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Room 10276

Washington, DC 20410-0001

Submitted electronically via www.regulations.gov

RE: Docket No. FR-6123-A-01

Dear Madam/Sir:

I am writing on behalf of Long Island Housing Services, Inc. (LIHS) in response to the Advance Notice of Proposed Rulemaking: AFFH Streamlining and Enhancements, published in the Federal Register on August 16, 2018. LIHS is a FHIP PEI and EOI grantee serving Nassau and Suffolk counties in New York.

LIHS strongly supports HUD's 2015 Affirmatively Furthering Fair Housing (AFFH) regulation and we urge HUD not to revoke or rewrite it. Rather, HUD should immediately resume implementation of the 2015 rule by taking the following steps: 1. Restore on-line access to the Assessment Tool for Local Governments; 2. Issue a notice informing local jurisdictions of their obligation to conduct an Assessment of Fair Housing (AFH) using that Assessment Tool and to follow the requirements spelled out in the rule; and 3. Resume training and technical assistance for those jurisdictions. It is imperative that HUD take these steps immediately, so that the 950 or so jurisdictions that will be submitting Consolidated Plans in 2019 and 2020, including Nassau county, Suffolk County, Babylon town, Huntington town, and Islip town in my organization's service area, have sufficient time to



jurisdictions through the Sustainable Communities Initiative. HUD should respect the careful, inclusive and deliberative rulemaking process that it undertook to devise the 2015 rule. Rather than undertaking another rulemaking process, which would be a duplication of effort and an unwise and unnecessary use of HUD's resources, it should instead move ahead with effective implementation of the 2015 rule.

HUD Should Preserve the 2015 Rule, Which Provides Both Clarity and Flexibility

One of the very important aspects of the 2015 rule is its definition of "affirmatively furthering fair housing." Previously, HUD's definition of AFFH was tied to the AI, which itself lacked definition, structure and standards. This left program participants with tremendous uncertainty about how to ensure that they were fulfilling their AFFH obligations and in compliance with the law. The definition in the 2015 rule eliminates that uncertainty, replacing it with the clarity that program participants sought. It states:

Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means 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. The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development (24 CFR 85.152)

actions that are inconsistent with its obligations under the Fair Housing Act. In other words, it cannot give with one hand and take away with the other. Those sections state, “Each jurisdiction is required to submit a certification that it will affirmatively further fair housing, which means that it will take meaningful actions to further the goals identified in the AFH conducted in accordance with the requirements of 24 CFR §5.150 through 5.180, and that it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.” (24 CFR §91.225; see also §91.324 and §91.425). This definition, in combination with other provisions of the rule and the Assessment Tool, provides program participants the clarity they need to understand their AFFH obligations and take meaningful steps to fulfill them. Such clarity was lacking in the AI process, which created confusion about what program participants should do to fulfill their AFFH obligations. As the result of that confusion, and their subsequent failure to take effective steps to affirmatively further fair housing, some jurisdictions found themselves subject to various sorts of enforcement actions under the Fair Housing Act and other laws. The clarity provided in the 2015 rule is reinforced by the requirement that AFHs be submitted to HUD for review and acceptance, and the provision for HUD to reject initial submissions that it deems unacceptable while also offering specific guidance about revisions jurisdictions can make to correct those shortcomings. These are critical components of the rule and must be preserved.

While the rule provides clarity and direction, it does not take a “one size fits all” approach. It establishes a robust process through which community input must be solicited and considered, so that the AFH reflects local concerns. Based on that input, jurisdictions then identify their most pressing fair housing problems, set their own goals and priorities, and design their own strategies for achieving those goals. Nowhere does the rule state that program participants

fact, there were a number of extremely positive aspects of the AFH process undertaken by the initial cohorts. For example, they undertook more robust community engagement efforts, offering more opportunities for public input and involving a larger number of stakeholders than under the AI process. (See Vicki Been and Katherine O'Regan, "The Potential Costs to Public Engagement of HUD's Assessment of Fair Housing Delay," NYU Furman Center, March 9, 2018.) Jurisdictions analyzed residential patterns and trends through a focused, fair housing lens, assessing the extent to which members of protected classes have equitable access to important community assets, resources and opportunities. They set priorities for addressing their particular local (and in some cases regional) fair housing problems, and adopted concrete goals, with metrics and milestones to measure their progress toward achieving those goals. (See, for example, the research of Justin Steil and Nicholas Kelly, "The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance," Working Paper for the Future of Housing Policy in the U.S. Conference, University of Pennsylvania, September 15, 2017.)

