segregation, concentrations of poverty, disparities in access to community assets, and disproportionate housing needs based on protected class" and then to identify "the most significant fair housing determinants." It is unclear how, on a statewide basis, a program participant could even begin to identify the determinants of these conditions. Given all the areas of a state that could meet one or more of these conditions, the amount of analysis required would be overwhelming. We recommend HUD eliminate this requirement and allow program participants to spend their time instead on devising and implementing strategies to reduce these conditions, as permitted by their authority and resources.

Clarification is also required regarding the meaning of "significant disparities in access to community assets." For example, the neighborhood school proficiency index uses school-level data on the performance of students on state exams to describe which neighborhoods have more proficient elementary schools and which have less proficient elementary schools. The focus of this definition appears to be not access to the community asset of education but unequal outcomes of the assets to which families have access. An informal quality dimension may be added to the definition by either AFH reviewers or those wishing to challenge an AFH.

State and PHA Consultation

*In terms of the cooperation of Consolidated Plan jurisdictions and PHAs, what are the best models and approaches and other considerations to facilitate that joint participation? What is the best method for consolidated plan program participants to use to begin their engagement with PHAs in the AFH process? Would a letter or other similar solicitation of involvement be sufficient?*

At the state level, HUD should provide as much flexibility as possible, considering the number of PHAs a state may consult with under this rule. A PHA's decision to jointly participate with a state should not transfer the responsibilities of the PHA to achieve its AFFH goals onto the state or relieve a PHA from responsibility for achieving the affirmatively furthering fair housing goals under its purview.

States should be able to set a deadline by which PHAs must provide notice of their intent to engage in joint participation.

Non-HUD Program Planning Efforts

*Are there other planning efforts (for example, in transportation, education, health, and other areas) or other federal programs, such as the low income housing tax credit, that should be coordinated with the fair housing planning effort contemplated by this rule, and, if so, how and what issues would be best informed by this coordination?*

States strive to coordinate the various program processes and resources under their jurisdiction whenever possible and as permitted by program rules. One example of ongoing coordination efforts is HFA participation in the White House Rental Policy Working Group's alignment initiative to coordinate aspects of various rental program requirements. While states work hard to finance transit-oriented development, maintain affordability in gentrifying areas, encourage energy efficiency, and finance developments that combine housing with important social, education, and health services, HUD should not mandate coordination of such programs or planning processes that are often beyond the control of program participants and over which HUD does not have program jurisdiction.

With regard to the Housing Credit program, NCSHA believes that IRS regulations would be the appropriate vehicle for any additional federal guidance concerning that program. In addition, under the Housing Credit, states are required to review and revise their qualified allocation plans and engage in a public participation and hearing process on an annual basis, providing a greater opportunity for public participation than under the 5-year process contemplated by this proposed rule. States should have the flexibility to coordinate the processes of the various programs they administer where possible and practicable.

Indicators of Effectiveness

*Are there appropriate indicators of effectiveness that should be used to assess how program participants have acted with regard to the goals that are set out?*

Keeping in mind the significant budget cuts to HUD programs in recent years, the ability to realize the types of changes the rule aspires to may be limited. Indicators of effectiveness, if created, should be limited to the role of guideposts rather than mandates. As HUD recognizes in the rule itself, it may be impossible to accurately measure effectiveness or even to achieve significant effectiveness. The rule states, "in terms of quantifying the community impacts of the proposed rule, this analysis has highlighted the uncertainty that exists regarding how the new information generated through the new AFH process will translate into different actions by program participants. In terms of estimating impact, this suggests that the probability that any particular outcome occurs is exceedingly small. Moreover, the analysis has identified uncertainty with respect to how much specific actions will advance fair housing goals."

To the extent HUD creates a list of indicators, NCSHA recommends that such indicators be limited to actions that are clearly within the authority and ability of the program participant to carry out.

Rule Modifications for States

*Are there any requirements of the new structure that the proposed rule will create that should be modified for states?*

Yes. The rule should express clearly that state AFHs should be consistent with state program participants' funding authority and, therefore, will be limited to covering only non-entitlement jurisdictions. To the extent program participants choose to partner with entitlement jurisdictions, such collaboration should be voluntary and left to the discretion of the program participant.

HUD is concluding that the proposed rule will pose very little additional burden on program participants as a result of the new geospatial tool and the HUD-provided data. In light of the fact that there are significant questions as to the usability of the tool at the state level, NCSHA recommends that HUD allow as much flexibility as possible in using the tool and interpreting the data.

Finally, the rule does not recognize that the burdens and considerations for a state program participant are vastly different and greater than faced by a single local jurisdiction. For example, the level of analysis required to identify the primary determinants of segregation at the state level is a much bigger inquiry than for a single municipality. HUD should acknowledge these differences and ensure that the rule's requirements are appropriately tailored for the various program participants.

Dispute Resolution

*If the AFH is not acceptable after the back-and-forth engagement because of the disagreements between program participants collaborating on an AFH, what process should guide the resolution of disputes between program participants?*

NCSHA recommends that the entity charged with submitting the AFH and with primary responsibility for acting upon the goals set forth in the AFH should have ultimate authority over disputes. As noted in the proposed rule, if a program participant does not agree with the AFH it may submit a dissenting opinion. A process should be built into the rule to ensure that any dissents or challenges to an AFH do not hinder the timely movement of resources.

Recently Completed Analyses of Impediments (AI)

*For program participants that have recently conducted a comprehensive AI, should HUD waive or delay implementation of the AFH requirement for those program participants?*

Yes. To avoid squandering the time and resources that contributed to conducting a comprehensive AI, HUD should waive the implementation of the AFH requirement for those program participants.

Consequences of Natural Disasters

*What process and challenges will a program participant face when an unexpected occurrence, such as a natural disaster, dictates that it take actions that may be contrary to its applicable plan contents? What impact might a natural disaster or similar type of occurrence have on a program participant's compliance with the AFH?*

The impact of a natural disaster would be difficult to identify or quantify ahead of time. Depending on the type and magnitude of a disaster, a program participant may, for example, have to relocate low-income residents, demolish irreparably damaged housing, or waive income or other program rules. In such circumstances, HUD should provide flexibility in enforcing the rule's requirements. Ultimately, HUD and program participants will likely have to address this issue on a case-by-case basis.

We look forward to working with HUD to advance our mutual fair housing objectives while minimizing the administrative and procedural burdens on state administrators of HUD programs.

Thank you for your consideration of our comments. Please contact me if we can provide additional information.

Sincerely,

Garth Rieman
Director, Housing Advocacy and Strategic Initiatives