



703 Market St., Suite 2000
San Francisco, CA 94103
Telephone: 415-546-7000
Fax: 415-546-7007
nhlp@nhlp.org
www.nhlp.org

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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

Via regulations.gov [<http://www.regulations.gov/#!submitComment;D=HUD-2013-0066-0001>]

Re: Docket No. FR-5173-P-01, Affirmatively Furthering Fair Housing

Dear Office of General Counsel:

This letter is written on behalf of the National Housing Law Project (NHLP), as well as the undersigned advocacy organizations. NHLP is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income tenants and homeowners; and increasing housing opportunities for racial and ethnic minorities. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide. Established in 1968, NHLP has been dedicated to advancing housing justice for low-income individuals and families for 45 years. In this letter, NHLP submits its comments on the proposed Affirmatively Furthering Fair Housing rule (Proposed AFFH Rule) issued by the Department of Housing and Urban Development (HUD) on July 19, 2013.¹

NHLP commends HUD for issuing this proposed rule, as it provides an encouraging step towards fostering inclusive communities for all. We applaud, for example, the proposed rule's examination of the fair housing mandate through a wider lens that includes analysis of factors such as an area's access to transportation, education, healthcare, social supports, and economic opportunities. Furthermore, HUD's intent to provide extensive data, in conjunction with a geospatial mapping tool to offer appropriate context for the data, is quite ambitious and laudable. We also applaud HUD's efforts to incentivize regionalization in the Assessment of Fair Housing (AFH) process, as collaboration among public housing agencies (PHAs) and other program participants will allow these agencies to leverage resources and to promote fair housing goals extending far beyond their jurisdictional

¹U.S. Dep't of Housing and Urban Dev., Proposed Rule, "Affirmatively Furthering Fair Housing," 78 Fed. Reg. 43,710 (July 19, 2013).

boundaries. NHLP makes these comments in a spirit of cooperation, and seeks to contribute to the wider conversation about how we can promote communities of opportunity while being mindful of affordable housing needs within our existing low-income, segregated neighborhoods.

There are three major areas in which we feel the proposed rule could be strengthened:

First, NHLP strongly urges the Secretary to include language in the final rule that would focus on a *balanced approach* to implementing the AFFH mandate in a manner that incorporates both revitalization and desegregation of areas of concentrated racial and ethnic poverty. The ultimate goal of the final AFFH rule should be making *every community* nationwide a community of opportunity while promoting resident choice. This goal can only be accomplished by taking a regional approach to assessing fair housing needs because only considering low-income housing in one specific jurisdiction could have the effect of perpetuating or increasing segregation in the larger region.² The final rule should encourage participants to provide avenues of mobility for families while at the same time working to build inclusive, asset-rich communities in areas that are currently distressed.³ We recommend that the proposed rule's language reflect these goals by not only emphasizing mobility to communities of opportunity, but also prioritizing revitalization and investment in traditionally low-income, high poverty neighborhoods.

Second, we emphatically stress the need to preserve affordable housing, even in areas that are economically depressed and have racial and ethnic concentrations of poverty. As an organization with a core mission of advocating for housing rights on behalf of low-income tenants, we are concerned that the proposed rule could be interpreted as a license for jurisdictions to completely disinvest in these economically distressed areas. While we acknowledge the importance of PHAs utilizing tools such as the Section 8 Housing Choice Voucher Program, project-based vouchers in communities of opportunity, RAD, and the Choice Neighborhoods Initiative as means of alleviating segregation, investment in preserving affordable housing stock is an important and complementary component of the fair housing calculus.

Third, NHLP echoes concerns across the civil rights community that the proposed AFFH rule must be strengthened with respect to the enforceability of the AFFH mandate. Key questions regarding how the AFFH rule would be enforced, such as how HUD reviewers will quantify discernible progress towards meeting fair housing goals set out in the AFH, are not answered within the text of the proposed rule. We strongly believe that achieving meaningful enforcement includes requiring PHAs and jurisdictions to set benchmarks in their AFHs, including specific goals and a timeframe in which to achieve these goals. The preamble to the proposed rule rightfully acknowledges that the current

² See generally, *United States ex. Rel. Anti-Discrimination Ctr v. Westchester Co.*, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009).

³ Many residents of currently distressed areas wish to remain in their communities, and to see them thrive. For example, a person with limited English proficiency may wish to remain in in her current community, despite it being a racially or ethnically concentrated area of poverty, so as to live in place where her language is more widely spoken and where she feels a sense of cultural cohesiveness with her fellow residents. Our belief is that, by taking a balanced approach, such residents would have a choice whether to remain in their current communities or to move to higher opportunity areas – but that the choice ultimately remains squarely with the resident.

analysis of impediments to fair housing choice (AI) has failed to provide for meaningful, informed community planning processes.⁴ Our concern is that *shortcomings in enforceability will ultimately lead to a similar ineffectual result.*

The three major themes, as described above, outline the most important areas where the proposed AFFH rule must be strengthened before a final rule is issued. We now detail specific comments about how to enhance the AFFH final rule so it can benefit all families and communities.

A Balanced Approach Includes the Preservation of Affordable Housing

As discussed above, NHLP and other advocacy groups vigorously endorse the need for a balanced approach to implementing the AFFH mandate by encouraging mobility while investing in distressed neighborhoods. The opening section of the AFFH regulations, Section 5.150, describes the purpose of the rules and states, “A 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).⁵ Nearly identical language appears in the preamble to the rule.⁶ **This either/or language creates a false choice for program participants by suggesting that one approach may be sacrificed at the expense of the other.** We recommend changing the “or” to an “and” so that program participants know that they must engage in a balanced approach to community development within the larger context of affirmatively furthering fair housing.

The final AFFH rule must underscore that the definition of “affirmatively furthering fair housing” does not *exclusively* translate to mobility out of racially and ethnically concentrated areas of poverty. Proposed Section 5.152, which defines the term “affirmatively furthering fair housing,” states that the goals of the AFFH mandate will be accomplished “primarily by making investments with federal and other resources, instituting strategies, or taking other actions that address or mitigate fair housing issues” identified in the AFH.⁷ We urge HUD to include language clarifying that these investments and actions can be made with an eye towards balancing the complementary goals of preserving and rehabilitating existing affordable housing stock and eliminating concentrations of poverty and segregation.

