



March 16, 2020

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

Re: Affirmatively Furthering Fair Housing, Docket No. FR-6123-P-02

To Whom It May Concern:

The National Council of State Housing Agencies (NCSHA) appreciates this opportunity to provide comments on HUD's proposed revision of its Affirmatively Furthering Fair Housing (AFFH) regulations. NCSHA and our state Housing Finance Agency (HFA) members are committed to upholding the 1968 Fair Housing Act, including its obligation that HUD and its program grantees affirmatively further fair housing. Central to NCSHA's vision of an affordably housed nation is the goal of removing obstacles that impede anyone from accessing the affordable housing of their choice.

NCSHA is a nonprofit, nonpartisan organization representing the nation's state HFAs.<sup>1</sup> HFAs administer a wide range of affordable housing and community development programs, including the HOME Investment Partnerships program, the Housing Trust Fund, Section 8 rental assistance, the Emergency Solutions Grant, the Community Development Block Grant, and Housing Opportunities for Persons with AIDS. HFAs also administer down payment assistance, home-buyer education, loan servicing, state housing trust funds, and the Low Income Housing Tax Credit (Housing Credit) and issue tax-exempt private activity Housing Bonds to finance affordable housing for renters and home buyers.

HUD has taken various approaches to AFFH guidance over the past decade, and NCSHA has engaged actively with the department throughout this process. We have consistently sought to provide practical advice to the department on balancing requirements under the law and realities on the ground for state HFAs and other responsible HUD grantees.

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<sup>1</sup> NCSHA is a nonprofit, nonpartisan organization. None of NCSHA's activities related to federal legislation or regulation are funded by organizations that are prohibited by law from engaging in lobbying or related activities.

NCSHA, like other organizations that represent state and local HUD grantees, had numerous concerns about the AFFH regulations HUD published in 2015, especially the proposed state Fair Housing Assessment Tool. While HUD had improved the tool in response to our comments, the most recent version still fell far short of what was needed for state grantees.

We appreciate HUD's intention in the proposed revision to streamline AFFH and make compliance with its requirements more feasible for grantees. However, the new proposed rule raises a number of other concerns. Most important, it fails to meet what we believe should be HUD's ultimate objective: upholding the Fair Housing Act's AFFH obligation by establishing a mechanism for meaningful and productive fair housing planning and actions, while minimizing to the greatest extent feasible the burden associated with implementation of the regulations.

### **Core Principles for a Rigorous and Workable AFFH Rule**

The following core principles can establish the foundation for HUD to issue a workable rule that achieves that objective:

1. Grantees' AFFH activities should focus directly on facilitating the goals of the Fair Housing Act, including eliminating discrimination, removing barriers to housing faced by protected classes, and promoting fair housing choice.
2. HUD guidance should provide grantees with a clear framework that sets forth HUD's expectations and holds grantees to a high standard while not being overly burdensome.
3. Grantees' AFFH planning efforts should be based in large part on the best data already available about the fair housing needs and obstacles in their communities and not require extensive additional research or costly consultants.
4. AFFH planning should not require grantees to have or obtain expertise in policy areas unrelated to or merely peripheral to affordable housing and fair housing.
5. HUD's requirements should be tailored by type of grantee as states, local governments, tribal entities, and local public housing authorities (PHAs) have different capacities, resources, and geographic scopes.
6. HUD oversight of grantees' AFFH planning should ensure that grantees are upholding the objectives of the Fair Housing Act.

While the proposed rule reflects several of these principles, it fails to meet three:

1. Its focus is far broader than the goals of the Fair Housing Act.
2. It does not require grantees to make data-driven choices when determining which obstacles to fair housing they will address.
3. It would not accurately measure the quality of grantees' AFFH actions.

The remainder of this letter explains NCSHA's perspective on the ways in which the proposed rule meets the principles outlined above and where and how it falls short.

**Core Principle 1: Grantees' AFFH activities should focus directly on facilitating the goals of the Fair Housing Act.**

To a large extent, the proposed rule appears to seek primarily to encourage grantees to remove regulatory barriers that limit overall housing production, rather than honing in on overcoming obstacles to fair housing for protective classes specifically. While increasing housing supply overall is a laudable goal, and certainly helpful to increasing housing opportunities for protected classes *and others*, the proposed rule allows grantees to meet their AFFH obligations by taking steps that are, at best, tangential to the more specific goals of the Fair Housing Act.

The proposed rule requires a grantee to submit a certification that it will affirmatively further fair housing by addressing at least three factors. These factors are intended to be obstacles to fair housing that the grantee would seek to overcome. For states, HUD provides a list of 16 factors, which it believes to be common barriers to fair housing choice. (A similar list is provided for local grantees.) If the state chooses from this list of factors, it does not need to provide any justification for its choice. Alternatively, the state may choose to address factors that are not on the list, so long as it provides a brief description of how accomplishing the goal or ameliorating the obstacle will further fair housing.

