



We build strength, stability, self-reliance and shelter.

March 16, 2020

Regulations Division
Office of General Counsel
Department of Housing and Urban Development

**RE: Request for Comments on Proposed Rule “Affirmatively Furthering Fair Housing”
(Docket No. FR 6123-P-02)**

To Whom It May Concern:

Habitat for Humanity appreciates the opportunity to share its perspective on the Proposed Rule on Affirmatively Furthering Fair Housing. While we applaud the discussion of incentives and follow-up assessments for participating jurisdictions to prompt action to increase fair housing choice, the Proposed Rule’s disregard of segregation and spatially constrained housing choices must be remedied before any revised rule moves forward.

Habitat for Humanity invests in communities nationwide by helping low-income families access and sustain responsible, affordable homeownership. Through home construction, rehabilitation and repairs, housing finance, housing support services, and technical assistance, Habitat partners with families and individuals to build and improve a place to call home. Over the past 10 years, more than 1,100 Habitat affiliates located in all 50 states have helped nearly 300,000 people become first-time homebuyers, improve their housing conditions, and achieve the strength, stability and self-reliance they need to build better lives for themselves.

Recognizing that a home is more than just a house, Habitat works to build communities as well as homes where all families have access to the assets and opportunities they need to thrive. For this reason, the Fair Housing Act and the duty to affirmatively further fair housing (AFFH) are of particular importance to Habitat.

Affirmatively Furthering Fair Housing

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968) prohibits housing discrimination based on race, color, religion, sex, familial status, national origin, and disability. It requires all federal agencies relating to housing and urban development (and their grantees) to both avoid overt discrimination and to administer their housing programs “in a manner affirmatively to further the policies of the [Fair Housing Act].”¹

The courts have recognized this obligation to affirmatively further fair housing (AFFH) as taking proactive steps “to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”²

¹ The Fair Housing Act, Section 808 (e)(5).

² NAACP, Boston Chapter v. Secretary of HUD, 817 F. 2nd 149, 155 (1st Cir. 1987).

HUD has clarified this principle in recent years. In its 2015 Final Rule on AFFH, HUD specified that funding recipients must take steps to reform policies and investment strategies as needed to ensure that HUD funding is furthering inclusive communities rather than perpetuating patterns of segregation, so that people of all backgrounds have more meaningful housing choices with access to opportunities. Increasing the supply of affordable homes is a first step in affirmatively furthering the purposes and policies of the Fair Housing Act. The second essential component is ensuring that affordable homes—and opportunities—can be found in diverse settings, so that people are not disproportionately isolated from opportunities and restricted in where they can live based on race, color, religion, sex, familial status, national origin, or disability.

Unfortunately, enforcement of the Fair Housing Act's AFFH mandate has been loose and sporadic over the past five decades, and compliance has been limited. Prior to 2015, HUD grantees had little clarity about what level of analysis and planning would satisfy their duty to affirmatively further fair housing. Participating jurisdictions prepared an analysis of impediments to fair housing choice as part of their Consolidated Plans submitted to HUD, and self-certified that they would take actions to further fair housing based on this analysis. A 2010 report from the Government Accountability Office (GAO) found poor compliance, with HUD's limited regulatory requirements and oversight cited as the major reasons.³ HUD only recently challenged certifications in a few places, most notably Westchester County, NY, Marin County, CA, and the state of Texas.

2015 Final Rule on Affirmatively Furthering Fair Housing

In 2015, HUD unveiled a new rule on Affirmatively Furthering Fair Housing to clarify HUD's expectations and to share new tools to help localities conduct assessments of fair housing in their communities. HUD committed itself to providing states, local governments, and public housing agencies (PHAs) with local and regional data on integrated and segregated living patterns, racially or ethnically concentrated areas of poverty, the location of certain publicly supported housing, access to opportunity afforded by key community assets, and disproportionate housing needs based on classes protected by the Fair Housing Act. The purpose of this data was to help program participants better evaluate their present environment to: 1) assess fair housing issues such as segregation, conditions that restrict fair housing choice, and disparities in access to housing and opportunity; 2) identify the local factors that contribute to these conditions; and 3) set fair housing priorities and goals.