Furthermore, the definition of “fair housing issue” in Section 5.152 should include language acknowledging that the inability of members of protected classes to find affordable housing in a given geographic area *is a fair housing issue*. This change is particularly important given the language in the

⁴78 Fed. Reg. at 43,710; 43,713.

⁵ Proposed § 5.150, 78 Fed. Reg. at 43,729.

⁶ This preamble language reads, “A program participant’s strategies and actions may include strategically enhancing neighborhood assets (for example, through targeted investment in neighborhood revitalization or stabilization) *or* promoting greater mobility and access to communities offering vital assets such as quality schools, employment, and transportation consistent with fair housing goals” (emphasis added). 78 Fed. Reg. at 43,716.

⁷ Proposed § 5.152, 78 Fed. Reg. at 43,729.

rule summary stating that the definition of “fair housing issue” “incorporates *any* other condition that impedes housing choice”⁸ (emphasis added).

Additionally, the definition of “fair housing choice” included in Section 5.152 should read: “that individuals and families have the information, *affordable* options, and protection to live where they choose without unlawful discrimination and other barriers...It encompasses actual choice, which means the existence of realistic *and affordable* housing options *in all communities*” (additions in italics). Again, this suggested language simply underscores our broader point that the inability of protected classes to locate affordable housing is a major barrier to fair housing choice.

Similarly, the proposed rule requires that development-related policies in public housing agency (PHA) plans “reduce disparities in access to community assets, and address disproportionate housing needs” for members of protected groups.⁹ NHP recommends that such language be clarified so as not to preclude development-related activities that revitalize impoverished areas. This view stems from our firm belief that the AFFH mandate should not result in the involuntary displacement of individuals and families who currently reside within racially and ethnically concentrated areas of poverty or in the loss of affordable housing units in these areas. NHP provides additional comments suggesting an expansion of the definition of “development-related policies” in PHA plans below.

Proposed Section 91.225 imposes on each Consolidated Plan jurisdiction an obligation to certify that it will affirmatively further fair housing, and that “it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.”¹⁰ **Just as we urge that HUD adopt language in its definition of “affirmatively further fair housing” that reflects a balanced approach to the AFFH mandate, we also firmly believe that this section of the final rule must include language stating that preservation of affordable housing and neighborhood investment in racially and ethnically concentrated areas of poverty are not actions necessarily materially inconsistent with the AFFH obligation.**

Substantive AFFH Obligations and Enforcement

The proposed rule places great emphasis on procedure without providing similar weight to program participants’ substantive obligations. For the AFFH rule to be effective, HUD must designate tools for meaningful enforcement. Components of meaningful enforcement include (1) requiring participants to set benchmarks in the AFH that include specific goals and a timetable in which to achieve the goals; (2) mandating participants to report annually on progress towards meeting these benchmarks; (3) requiring a transparent process where reports and other documents are available to the public and submitted to HUD; and (4) instituting a formal complaint procedure. Further, where a participant has not met its goals or takes actions to materially contradict them, then HUD or members

⁸ 78 Fed. Reg. at 43,717.

⁹ Proposed § 903.2(a)(3), 78 Fed. Reg. at 43,742.

¹⁰ Proposed § 91.225(a)(1), 78 Fed. Reg. at 43,738.

of the public must have the means to encourage, if not compel, the participant to comply with the goals set forth in the AFH.

The Need for Benchmarks

Proposed Section 5.154 does not clearly delineate what kinds of milestones HUD reviewers would use to indicate that a PHA or jurisdiction has made progress toward one or more goals identified in a participant's AFH. **Section 5.154 must be amended to require that participants submit benchmarks, a timetable in which to complete those benchmarks, and information about the entity responsible for completing them, in their AFH.** HUD should clarify what types of activities can meet a participant's fair housing goals in the final rule by providing specific examples of best practices and policy approaches to AFFH.

Prioritizing More than One Goal

The proposed rule only obligates participants to prioritize as few as one goal for addressing or mitigating the fair housing determinants outlined in Proposed Section 5.152.¹¹ **NHLP shares the concern of other advocacy groups that allowing program participants to prioritize as few as one goal would not allow for the in-depth of analysis required to assess a community's housing needs. In fact, such language signals to program participants that additional existing fair housing issues can be ignored or somehow de-prioritized, undermining much of what HUD sets out to accomplish with this rule.**

Annual Reporting

NHLP proposes that HUD include an *annual reporting* requirement in the AFH process, whereby program participants report on their progress and briefly describe what actions have been taken in the last year to meet their stated AFH goals. This obligation would increase accountability throughout the five-year time period. HUD could review these reports as they are submitted, and intercept problems as they arise. HUD should require that these reports be easily accessible on the participant's and HUD's websites, thereby enhancing accountability in the AFH process. For most PHAs, this annual reporting requirement can be easily inserted into the existing annual plan process, as described in more detail below. Without periodic HUD review, NHLP fears that we are trading what has essentially become a pro forma process in the AI for another in the AFH.

Importance of HUD Review in the Absence of Robust Public Participation

Proposed Section 5.162 relies heavily on the citizen participation process without also guaranteeing thorough review of a participant's AFH by HUD. Citizen participation may inform and serve as a check on local government and PHA plans, but it cannot be the sole standard for determining

¹¹ See Proposed § 5.154(d)(4)(ii), 78 Fed. Reg. at 43,731.

compliance with AFFH obligations. Moreover, there may be situations in which the public does not engage in the citizen participation process. An exacting HUD review will serve as the sole or an additional safeguard when the public does not fully engage in the citizen participation process, while still meeting the minimum requirements for AFH submission. Of course, NHLP fully supports a robust citizen participation process and includes comments specifically regarding citizen participation below. However, community participation serves a different purpose and is no substitute for a thorough review by HUD. Additionally, while required by HUD, there are many reasons why a program participant is unlikely to fulfill its obligation to engage residents and community members in the AFH process. Limited resources, for one, present a huge barrier to HUD's community participation mandate. Without additional support, most participants will have little means to organize and participate in their local or regional AFH. In those cases HUD will be the only entity assessing the adequacy of a participant's AFH.