While we generally support giving grantees the flexibility to choose the obstacles that are most relevant to their particular jurisdictions and authority, we have several concerns about this process at set forth in the proposed rule.

While several of the factors HUD considers to be inherent barriers to fair housing choice are appropriate, the remaining factors are not directly related to preventing discrimination or furthering fair housing choice. We therefore urge HUD to retain on its list of inherent barriers to fair housing only the following three factors:

- lack of sufficient supply of decent, safe, and sanitary housing that is affordable and accessible to people with disabilities;
- concentration of substandard housing stock in a particular area; and
- source of income restrictions on rental housing.

Other than the three factors above, the factors listed in the proposed rule, such as those focusing on rehabilitation codes, environmental regulations, construction and permitting reviews, and tax policy, are more in line with the goal of removing regulations broadly as a means of increasing housing stock, rather than on reducing discrimination against protected classes and preventing segregation. They may be barriers to *affordable housing*, but they are not inherently barriers to *fair housing*. Thus, we recommend HUD to remove them.

In addition, we recommend HUD supplement these three remaining factors with the following additional factors, which research and HFA experiences find can be barriers to fair housing:

- zoning requirements that prevent or make difficult the development of multifamily housing;
- lack of public services and amenities in low- and moderate-income areas (examples include schools, recreational facilities, social service programs, parks, roads, transportation, street lighting, trash collection, and police protection);
- lack of affordable housing in areas with access to public services and amenities;
- lending discrimination; and
- lack of public awareness about fair housing rights.

We appreciate HUD's desire to provide grantees discretion to choose factors that are not on the list HUD believes to be inherent barriers to fair housing. This could, however, create opportunities for grantees to exclude from their own lists *any* factors directly related to fair housing. We suggest a middle-ground approach: At least two of the three factors each grantee chooses should be from HUD's list as revised to reflect our suggested additions and deletions.

We believe that, regardless of which factors a grantee chooses to address, whether on the list or not, HUD should require all grantees to explain why they are choosing to address the factors they set forth in their certifications, including why each particular factor is relevant to the grantee. As we will discuss in more detail, we also believe that grantees should choose their factors based, to a large extent, on data and provide HUD with that data to explain their choices.

**Core Principle 2: HUD guidance should provide grantees with a clear framework that sets forth HUD's expectations and holds grantees to a high standard while not being overly burdensome.**

The proposed rule provides a clear framework for grantees and sets forth HUD's expectations of them. There are several aspects of the proposed rule that we particularly appreciate. In particular, the ability to combine the AFFH public participation process with the public participation process grantees already undertake as part of the Consolidated Plan, the flexibility to identify barriers to fair housing that are most applicable to individual grantees without requiring them to address all factors presented, and the fact that the proposed rule does not require state grantees to analyze fair housing challenges outside of their borders.

**Core Principle 3: Grantees' AFFH planning efforts should be based on the best data available about the fair housing needs and obstacles in their communities.**

The 2015 AFFH regulations sought to establish a mechanism by which every grantee would have access to the data necessary to understand the demographics and resources within their community. Thus, HUD created a Fair Housing Assessment Tool (Tool) for each category of grantees.

While NCSHA felt that the state Tool had a number of flaws (see our [May 2016](#) and [October 2016](#) comments on the state Tool), we supported this idea in concept and had hoped to continue to work with HUD to develop a better state Tool.

We continue to believe that AFFH planning and actions should be strongly rooted in objective data. While a public comment process and consultation requirements are essential and would provide the grantee with an important foundation as part of their AFFH planning process, such processes must be supplemented with data about demographic patterns, the location of public services, etc.

The proposed rule does away with the concept of the Tool entirely. Instead, the notice accompanying the proposed rule states only that the contents of grantees' certifications, "should reflect the practical experience and local insights of the jurisdiction, including objective quantitative and qualitative data as the jurisdiction deems appropriate." While many state HFAs have strong research departments and thus the capacity to ensure that their choices of factors would be based on objective data, not all grantees have that capacity.

We therefore urge HUD to provide grantees with the best data available to HUD through either a Tool or some other system of data dissemination. This will allow grantees to use HUD's data if they do not have other more timely and granular data available to them. However:

- HUD should not require grantees to use the data it provides if the grantee determines it has access to other, better data.
- While grantees may choose to conduct certain supplementary research, the data HUD provides should be sufficient so that they do not have to.
- HUD should ensure that whatever data system it provides grantees is simple to use and does not require outside consulting assistance for which a grantee would have to pay.

**Core Principle 4: AFFH planning should not require expertise in policy areas unrelated to or merely peripheral to affordable housing and fair housing.**

One of the concerns NCSHA consistently raised regarding the 2015 AFFH rule and the Tool was that they would have required grantees to have expertise in policy areas that are not directly related to affordable housing; specifically, education, labor markets, job training programs, and environmental health.

Some of the factors HUD provides in the proposed rule as barriers to fair housing choice would require grantees to have expertise in non-housing policy areas or require them to make judgments about the extent to which specific non-housing-related regulatory requirements are needed.