Under the (now suspended) 2015 rule, localities, states, and public housing agencies were given broad freedom to define their own priorities and goals, so long as they were informed by their local Assessment of Fair Housing (AFH). Participating jurisdictions and public housing agencies could pursue various activities to meet their obligation to affirmatively further fair housing, including but not limited to “developing affordable housing and removing barriers to

³ See: <https://www.gao.gov/new.items/d10905.pdf>

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.”

Aside from this guidance, localities, states, and public housing agencies were free to develop their own customized solutions. HUD did not prescribe specific remedies. To ease compliance and spur more effective plans, program participants were also allowed to share resources and produce joint or regional AFHs.

These Principles Should Guide Any Update to the AFFH Rule

Habitat for Humanity supports the overall goals and principles of the 2015 rule on Affirmatively Furthering Fair Housing. We are stronger and healthier as a nation when all individuals and families—regardless of race, color, religion, sex, familial status, national origin, or disability—have access to affordable homes, decent living environments, job opportunities, school choices, and safe environments in which to raise children so they can realize their full potential. Significant racial and ethnic disparities remain in housing needs and access to opportunity nationwide. These disparities cannot be addressed without reducing segregation, developing more inclusive communities, and transforming concentrated areas of poverty into areas of opportunity so that all inhabitants can benefit.

The 2015 AFFH rule needs streamlining and stronger enforcement. But any update to the rule must ensure that grantees:

- 1. Document existing patterns of segregation and access to community assets and job opportunities in their communities;**
- 2. Analyze barriers to fair housing choice—including historical and current policies that led to or perpetuate housing segregation and spatially constrained housing opportunities based on race and other protected classes under the Fair Housing Act; and**
- 3. Identify policy and programmatic steps for overcoming these barriers and improving location choices for homebuyers and renters that experience disproportionate barriers to fair housing choice.**

Flaws in the 2020 Proposed Rule

Habitat for Humanity applauds the 2020 Proposed Rule’s emphasis on results and follow-up assessment. We support the proposal to connect the AFFH review process to financial incentives to strengthen action and follow-through at the local and state level. It is also important that the Proposed Rule retains the ability of localities to develop customized solutions to local barriers to fair housing choice.

However, several of the changes discussed in the 2020 Proposed Rule are fundamentally flawed:

1. Offering a list of factors presumed to be valid local barriers to fair housing choice.

Under the Proposed Rule: “HUD proposes including a non-exhaustive list in the regulation of conditions that HUD considers to be common barriers to fair housing choice. HUD would consider a goal to take concrete steps toward alleviating or improving one of these listed conditions as a justified method of affirmatively furthering fair housing, and therefore jurisdictions would not need to include an explanation of why the jurisdiction is pursuing solutions to these barriers.”

Problem: Nearly all the presumed barriers to fair housing choice in the Proposed Rule relate to housing supply generally. While overcoming these barriers may be in some cases necessary for improving fair housing choice, they are not sufficient. Few relate to the lack of *affordable* homes accessible to households regardless of race, color, national origin, religion, sex, or disability. Fewer still relate to the *location* of affordable and accessible homes.

For example, while eliminating wetland protections may enable more homes to be built in some communities (though certainly a minority of jurisdictions), these changes will not necessarily create more affordable homes, nor create homes that improve location choices for disproportionately constrained populations. Likewise, allowing denser housing development in neighborhoods with high concentrations of poverty may increase housing supply in these communities, but will not necessarily improve the availability of housing choices in neighborhoods with access to community assets and opportunities for disproportionately segregated populations.

Recommendation: HUD grantees need to address locally-relevant barriers to fair housing choice, backed by evidence and substantiation. And these barriers need to speak to the affordability and location of housing options—not just overall supply. None of the “common barriers” listed by HUD should be presumed to be local barriers. HUD could still list them to provide “food for thought” as grantees consider potential local barriers to investigate. But HUD should continue to expect grantees to substantiate their choice of local barriers, and to include affordability and spatial factors in their assessment of barriers.

2. Vague evaluation metrics.

Under the Proposed Rule: “HUD is retaining the requirement of jurisdictions to commit, in the certification, to taking specific steps to address obstacles to fair housing choice. But HUD is proposing to evaluate how program participants are carrying out their AFFH obligation as a threshold matter by using a series of data-based measures to determine

whether a jurisdiction (1) is free of adjudicated fair housing claims; (2) has an adequate supply of affordable housing throughout the jurisdiction; and (3) has an adequate supply of quality affordable housing. Jurisdictions that score highly using these metrics (or through improvements over a 5-year cycle) would be eligible for various incentives in HUD programs. HUD would focus remedial resources and potential regulatory enforcement actions on the lowest performers.”