Lack of Formalized Complaint Process

Currently, the proposed rule lacks a formalized complaint process whereby residents, advocates, and other stakeholders can voice their concerns directly to HUD. **The final rule must include a formal complaint process that includes at minimum: (1) instructions for community members to challenge the acceptability of an AFH, the subsequent actions of a jurisdiction to meet its AFH goals, and/or the failure to engage in the citizen participation process to develop the AFH; (2) meaningful and timely review of meritorious complaints by HUD; and (3) options for sanctions in the event the program participant is taking steps in violation of its AFH or other AFFH obligations.**

HUD must add a section that provides advocates and citizens with a means to challenge an AFH and/or actions taken by a jurisdiction that are in conflict with fair housing goals. **The section should state that community members may make a complaint at any time, outline the specific process involved in filing a complaint, and state that HUD must respond to all complaints, in writing, within 90 days.** The final rule must also include an opportunity for advocates to appeal a decision to FHEO headquarters when the local FHEO office accepts an AFH or a civil rights certification or does not adequately address a formal complaint. Of course, pursuit of these administrative procedures would not affect the rights advocates or citizens might otherwise have under the Fair Housing Act such as filing a discrimination complaint with HUD or a state civil rights enforcement agency, or filing a lawsuit. HUD's implementation of the AFFH mandate is only part of a larger fair housing picture.

A formal complaint process is especially important when a jurisdiction fails to address stakeholder concerns in its final AFH. Proposed Section 5.154(d)(5) requires program participants to include "a summary of any comments or views [from the community participation process] not accepted and the reasons why" in the final AFH.¹² This does not provide sufficient safeguards against PHAs and jurisdictions failing to provide explanations for not addressing certain community concerns.

¹² Proposed 5.154(d)(5), 78 Fed. Reg. at 43,731.

Except in high-profile instances, there would be almost no way for HUD to know about dissenting community views, for example, unless the participant chooses to disclose them. Thus, we suggest that the rule require PHAs and jurisdictions to respond to all comments not accepted, rather than simply summarizing such comments. We also join other civil rights advocates in strongly urging HUD to add a formalized complaint process to the final AFFH rule.

HUD Acceptance of AFH Submissions

The proposed rule provides little insight into what standards must be met to deem an AFH “accepted.” **Section 5.162 should include more examples of what constitutes a “substantially incomplete” AFH submission.** Further, the language suggests that an AFH will be reviewed to determine whether the program participant has fulfilled the procedural requirements of the AFH process, but that HUD will not undergo a substantive review upon submission. As explained above, NHLP urges HUD to consider requiring that each participant set benchmarks and then show tangible progress in meeting these benchmarks. Ideally, a re-submission will be triggered where a participant does not satisfy procedural requirements *or* has not met the substantive benchmarks as articulated in the AFH. The final rule’s language should reflect this requirement. If program participants have not met their substantive benchmarks, then HUD should require that these participants proffer specific reasons why these goals have not been met – and how the participant is working to overcome any barriers to achievement.

In addition, the consequences of submitting a non-accepted AFH after the initial re-submission must be clarified in Section 5.162(c). In exceptional circumstances where an AFH is not accepted because there is evidence that a jurisdiction is taking measures to completely frustrate fair housing goals or ignore them altogether, NHLP proposes providing an interim period during which funding is partially or wholly withheld due to the submission (and re-submission) of an unacceptable AFH. During this period, which would begin upon HUD’s non-acceptance of a resubmission, the program participant would have an opportunity to cure the deficiencies in its AFH. Funding would once again flow upon submission of an acceptable AFH. Of course, where a funding reduction may further frustrate the participant’s efforts to AFFH, then other penalties should apply. Other penalties that may provide an incentive to comply with the AFH process without actually exacerbating non-compliance or unduly harming low income recipients/beneficiaries include deeming program participants temporarily ineligible to qualify for discretionary funding, or imposing restrictions on the types of waivers participants may obtain. These same sanctions should apply to participants who fail to submit an annual update to their AFH.

Additionally, the final rule should provide more examples of what constitutes an unacceptable AFH to supplement those in Proposed Section 5.162(b). The current examples are too general and provide little practical guidance for jurisdictions, PHAs, and stakeholders.

HUD FHEO Review of AFH Submissions

The proposed rule does not designate the office within HUD that is tasked with reviewing AFH submissions. **The final rule should specifically charge HUD’s Office of Fair Housing and Equal Opportunity (FHEO) with review of AFH submissions, as well as general implementation of the AFFH mandate as outlined by the proposed rule.** FHEO should be designated in the rule itself because it is important to maintain consistency and to preserve institutional knowledge among reviewers even as administrations change.

Additionally, to ensure meaningful HUD review, and to provide HUD with sufficient time to consider complaints filed as part of any formalized review process adopted, the review period should be extended from 60 to 90 days. Furthermore, the final rule should include a mechanism for HUD FHEO to audit a certain percentage of accepted AFHs per year, so as to provide an additional check on whether HUD review procedures are adequate.

Examining Discrimination Beyond Explicitly Protected Groups

The AFFH mandate to expand equal housing opportunities for protected classes lies at the heart of the proposed rule. The term “protected classes” is invoked throughout the proposed text. However, the proposed rule’s definition of “protected class” is limited to those classes of persons explicitly protected by the FHA (race, color, sex, religion, familial status, national origin, and disability). We urge HUD, in the final rule, to make reference to additional groups beyond explicitly protected classes who are often singled out for discrimination, including members of the Lesbian, Gay, Bisexual, and Transgender (LGBT) community, Section 8 Voucher holders (often subject to source of income discrimination), migrant workers, large families, people with limited English proficiency, people who are homeless, and survivors of domestic violence, dating violence, sexual assault and stalking. Oftentimes, there is overlap between membership in one of these groups and membership in a protected class. However, to the extent the overlap is unclear, **HUD should encourage program participants to include in their AFHs a discussion of housing barriers experienced by these and additional groups that have been historically subjected to discrimination.** In addition, the rule should specifically require program participants to seek out data about these groups when they make up a significant part of a jurisdiction’s minority population.