While our primary reason for asking HUD to remove these factors from its list is that they are not directly related to fair housing, a secondary reason for doing so is that they require policy expertise that is not necessarily available to grantees.

For example, the factors currently on HUD's list include "unduly burdensome wetland or environmental regulations" and "arbitrary or excessive energy and water efficiency mandates." The staff of a state HFA is not positioned to determine which wetland, environmental, energy/water regulations are needed and worthwhile and which may be unduly burdensome without compensatory benefit. We do not believe it is appropriate to expect HUD grantees to be able to make such determinations.

**Core Principle 5: HUD's requirements should be tailored by type of grantee.**

We appreciate HUD's effort in this proposed rule to tailor requirements by type of grantee. For example, the proposed rule requires state grantees to consult with other state-based and regional organizations representing protected-class members; whereas, local grantees are required to consult with similar community-based organizations.

The proposed rule also indicates that HUD is considering various incentives to reward grantees it considers to be high performers. We encourage HUD to clarify that, when it says it would reward only jurisdictions that are free of material civil rights violations, it means that only the specific grantee in question would be impacted. For example, if HUD or the Department of Justice brought suit against a local government or PHA, the state in which the local government or PHA is located should not face punitive action or become ineligible for whatever reward system HUD adopts.

**Core Principle 6: HUD oversight of grantees' AFFH planning should ensure that grantees are upholding the objectives of the Fair Housing Act.**

NCSHA is particularly concerned that the system HUD proposes for AFFH oversight is insufficient to ensure grantees are living up to their obligations under the Fair Housing Act. HUD intends to develop a risk analysis system that would rank like grantees against one another based on metrics such as median home values, household cost burdens, vacancy rates, the availability of Housing Choice Vouchers, etc. HUD may question the AFFH certifications of grantees that fall in the bottom quartile based on this ranking.

NCSHA believes this ranking system is profoundly flawed and insufficient as a mechanism for judging the successes or failures of grantees' AFFH activities. Specifically:

- We do not think any of the indicators HUD plans to use for this ranking are related to the quality of a grantee's AFFH activities or its outcomes.

- Ranking grantees against one another is not an appropriate way to measure an individual grantee's success or failure. What if all grantees in a cohort are exceptional? What if they are all poor performers? A simple ranking would not allow for these determinations.
- We understand HUD is looking to develop an objective system for determining success, as HUD does not want to impose subjective criteria on its grantees. While we appreciate the reasoning behind HUD's goal, it is not possible to determine the extent of a grantee's success in AFFH without some level of subjective engagement with the grantee and its particular plans and executions.

We strongly urge HUD to develop an oversight system in which grantees' certifications are evaluated independently in accordance with the goals of the Fair Housing Act and based on the resources available to the grantee and its jurisdictional authority.

In conclusion, we appreciate HUD's effort to streamline AFFH requirements and make them more achievable in practice. However, we believe that HUD has gone from one extreme to another. We urge HUD to continue to work with grantees to find a happy medium in line with the Fair Housing Act and practicable implementation of its AFFH obligation.

Thank you for your consideration of our comments. Attached below for your convenience is a summary of NCSHA's recommendations in this letter. Please contact me if we can provide additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Garth Rieman", with a long horizontal flourish extending to the right.

Garth Rieman  
Director, Housing Advocacy and Strategic Initiatives

## Appendix: Summary of NCSHA's Recommendations to HUD on Its AFFH Proposed Rule

- The proposed rule should adhere to the principles NCSHA sets forth as critical to AFFH.
- HUD should replace the list of factors that are inherent barriers to fair housing with the following:
  - lack of sufficient supply of decent, safe, and sanitary housing that is affordable and accessible to people with disabilities;
  - concentration of substandard housing stock in a particular area;
  - source of income restrictions on rental housing;
  - zoning requirements that prevent or make difficult the development of multifamily housing;
  - lack of public services and amenities in low- and moderate-income areas (examples include schools, recreational facilities, social service programs, parks, roads, transportation, street lighting, trash collection, and police protection);
  - lack of affordable housing in areas with access to public services and amenities;
  - lending discrimination; and
  - lack of public awareness about fair housing rights.
- Grantees should choose at least three factors for their AFFH certification. However, at least two of those factors should come from the list above.
- Grantees should explain why they are choosing to address the factors they choose for their certifications, including why each chosen factor is relevant to the grantee. Data should be a component reason for grantees' choice of factors.
- HUD should provide grantees with the best data available to HUD through either a Tool or some other system of data dissemination, but it should not require them to use HUD's data if they have their own better-quality data, as determined by the grantee.
- HUD should clarify that, when it says it would reward only jurisdictions that are free of material civil rights violations, it means only the specific grantee in question would be impacted and not the state in which a local jurisdiction or PHA is located (if the local entity is the grantee that has a material civil rights violation).
- HUD should develop an oversight system in which a grantee's certification is evaluated independently in accordance with the goals of the Fair Housing Act and based on the resources available to the grantee and its jurisdictional authority.