March 1, 2020

TO BE SUBMITTED VIA REGULATIONS.GOV
Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0001

Re: HUD's Implementation of Affirmatively Furthering Fair Housing, Docket No. FR-6123-P-02

To Whom It May Concern,

I am writing, as President of the civil rights organization ERASE Racism, in opposition to the proposed rule [Docket No. FR-6123-P-02] by the U.S. Department of Housing and Urban Development (HUD). Despite its title – “Affirmatively Furthering Fair Housing” – the rule would undermine this federal mandate, which is critical to implementation of the Fair Housing Act of 1968, its subsequent amendments, and related enforcement policies and mechanisms.

This proposed HUD rule fundamentally redefines the duty to affirmatively further fair housing, so that it is no longer a key component that pushes for the end to racial discrimination and segregation in housing. The following formal comment sets forth the reasons that ERASE Racism urges HUD to withdraw the proposed rule.

“The purpose of the Fair Housing Act is to provide, within constitutional limitations, for fair housing throughout the United States. The Act implements the Congressional policy favoring the achievement of integrated living patterns . . . and effective elimination of all traces of racial discrimination in the housing field.” The Fair Housing Act “forbids not only the refusal to sell or rent a dwelling, but also prohibits all practices that ‘otherwise make unavailable or deny’
housing to any”¹ member of its protected classes. Yet, to our national shame, “Congress’s strong national commitment to promote integrated housing”² has yet to be realized. Even today housing discrimination remains all too prevalent.

I speak from experience, as ERASE Racism, based on New York’s Long Island, has been combating housing discrimination and championing fair housing for nearly two decades. ERASE Racism exposes and addresses the devastating impact of historical and ongoing structural racism, particularly in housing and public school education. It does so through research, policy and legislative advocacy, legal action, as well as educating and mobilizing the public; it has been recognized locally and nationally for its cutting-edge work.

Affirmatively Furthering Fair Housing (AFFH) is a statutory requirement in the Fair Housing Act that obligates the federal government and its grantees to further the purposes of the Act. The obligation makes clear that it is not enough for those agencies and grantees to only respond to acts of housing discrimination; they must proactively further fair housing by stopping discrimination in all its forms and dismantling the racial segregation in housing that is the natural result of housing discrimination based on race.

Below are examples of how the proposed rule undermines AFFH and thereby dismantles the implementation and enforcement of the Fair Housing Act.

First, the proposed rule would no longer require HUD or its grantees to take affirmative steps to further fair housing. Instead, it focuses on reducing local regulations, like green building standards, tenant protections, and labor standards, that are not responsible for residential racial segregation or our housing crisis.

In a stunning reversal, HUD removes language mandating that jurisdictions take meaningful actions to replace segregated living patterns with integrated and balanced ones. It also removes language requiring that jurisdictions “take no action that is materially inconsistent with its obligation to affirmatively further fair housing.”

Instead of requiring grantees, as presently mandated, to be proactive and take “meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities,”³ HUD has drastically watered down the AFFH obligation. The proposed rule merely directs grantees to offer “fair housing choice” within a HUD program participant’s sphere of influence.”⁴

³ 24 C.F.R. § 5.152
⁴ § 5.150(a)(2)
Ordinarily, the concept of true fair housing choice is one that should be embraced by all Americans. In the proposed rule, however, HUD defines “fair housing choice” as a substitute for genuine AFFH. By doing so, HUD eliminates the long-standing duty of program participants to take active steps to remedy segregated housing patterns and fight discrimination.

In addition, by limiting the scope of AFFH to a grantee’s “sphere of influence,” the proposed rule underscores HUD’s full-blown retreat. No longer would program participants be expected to exert any effort to promote housing equity beyond the strict confines of actions that are directly tied to their immediate work.

Second, the proposed regulation creates a new ranking system that would be used to stratify funding levels. Jurisdictions with lower AFFH performance would be subject to more oversight and could have their AFFH certifications questioned.

Outstanding AFFH performers would have access to more funding, yet none of the factors that HUD has included as examples of what would be considered in this ranking system relates to race (whether through data reflecting levels of segregation or housing-related racial disparities). Only one of the nine specified factors contained in the proposed rule even relates to a protected class defined in the Fair Housing Act.

A jurisdiction’s civil rights violations should be a bar to becoming an “outstanding” AFFH performer, but HUD will instead turn a blind eye to an overwhelming number of those. Only findings of discrimination by courts or administrative judges in cases brought by the federal government would affect HUD’s oversight of a jurisdiction’s fair housing compliance. Meanwhile, most of the findings of housing discrimination result from cases brought by nonprofits or other fair housing groups, and those cases would simply be ignored by HUD in determining outstanding AFFH performance.

Excising these successful civil rights actions – from the calculus for determining outstanding AFFH performance – amounts to HUD openly placing its organizational thumb on the scale in favor of discriminatory jurisdictions, a step antithetical to the Fair Housing Act and HUD’s statutory duty to enforce it. In addition, by wholly abandoning the Assessment of Fair Housing tool contained in the 2015 AFFH rule, HUD has also clearly shown that it is uninterested in

5 § 5.155(c)(3).
6 § 5.155(d)(1)
7 § 5.155(c)(1)(ix) (“[a]vailability of housing accessible to persons with disabilities”).
8 See § 5.155(d)(3)(i) (“if the jurisdiction . . . has in the past five years been found by a court or administrative law judge in a case brought by or on behalf of HUD or by the United States Department of Justice to be in violation of civil rights law . . . “ (emphasis added)
having participants even undertake learning about, much less reporting on, the extent or scope of their jurisdictions’ structural barriers to housing integration.