“Inclusive Communities” and “Community Assets”

Lastly, Proposed Section 5.152 should define “inclusive communities” and “community assets,” as both of these definitions are important to the overall operation of the AFFH rule. Any definition of “community assets” should include affordable housing itself as an example of a community asset. In fact, “community assets” should be broadly defined to include factors such as affordable housing, access to healthy food, quality schools, social services, transportation, and other factors that foster a healthful, secure, and opportunity-centered quality of life.

PHA Programs and the AFH Process

The proposed AFFH rule aims to reduce racial and ethnic concentrations of poverty and revitalize neighborhoods while maximizing housing choice for all families. PHA programs, and particularly the use of Housing Choice Vouchers (HCV), are integral to combating segregation by providing a path to communities with assets such as good schools and access to employment. However, as we note throughout these comments, equally important is the preservation of existing federally subsidized housing units – even those units currently situated in racially or ethnically concentrated areas of poverty. As PHA programs are central to a jurisdiction’s efforts to affirmatively further fair housing, we are pleased that HUD is requiring PHAs to submit AFHs and enthusiastically support HUD’s efforts to incentivize regionalization in the AFH process. We now include specific comments related to the proposed regulations with respect to PHA programs.

Regionalization

NHLP agrees with HUD’s approach to incentivize regionalization of the AFH process. By amending Option 1 in Proposed Section 903.15 to allow a PHA to participate in an AFH with a broad range of program participants as explained below, HUD can best encourage collaboration. In addition to the other options, it allows PHAs flexibility and control of the AFH process.

According to the proposed rule, PHAs are given three options for submitting an AFH.¹³ Option 1 allows a PHA to calculate its hard units to determine with which Consolidated Plan jurisdiction it will collaborate. The rule for determining the applicable Consolidated Plan jurisdiction with respect to a PHA’s hard units seems arbitrary, however, and is too narrow of an assessment. First, **HUD should define “hard units” to include all federally-assisted owned and managed units subject to a PHA’s control including but not limited to Section 202, Section 8 Moderate Rehab, project-based vouchers and RAD conversions.** Many PHAs are currently converting their public housing stock to RAD project-based Section 8 or project-based vouchers. If HUD does not broaden the definition in the final rule, then these formerly public housing units will not be considered in PHAs’ AFH processes. In addition, in some cases, particularly in metropolitan areas, a PHA’s vouchers may be utilized primarily or substantially in an adjacent jurisdiction, which should also be considered a basis for determining an applicable jurisdiction.

Also, Option 1 does not accurately reflect HUD’s intent to implement a full range of regionalization options as stated in the summary: “New§ 5.156 addresses and encourages regional assessments and fair housing planning, providing that two or more program participants may join together to submit a single AFH to evaluate fair housing challenges, issues, and determinants from a regional perspective.”¹⁴ **The rule needs to be clarified not only to allow, but to encourage, two or more PHAs to work together on an AFH, within a regional boundary.** Presumably, Option 1 is

¹³ See generally Proposed § 903.15(a)(1)-(3), 78 Fed. Reg. at 43,743.

¹⁴ 78 Fed. Reg. at 43,718.

meant to cover PHAs that wish to file an AFH with another PHA in the region, although the language is unclear. Option 1 must be modified to *explicitly* allow for PHAs that wish to submit an AFH with other PHAs in its region.

While NHLP supports collaboration among PHAs, **regionalization must not relieve program participants of their individual obligation to AFFH.** In fact, the summary states, “a regional assessment does not relieve each regionally collaborating program participant from its obligation to analyze and address local fair housing issues and determinates [sic] that affect housing choice within its respective jurisdiction.”¹⁵ The final rule must reflect that each collaborating PHA has an obligation to AFFH, to set local PHA-specific goals, and to report on the PHA’s progress in meeting these goals. **The final rule should add language as follows: Section 5.156(d) Content of the Regional Assessment: “Each collaborating member must set its own goals to affirmatively further fair housing, take its own meaningful actions to affirmatively further fair housing and report on its progress to affirmatively further fair housing.”**

Whereas PHAs should be required to report on local goals and progress when participating in a joint AFH, an AFH submitted by a PHA independently should not be too narrow in scope so that it precludes consideration of regional fair housing issues. Currently a PHA is required to certify that its PHA plan is consistent with the Consolidated Plan of jurisdictions that overlap with the PHA. A PHA that chooses Option 2 and submits its own AFH should be explicitly required in the final rule to demonstrate and certify that it has reviewed and taken into consideration any existing regional or state-wide AFHs for the area.

Lastly, the rule provides no guidance on notice requirements of program participants seeking to collaborate with other program participants in an AFH. At minimum, Consolidated Plan jurisdictions should be required to publicly notice other program participants within their regional boundaries of the AFH process. Section 5.156 should be amended to add a section encouraging program participants who plan to submit a joint AFH to notify Consolidated Plan jurisdictions and PHAs within their region of their intention to file a regional AFH and who to contact for more information about the regional process.