These initial AFHs were a substantial improvement over the Analyses of Impediments to Fair Housing (AIs) which preceded them, and to which HUD has now returned. As the Government Accountability Office found, and as HUD itself determined, the AI process was not an effective means for HUD to fulfill its own statutory obligation to affirmatively further fair housing or for HUD to ensure that its program participants were fulfilling their AFFH obligations. (See GAO-10-905, Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans," October 14, 2010.) Too often, AIs were done without input from fair housing organizations, members of protected classes, or other stakeholders. They lacked a consistent format and often lacked a fair housing focus. Many failed to consider the barriers facing members of key protected classes under the Fair Housing Act, including people of particular races and ethnicities, families with children, and people with disabilities. Most did not contain concrete goals for addressing local barriers to fair housing, nor did they include specific steps to be taken, timelines for taking those steps, or

1. **Community participation** – The 2015 rule requires much more robust community engagement. It directs program participants to give the public reasonable opportunities for involvement in the development of the AFH and in its incorporation into the Consolidated Plan or PHA plan, and to use communications designed to reach the broadest possible audience to inform the public of those opportunities. (See §5.158(a)). Further, it requires program participants to consult with a wide range of stakeholders. These include not only fair housing groups like mine, but also organizations that represent members of protected classes, public and private agencies that provide assisted housing, health services, and social services. (See, for example, §91.100). These provisions foster a much more inclusive fair housing process that reflects the problems that community residents feel are most pressing, and also incorporates the expertise of stakeholders who can offer solutions to the problems identified.

2. **Use of data** – The ANPR asks whether the fair housing planning process should be data-driven, or should allow program participants to plan based on their local experiences. We strongly oppose the notion that fair housing planning should be based solely on a qualitative approach rather than strategic, focused data analysis. A strictly qualitative approach would send a signal that program participants do not need to assess the extent to which their own policies and programs may be at odds with their obligation to affirmatively further fair housing, or to consider changes to existing policies and practices that would do a better job of ensuring that all community residents, regardless of the neighborhood in which they live, have equitable access to opportunity. It would endorse a “business as usual” approach to housing and community development, an approach that would perpetuate the problems so many communities face.

The 2015 rule strikes an appropriate balance with respect to the use of data. It provides for the use of qualitative information, as well as a mechanism for members of the

goals to overcome the contributing factors and, finally, as well as metrics and milestones by which to measure progress toward achieving those goals, it does not dictate what those goals should be, how many goals must be identified, or what metrics and milestones must be used. Nonetheless, this modest framework is essential for ensuring that jurisdictions actually take concrete steps to address fair housing problems, and for holding them accountable for implementing those steps. Too often, jurisdictions' AIs lacked any such concrete plans or accountability measures. For example,

4. **Safe harbor** – HUD asks whether it should create “safe harbors” for jurisdictions by specifying certain levels of effort on specific actions that would be deemed to be in compliance with the obligation to affirmatively further fair housing. LIHS strongly opposes this idea. Given the wide variations in its program participants in terms of size, local conditions, priorities and resources, it is difficult to see how HUD could determine the range of activities or level of effort that would be appropriate for each. Further, even if it were possible to say that a particular jurisdiction had fulfilled its AFFH obligations at a particular moment in time, which is difficult to envision, local circumstances are dynamic and change over time. This means that jurisdictions must continually assess the extent to which fair housing problems may exist, the nature of those problems and the solutions needed to address them. Just as the need for other forms of planning and the implementation of those plans must be on-going, so the obligation to affirmatively further fair housing, which is rooted in statute, must be on-going, as well.

For more details on these and other questions posed in the ANPR, please refer to the comments filed by the National Fair Housing Alliance, which we endorse.

larger, regional patterns and collaborating with other regional partners is a very sensible approach, one that should be preserved.

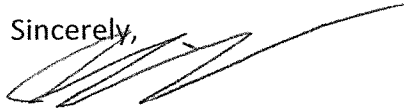
Conclusion

For these and other reasons, the AFH process laid out in the 2015 AFFH regulation is far better than the AI system as a means for HUD to ensure that its program participants are fulfilling their AFFH obligations and taking meaningful steps, designed by them and tailored to local conditions, to address the fair housing problems identified by local stakeholders. It would be a mistake either to rely on AIs for this purpose, or to go back to the drawing board and try to create an entirely new regulation. HUD acted on an extensive record when instituting the AFFH regulation, including prior case law on the scope of its mandate under the Fair Housing Act and an extensive administrative record. To disregard this record and retreat from the regulation now may be deemed arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act.

In a recent interview with the Wall Street Journal, HUD Secretary Ben Carson suggested that the best way for the country to solve its housing discrimination problems is to build more affordable housing and to eliminate zoning barriers that impede such development. (See Laura Kusisto, “HUD Moves to Shake Up Fair-Housing Enforcement,” The Wall Street Journal, August 13, 2018.) There is no question that our supply of affordable housing – available to only one out of four households who qualify for assisted housing - is woefully inadequate. We wholeheartedly endorse an increase in housing subsidy dollars. And there may be cases in which local zoning ordinances create unnecessary barriers to affordable housing development. The AFH process laid out in the 2015 regulation provides a good opportunity for jurisdictions to identify such situations and take steps to address them. However, simply expanding the supply of affordable housing will not solve our nation’s housing discrimination and segregation

prosperity. Rather than pursuing this course, we urge HUD to preserve the existing HUD
regulation and use its resources to ensure effective implementation, oversight and
enforcement of that regulation.

Sincerely,



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