Problem: Evaluating the performance of jurisdictions is helpful. And having evaluation metrics could help ensure that some jurisdictions choosing to remedy unimportant barriers could still be held accountable for poor outcomes. But the three metrics proposed do not adequately evaluate efforts to improve the location of fair housing choices. In particular, the second evaluation metric—“an adequate supply of affordable housing throughout the jurisdiction”—is inadequately vague.

Recommendation: The second metric should read: “an adequate supply of affordable housing in diverse neighborhood settings such that households representing protected classes have improved housing choices outside of segregated communities and in neighborhoods with community assets and access to essential opportunities.”

3. **Eliminating the need for objective analysis and reducing community engagement.**

Under the Proposed Rule: “[O]bstacles identified in the certification would not need to be based on any HUD-prescribed mode of analysis, such as examining a statistical analysis of housing patterns, using any specified data set, or reflecting original research or commissioned expert opinions, but they should reflect the practical experience and local insights of the program participant in conducting its ordinary housing-related operations, both with HUD funding and other programmatic efforts.”

Problem: Just relying on the practical experience of the participating jurisdiction is insufficient for achieving success. Some degree of objective, statistical analysis is important to identifying barriers to fair housing choice. And accurately assessing barriers to fair housing choice cannot be done without the consideration of community perspectives residing outside “the practical experience and local insights of the program participant.”

Recommendation: Fair housing plans need to be grounded in basic analyses of existing barriers to fair housing choice that can clarify patterns of disproportionate isolation from community assets and opportunities, and disproportionate segregation in high-poverty communities. Furthermore, HUD should continue to encourage robust community participation at the analytical stage.

4. **Removing segregation and spatial considerations from the definition of affirmatively furthering fair housing.**

HUD's current regulation defines AFFH as "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."

HUD proposes changing the definition of AFFH to "advancing fair housing choice within the program participant's control or influence." HUD is proposing a definition of "fair housing choice" to be allowing "individuals and families [to] have the opportunity and options to live where they choose, within their means, without unlawful discrimination related to race, color, religion, sex, familial status, national origin, or disability."

Problem: Lost in this new definition is the spatial distribution of accessible, affordable homes. Actions to increase fair housing choice that do not reduce patterns of segregation cannot be described as successful.

Recommendation: Reducing segregation needs to remain a primary objective in any definition of affirmatively furthering fair housing. Residential segregation in the U.S. is rooted in policy choices and legal structures. Addressing this legacy through proactive policy and law is necessarily part of the solution.

Summary

While the Final Rule on AFFH (2015) was imperfect and lacked adequate enforcement mechanisms, it brought greater seriousness to the expectation under the Fair Housing Act that local jurisdictions, states, and public housing agencies affirmatively further fair housing opportunities as a condition of receiving federal funding such as CDBG, HOME, and Housing Choice Vouchers. Given the continued reality of residential segregation and its disproportionate impact on persons of color and others recognized in the Fair Housing Act, the 2015 Rule rightly emphasized that jurisdictions "take significant actions to overcome historic patterns of segregation, achieve truly balanced and integrated living patterns, promote fair housing choice, and foster inclusive communities that are free from discrimination."

Any update to the AFFH rule must continue to require that localities, states, and public housing agencies participating in HUD programs take steps to overcome locally-relevant barriers to fair housing choice—including steps that address segregation and improve spatially constrained housing choices.

The Proposed Rule has a few positive features. We applaud the Proposed Rule's emphasis on results, tracking progress, and tying performance to financial incentives. And the Proposed Rule rightly gives localities, states, and public housing agencies the flexibility to develop their own custom solutions to local barriers to fair housing opportunities—as the previous Rule did. But

these positive features are undermined by removing the need to analyze the spatial distribution of housing choices and community assets that isolate families and individuals from opportunity, and by not requiring remedies that directly confront the historical reasons for segregation and inequality of opportunity.

Thank you for your attention to these concerns.

Sincerely,

A handwritten signature in blue ink that reads "Robert Hickey". The signature is written in a cursive style with a prominent loop at the end of the last name.

Robert Hickey
Director, Housing Policy Development and Analysis
Habitat for Humanity International