Development-Related Activities

The proposed rule requires that a PHA’s development-related activities under its PHA plan be designed to reduce concentrations on the basis of race and national origin, “reduce disparities in access to community assets, and address disproportionate housing needs by protected class.”¹⁶ As we stress throughout our comments, this proposed language runs the risk of promoting the disposition of affordable housing in segregated, very low-income neighborhoods and justifies the failure to invest in impacted communities. More appropriately, the final AFFH rule should support PHA programs that

¹⁵ 78 Fed. Reg. at 43,719.

balance deconcentration with revitalization efforts. One way to strike this important balance is by requiring PHAs to include in their AFH the impact of the loss of affordable units related to PHA development-related activities. Language could be added to the end of Section 903(a)(3) such as, “...including housing needs created by disposition and demolition and other development related activities.” Further, HUD could modify Section 903.2(a)(3) or Section 903.2(d)(2) to include: “Affirmative steps must include a plan for replacement of one-for-one hard units affordable to public housing tenants at rents set at 30% of family income when a PHA plan includes the removal of affordable units from a racially or ethnically concentrated area of poverty in accordance with 24 CFR 970.11.”

Also, Section 903.2 identifies demolition as a development-related activity that should be designed to “address disproportionate housing needs by protected class.”¹⁷ Ordinarily, demolition is not an activity that will further this goal, unless it is replaced with higher quality affordable or mixed income housing without the loss of units. Where demolition and/or disposition are used as a tool to further other fair housing goals, the final rule should require that a PHA consider existing community assets in a neighborhood as a result of the housing, such as a community center, social services, or local businesses. Of course, as we noted in a previous section, availability of affordable housing itself is a community asset and should be included in any definition of that term.

Given that tenant mobility is an integral part of AFFH, PHAs should be required to keep records and report on tenant mobility such as applicant information by race and ethnicity, where applicants are offered housing, and what neighborhoods subsidized tenants are moving into. Also, PHAs should report on their specific efforts to encourage people to move into low-poverty neighborhoods and what, if any, additional services are needed and provided to facilitate these moves. Similarly, to promote desegregation and moves to higher opportunity areas, PHAs should be required to provide to applicants and participants information on high opportunity neighborhoods such as school rankings, walk scores, and other available data of interest to residents. To the extent possible, PHAs should include such information on their respective websites. Housing search assistance and counseling are also activities often necessary to support mobility strategies.

In the final rule, HUD must expand the definition of “development-related activity” as it pertains to the Housing Choice Voucher program. Historically, Section 903.2 governed public housing programs and HUD’s requirement that PHAs deconcentrate poverty by creating mixed-income developments. The proposed AFFH rule is clearly intended to cover all PHA programs, including Housing Choice Vouchers and the Project-based voucher program. Housing Choice Vouchers present a key component to any jurisdiction’s goals to AFFH. As such, Section 903.2 must be modified to more accurately reflect what a PHA must do with respect to the voucher program and to comply with fair housing requirements. For SEMAP purposes, HUD has already articulated examples of HCV program activities that might help reduce racial and ethnic concentrations including policies to “encourage participation by owners of units located outside areas of poverty or minority concentration; inform

¹⁷ Proposed § 903.2(a)(3), 78 Fed. Reg. at 43,742.

rental voucher holders of the full range of areas where they may lease units both inside and outside the PHA's jurisdiction; and supplies a list of landlords or other parties who are willing to lease units or help families find units, including units outside areas of poverty or minority concentration."¹⁸ Other policies that a PHA should be prompted to consider that would affirmatively further fair housing include adjustments to the payment standard, allowing for extended search time, counseling residents regarding neighborhood choices and determining how to assist with security deposits for those tenants, who want to move to or remain in areas that are not impacted. Either HUD must clarify the final rule that Section 903.2 includes vouchers and add HCV activities, or create a parallel section to address admission policies that will affirmatively further fair housing in voucher programs.

One of the development-related activities listed in Section 903.2(a)(3) includes "applicant consultation and information." What HUD meant by this activity is unclear and HUD should define these activities in the final rule. PHAs would be better served if HUD elaborated on the meaning of this clause.

PHA Program Enforcement

Annual Performance Reports: As we have noted throughout our comments, having program participants identify metrics for measuring success is essential to effective implementation of the AFFH mandate. This is particularly true with respect to PHAs because most PHAs already have annual performance reporting requirements. **The final rule should specifically require annual performance reports to indicate actions carried out to mitigate or address each of the goals articulated in the AFH, describe the results of those actions, and specify which fair housing issues were impacted and how.** In addition, the final rule should be substantially amended to read, Assessment of Fair Housing § 5.154(d)(4)(iii), "Identify a set of benchmarks for achieving your specific goals with a timeframe for each goal and the party or entity that is responsible to further the goal. For PHAs, these are the benchmarks that will be identified in the PHA annual plan update, see Section 903.7." Amended Section 5.154 will cross reference 903.7, which should also be amended to include these requirements in PHA annual plans.

Civil Rights Certification: NHLP urges HUD to require PHAs, as part of their annual civil rights certification, to describe specific fair housing goals and enumerate actions taken to further those goals. Under the PHA Annual Plan process, PHAs must submit an annual civil rights certification to HUD.¹⁹ The proposed rule strengthens the obligation to include an analysis of fair housing issues although the language is so vague that enforcement is unlikely. **HUD should require that PHAs identify specific goals from the AFH and certify that they are meeting those goals in their civil rights certification.** This will provide another enforcement mechanism for HUD and for advocates.

¹⁸ 24 CFR § 985.3(g). Unfortunately, the lists that many residents received only list units in areas of poverty and/or minority concentration. To AFFH, any list must be primarily focused on units in areas outside of areas of poverty or minority concentration.

¹⁹ 42 U.S.C. § 1437c-1(d)(15).

Public Participation: With respect to public participation, the final rule should strengthen the AFH citizen participation requirement within existing PHA regulations. Proposed Section 5.158(a)(2) directs PHAs to follow existing community participation in 24 C.F.R. §§ 903.7 and 903.19. However, neither of these provisions requires a citizen participation plan or details a robust community participation process seen in the proposed amendments to the Consolidated Plan regulations. Section 5.158 should also reference Sections 903.13 (RAB), 903.17 (public comment), and 903.21(modification of the PHA plan), and include stronger language throughout these sections that more closely reflects the proposed rule’s view of the increased importance of community and resident participation.