Third, HUD would eliminate the requirement that state and local governments conduct a stand-alone fair housing plan and would replace it with a requirement to create three goals to increase fair housing choice. Those goals would not need to align with the issues addressed in the Fair Housing Act or the 2015 AFFH rule. In addition, with affordable housing presented as a stand-in for fair housing, the rule ignores obstacles that involve discrimination against all protected class members, regardless of income.

HUD has provided a list of obstacles considered “inherent barriers to fair housing choice.” Some of the obstacles are extremely pernicious, however, when framed as inherent barriers. They include artificial economic restrictions on the long-term creation of rental housing, such as rent controls. This is troubling, as it suggests that rent control is never acceptable.

A jurisdiction will apparently have carte blanche to determine how and with what data (or lack of it) it will certify “that it will affirmatively further fair housing” as seen by HUD. The rule allows that “the certification need not be based on any HUD-prescribed specific analysis or data but should reflect the practical experience and local insights of the jurisdiction, including objective quantitative and qualitative data...” that the jurisdiction believes appropriate. HUD is thereby signaling that its effective oversight of certifications will not be a priority going forward.

It seems that HUD will only question the accuracy of the certifications of what it deems to be “low-ranking” jurisdictions, as scored according to the method described in the proposed rule. Those low-ranking jurisdictions could be asked to amend their certifications to “commit the jurisdiction to goals that have a rational basis toward favorably affecting” the non-exclusive factors that HUD has set out in the proposed rule.

Such purported “scrutiny” will do nothing to advance our nation’s express policy to “provide . . . for fair housing throughout the United States.” The non-exclusive categories of data HUD will rely upon in making these ranking determinations will not reveal a jurisdiction’s actual effort to

10 § 5.150(a)(2)(i)-(iii).
11 §§ 91.225(a)(1)(i)(A) through (P).
12 § 91.225(a)(1)(iii).
13 § 91.225(a)(1)(iv).
14 See § 5.155(c).
15 § 5.155(c)(1)(i)–(ix).
further the purposes of the Fair Housing Act. Absent meaningful measurements of plans to stem segregated housing patterns and break down genuine barriers to moving toward integrated communities, AFFH will become a toothless tiger.

In addition, HUD is willing to accept the “steps the jurisdiction has taken to affirmatively further fair housing” if they are rationally related to the goals or obstacles identified in the jurisdiction’s certification. The “rational basis” standard is the lowest level of scrutiny applied in constitutional analysis. Action is almost always upheld against challenges if the rational basis test is used. HUD’s use of that phrase gives grantees a relatively easy way for HUD to find their performance reports satisfactory, even if those reports do not materially or credibly address housing discrimination and segregation.

Fourth, the rule would essentially let public housing authorities off the hook. They would have no independent planning obligation, not even a de minimis one. They would have only a substantive obligation and certification that is loosely defined through a non-exclusive list of affirmative steps that a public housing authority “may” take.

In sum, the need for rigorous fair housing enforcement and the requirement for program participants to pursue meaningful AFFH cannot be ignored. That housing discrimination continues more than 50 years after passage of the Fair Housing Act is evident from Newsday’s recently published three-year investigation of real estate sales practices on Long Island, titled “Long Island Divided.” Its investigation involved the use of paired testers (one white, the other “of color”) and revealed widespread separate and unequal treatment of potential home buyers who were black, Hispanic and Asian and of minority communities. Black testers experienced disparate treatment 49 percent of the time, compared with 39 percent for Hispanics and 19 percent for Asian testers.

The results of Newsday’s investigation mirror those of an earlier investigation that ERASE Racism conducted with the Fair Housing Justice Center to determine whether black renters on Long Island were being discriminated against in the housing options that they were offered. Our similar use of paired testing revealed that in both Nassau and Suffolk counties property owners and management companies were showing apartments to white applicants and not to black applicants. Our findings led to successful litigation resulting in court-mandated settlements in 2014 and 2016 with the offending rental housing providers.

Unfortunately, housing discrimination continues to this day through discriminatory and predatory lending practices as well as federal and local policies and practices that perpetuate segregation. Housing discrimination has been cemented into the landscape of our nation, and

17 § 91.520(a)(i)(1).
18 Available at: https://projects.newsday.com/long-island/real-estate-agents-investigation/#open-paywall-message.
HUD has simply not been vigorous enough in displacing it. It is telling that against this backdrop HUD seeks to further retreat from oversight and enforcement of recipients’ AFFH obligations.

Affirmatively furthering fair housing is an essential ongoing need. HUD should be leading this effort, not undermining it. The proposed AFFH rule is the latest effort in a series of civil rights rollbacks implemented by HUD during the Trump administration. Those rollbacks are documented in a report issued in October 2019 by ERASE Racism with essential research from the Lawyers’ Committee for Civil Rights Under Law. That report – titled “Civil Rights Rollback”20 – states in summary that “The U.S. Department of Housing and Urban Development has acted deliberately to gut critical components of the enforcement infrastructure for the Fair Housing Act of 1968. It has done so in several key ways, among others: suspending the policies, procedures, and tools instituted to effectively improve municipal planning efforts to further fair housing; and, proposing to nullify the Fair Housing Act’s Discriminatory Effects Standard, also known as disparate impact, by shifting the burden of proof onto the plaintiff at every step of a disparate impact discrimination claim.”

HUD’s mission is “to create strong, sustainable, inclusive communities and quality affordable homes for all.” Yet with this proposed rule, and its other recent civil rights rollbacks, HUD has become an obstacle to its own mission. HUD should not become an “inherent barrier” to fair housing in America.

Sincerely,

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20 Available at: http://www.eraseracismny.org/storage/documents/Reports/rollback_report_FINAL_REPORT.pdf