HUD and local posting of AFH: Additionally, it is imperative that the final rule include an obligation that the AFH and all related documents are posted on the participant’s website, including PHA annual plans with AFH updates. Information regarding all PHAs’ AFHs should also be made available on HUD’s website and easily accessible to the general public in electronic form. This accessibility will create an additional incentive for PHAs to submit coherent, insightful, and comprehensive AFHs. A HUD posting of AFHs will also assist program participants in the sharing of potential solutions and the means to overcome barriers. Any information posted on HUD’s website should also include the status of an AFH in the HUD review process (e.g. “submitted,” “accepted,” “under review,” etc.). PHAs should be required to make all AFH-related documents accessible to people with disabilities and to people with limited English proficiency. NHLP has commented further on the AFH process with respect to these populations below.

Finally, as noted previously, HUD should extend the review period of any AFH submitted by a PHA from the proposed 60 days to 90 days in order to ensure thorough review and an informed determination of whether PHAs are making meaningful progress toward AFFH goals.

Possible Elimination of the PHA Plan Process

In the FY14 Budget, the Administration proposed to eliminate the PHA plan process. In the future, HUD may successfully seek and obtain legislative changes to the PHA plan or annual plan process. The PHA plan process represents an important opportunity for the public to be informed of local PHA housing strategies and to play a role in shaping its policies. Elimination of the plan would not only severely hinder any attempts at transparency but it would also greatly frustrate the purpose of the proposed AFFH rule.

The final rule must address the possible elimination of the PHA plan process. It can do so in specific terms by reference to 24 CFR § 903 and in general terms with explicit language to preserve the process as intended if HUD successfully eliminates the PHA plan process. We urge HUD to clarify the AFFH rule and its relation to the PHA plan process.

Inclusion of MTW PHAs

All PHAs should be required to submit an AFH. NHLP believes that is HUD's intent. There are currently 35 PHAs that are MTW PHAs.²⁰ These MTW PHAs currently submit plans annually to HUD but may not be subject to the 903 PHA plan process rules. The AFFH rules should state that current and any future MTW PHAs are subject to the AFFH rules and must conduct an AFH under the available options.

Community Participation

NHLP applauds the addition of what will hopefully become a robust community participation process – as community feedback is integral to the success of implementing the AFFH mandate. As an organization that has become a national leader in the area of resident engagement, NHLP includes the following considerations concerning increasing community participation.

Consultation

The consultation requirements, such as those included in proposed Section 91.100(a)(5), should further emphasize consulting with local community development agencies – as those agencies are currently the ones receiving funding. In other words, even if a PHA elects to conduct its own AFH, it should be required to consult with local ConPlan agencies, fair housing agencies, and planning agencies in the development of the AFH.

Capacity

The final AFFH rule should include language about the importance of financial support for capacity building with respect to community participation. While required by HUD, there are many reasons why a program participant is unlikely to fulfill its obligation to engage residents and community members in the AFH process. Limited resources, for one, present a huge barrier to HUD's community participation mandate. Without additional support, most residents and other stakeholders will have little means to organize and participate in their local or regional AFH.

Public tracking

To better inform community participants and other stakeholders, the final rule should mandate that upon receipt to HUD, the agency will provide each AFH submission with a publicly available tracking number. Such tracking would allow residents, advocates, and stakeholders to know the status of an AFH submission. As earlier noted, HUD should include status information on its website for ease

²⁰ Department of Housing and Urban Development, *Moving to Work FAQ*, available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/mtw/faq (last visited Sept. 16, 2013).

of access. Ideally, such public tracking would work in conjunction with a formalized complaint process and with an objection mechanism in the AFH.²¹

Guidance on increasing resident and public participation

HUD should provide guidance to program participants on how to encourage residents and the wider community to participate in this process. Such guidance is particularly important in this context, as implementation of the AFFH mandate may appear abstract and not immediately related to the everyday problems of residents. While additional financial resources should be allocated for increasing community participation, any guidance should also include strategies for promoting community involvement in times of limited funding.

Mechanism to Object Formally to HUD During AFH Review

In addition to, or in concert with, a formalized complaint process, HUD should have a mechanism whereby residents and other stakeholders can object to an AFH currently under review. As noted above, HUD should make tracking information publicly available on its website, such that concerns can be directed to appropriate HUD personnel reviewing a given AFH.

Community Participation by Persons with Limited English Proficiency

NHLP is greatly encouraged by the proposed rule's acknowledgement that outreach to limited English proficient (LEP) persons is integral to achieving full and informed community participation. We offer the following comments and suggestions.

Proposed Consolidated Plan Sections 91.105(a)(4) (Local governments) and 91.115(a)(4) (States) require jurisdictions, as part of their citizen participation plans, to take reasonable steps to "provide language assistance to ensure meaningful access to citizen participation"²² by non-English speaking persons. These sections also require that the citizen participation plan describe the jurisdiction's procedures "for assessing its language needs and identify any need for translation of notices and other vital documents."²³ **It is imperative that the final rule define what is meant by "vital documents" in this instance.** While the term appears throughout HUD's "Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons" (HUD LEP Guidance),²⁴ the term should

²¹ To demonstrate that a similar system can be effective, we point to the California Department of Housing and Community Development's system established to provide updated information about Housing Elements submissions (the state counterpart to the AD) from each jurisdiction within the state. This system provides interested persons with the opportunity to sign up for an e-mail listserv that provides information about Housing Element submissions; additionally, the state provides a host of information on its website about the status of Housing Element submissions. This system could provide a starting point for HUD to adopt a similar system for the AFH process. For more information, see <http://www.hcd.ca.gov/hpd/hrc/plan/he/> (under "Housing Element Currently Under Review").

²² 78 Fed. Reg. at 43,735; 43,737.

²³ *Id.*

²⁴ 72 Fed. Reg. 2732 (Jan. 22, 2007).

be defined specifically in the context of the citizen participation process with respect to an AFH. “Vital documents” in the HUD LEP Guidance describe those documents that are “critical for ensuring meaningful access.” Borrowing language from that definition, we propose that the final rule include a definition of “vital document” as describing “those documents and other materials that are critical for ensuring meaningful access to the community participation process.”

Furthermore, HUD must describe the types of documents that are “vital” for the purposes of the citizen participation process. For example, it is important for the AFHs to be available in multiple languages so that LEP individuals can have the opportunity to review the AFHs in sufficient time to meaningfully participate in public meetings and hearings. Given the extent to which LEP persons are underrepresented at public meetings/hearings, having enough time to review translated materials in advance is critical to ensuring that LEP individuals have the opportunity to fully participate.

To the extent that program participants may find that translating their AFHs and other planning documents in multiple languages overly burdensome, we propose that program participants must, at minimum, provide and translate an executive summary of the AFH into the area’s widely spoken non-English languages. This summary would capture the salient details of the AFH. Of course, program participants would be allowed to (and should be encouraged to) translate the entire AFH, other planning documents, and relevant AFH information into other languages. As many program participants are likely to meet the publication requirement of proposed Sections 91.105(b)(2) and 91.115(b)(2) by publishing an English-language summary of these documents, this summary can be used as the basis for the translated documents. Again, these documents should be translated well in advance of any public meetings concerning the AFH process.

Furthermore, program participants conducting public meetings/hearings regarding the AFH should be required to track the languages spoken by meeting attendees. This information will inform program participants’ subsequent assessments of language needs. If a program participant finds that LEP persons are continually underrepresented at public meetings/hearings, it must take steps, outlined in its assessment of language needs, to improve attendance by LEP residents.

The languages in which translated notices and vital documents will be provided as part of the citizen participation process should be included as part of a state or local jurisdiction’s description of procedures identifying language needs, as required by proposed Sections 91.105(a)(4) and 91.115(a)(4). The final rule should include language reflecting this requirement.

The final rule should note that jurisdictions needing guidance in determining which language groups require translated vital documents and notices should consult with the four-factor analysis detailed in the HUD LEP Guidance. The four-factor analysis is a balancing test that considers the following: (1) the number of LEP persons served or likely to be served or encountered; (2) frequency of contact with LEP persons; (3) importance of the activity or program at issue; and (4) available resources. This test can provide jurisdictions with an initial snapshot of the language access

needs for the purposes of ensuring effective citizen participation, including what languages should be covered.

The final rule should remind program participants that summaries of a proposed AFH or Consolidated Plan, as referenced in Sections 91.105(b)(2) and 91.115(b)(2) must also be published in non-English language newspapers and other media (including websites and radio) that serve the speakers of non-English languages. These languages should be enumerated, as proposed above, in the jurisdiction's description of procedures for identifying language needs.

While the proposed rule amends the Consolidated Plan regulations to require that the citizen participation plan include an assessment of language needs, no such provisions are included in the proposed amendments to regulations concerning the PHA Plan process at 24 C.F.R, Part 903. We ask that Section 903.17(c) be amended to require that PHAs: (1) include outreach to LEP populations in its outreach activities within the jurisdiction, and (2) identify the need for translation of notices and vital documents with respect to the PHA Plan process. We also ask that HUD require PHAs conducting public hearings pursuant to Section 903.17(a) describe how it will identify and address the needs of LEP attendees.

The preamble states that the requirement in proposed Section 91.105(a)(4) to provide meaningful access within the public participation process to LEP persons “strives to have local governments involve these individuals to the maximum extent possible.”²⁵ We recommend that the language read, “...the maximum extent possible, *and in compliance with Title VI and other laws requiring meaningful access to LEP persons.*” This strengthened language notes the importance of language access, and serves as a reminder that in certain cases, jurisdictions may have obligations beyond voluntary compliance with respect to ensuring meaningful access to LEP persons.

The CDBG regulations for local governments, found at Section 570.486, should also include a general mandate that local governments must assess existing local language needs to ensure meaningful access at public hearings in Section 570.486(a)(5).

Additional Affordable Housing Mechanisms Included in the AFFH

HUD Commenter Question 8 requests comment on whether other planning efforts should be coordinated with fair housing efforts contemplated by the rule. **NHLP strongly believes it is imperative that any other affordable housing programs, particularly housing operating under the Low Income Housing Tax Credit (LIHTC) program and project-based Section 8 developments, be included in the AFH analysis as a subset of “activities relating to housing and urban development.”**

²⁵ 78 Fed. Reg. at 43,721.

Given the sheer reach of the LIHTC program, having created more than 2 million affordable units nationwide,²⁶ jurisdictions should be required to consider how LIHTC properties factor into the availability of affordable housing both within and outside of racially and ethnically concentrated areas of poverty. Furthermore, HUD should require that program participants coordinate with the Department of Treasury and the states' tax credit allocation committees, which administer the LIHTC program, to ensure that plans for construction and conversion of LIHTC properties are incorporated into the jurisdiction's AFH. HUD should also require that participants consider a state Qualified Allocation Plan when setting its goals to AFFH.

Additionally, affordable housing programs administered by the U.S. Department of Agriculture should also be included as a subset of housing and development-related activities. Units from these programs should be factored into a program participant's AFH accordingly.

HUD Data

In response to HUD Commenter Question1, we offer the following comments. NHLP applauds HUD's ambitious undertaking of providing a wealth of data to assist program participants and stakeholders in conducting an informed and holistic assessment of fair housing issues within a broader community and regional context. We note, however, that improvements can be made with respect to the following issues. First, HUD data is reliable to varying degrees. For example, current HUD data employs fair market rents that do not reflect today's market rents. Also, data with respect to people with disabilities is unreliable and often unavailable. This is discussed in more detail below. NHLP suggests creating a process in which a program participant can challenge HUD data.

Further, given the importance of properties that PHAs control beyond public housing stock, **we strongly urge HUD to provide information about other PHA-controlled properties, such as undeveloped land, state-funded or market rate units that PHAs own as investment properties.**

The proposed rule includes HUD data as a centerpiece of the AFH framework and as essential in ensuring that community participants have updated information. **We therefore urge HUD to include language in the final rule that requires HUD data to be updated annually or biannually.** The proposed rule only states that such data will be updated "periodically."²⁷ If HUD determines that there has not been any substantial change in the available data, it should publish a notice to that effect for the respective year. Loosely stating that HUD will periodically update the data is insufficient. Such a vague standard may result in the data being updated every 20 years, which would benefit no one.

²⁶ See, e.g., HUD, "What Happens to Low-Income Housing Tax Credit Properties at Year 15 and Beyond?" at xi (August 2012), available at: www.huduser.org/portal/publications/what_happens_lihtc_v2.pdf (noting that tax credit units comprised approximately one-third of multifamily rental housing built from 1987-2006).

²⁷ 78 Fed. Reg. at 43, 716.

HUD's Obligations to Affirmatively Further Fair Housing

The final rule should include language that also outlines HUD's own obligation to affirmatively further fair housing, not just the obligation of program participants. Section 808 of the FHA, 42 U.S.C. § 3608(e)(5), places this obligation to affirmatively further fair housing with the HUD Secretary. Despite HUD's clear AFFH mandate in the FHA, HUD counsel continues to deny that the FHA is enforceable against itself under the APA because the AFFH duty does not impose any discrete requirements on HUD.²⁸ If HUD expects program participants to take meaningful steps to affirmatively further fair housing, HUD must lead by example and place itself under the same obligations. **NHLP believes this should include, at a minimum, HUD conducting a periodic analysis that outlines the agency's obligations under Section 808 of the FHA, the barriers to meeting these obligations, the steps that HUD is taking to work toward successfully implementing the AFFH mandate, and the outcomes that have been obtained due to these actions.**

AFFH for People with Disabilities

NHLP applauds HUD's acknowledgement that housing mobility for people with disabilities is a critical part of a participant's AFFH goals, and agrees that these goals may be expressed differently than other protected classes due to a history of segregation and institutionalization. We therefore offer the following comments specifically related to the obligation to AFFH for people with disabilities.

Proposed Section 5.152 defines fair housing choice for individuals with disabilities as (1) the availability of housing accessible to people with disabilities and (2) the opportunity to move to the most integrated setting appropriate.²⁹ Program participants must consider both in their AFHs, and Section 5.154 should specifically identify these as priorities to affirmatively further fair housing.

A key component of the proposed AFFH rule is the availability of data regarding protected classes and housing. To refine the current AFFH planning process, HUD will provide a range of data to program participants including racially and ethnically concentrated areas of poverty and access to community assets. A meager amount of data, however, is currently available regarding housing accessibility for people with disabilities. HUD seems to recognize this shortfall in Section 5.154(c), which includes a list of the types of data it will make available to program participants, "including, *to the extent available*, accessible units" (emphasis added).³⁰ Given that the AFH is predicated on data, it is imperative that HUD continue to compile and analyze data regarding the availability of accessible units and other disability-related data. **At the very least, PHAs should be required to provide updated information with respect to the accessibility of PHA-owned units and the identity of landlords with accessible units in the jurisdiction who cannot discriminate against Section 8 tenants, such as owners of LIHTC properties.** Further, where HUD cannot provide the data, jurisdictions should be required to make local efforts to do so.

²⁸ *United Tenants of Mercedes Palms v. U.S. Dept. of Housing and Urban Development*, 7:07 CV 00310 (S.D. Texas 2010); *Inclusive Comm. Project v. U.S. Dept. of Housing and Urban Development*, 2009 WL 3122610 at *8 (N.D. Tex. Sept. 29, 2009).

²⁹ Proposed § 5.152, 78 Fed. Reg. at 43,730.

³⁰ Proposed § 5.154(c), 78 Fed. Reg. at 43,731.

Further, HUD acknowledges the incredible barriers that people with disabilities have historically faced to finding accessible and appropriate housing. The Supreme Court’s decision in *Olmstead v. L.C.* recognized the rights of people with disabilities to live in the most integrated setting appropriate.³¹ Pursuant to 24 CFR § 8.4(d), HUD promotes housing choice and the deinstitutionalization of people with disabilities. The *Olmstead* mandate includes that each state have and implement a plan with measurable objectives to meet this goal of housing choice and opportunity. **A description of how a program participant is implementing its state *Olmstead* plan should be a mandatory part of an AFH.** Integrating fair housing issues for people with disabilities into the AFH is essentially the type of collaboration that is called upon in the AFFH rule and will only strengthen a jurisdiction’s compliance with the *Olmstead* mandate. A Section (iii) should be added to 5.154(d) to require a participant to “Identify and prioritize the goals set forth in the state *Olmstead* plan that address the housing needs of people with disabilities who are in segregated settings and describe how the participant is addressing those goals.”

HUD includes examples in the proposed rule of PHA activities that will AFFH. With respect to people with disabilities, Section 903.2(d)(2)(ii) lists “residency preferences such as those designed to assist in deinstitutionalizing individuals with disabilities” as an example of one such PHA activity.³² **NHLP strongly suggests that HUD change “residency preferences” to “admissions preferences” because admissions preferences will more effectively further the goal of integrating people with disabilities into housing with the non-disabled population.** In addition, residency preferences, particularly in communities with high non-minority populations, have the potential to be used as barrier to AFFH by affording a preference to persons who are very likely to be non-minority. This may result in minority applicants spending a disproportionate amount of time on housing waitlists, frustrating the purpose of the AFFH mandate.

The final rule should guarantee that community participation plans are required to be accessible to people with a range of physical and mental health disabilities. The rule should explicitly state that program participants will provide reasonable accommodations to individuals with disabilities so that they may fully engage in the public participation process. All program participants must be required to perform outreach to agencies that provide services to people with disabilities and should have all materials available in formats that are accessible to individuals with hearing and visual impairments. **Sections 91.105 and 91.110 must be amended to specifically require program participants to adopt a plan for accessibility as part of the citizen participation requirement.** Consolidated Plan jurisdictions and PHAs are covered by the ADA and Section 504 requirements regarding accessibility but these obligations should be unequivocally stated in the rule.

In closing, NHLP and the undersigned organizations wish to applaud your efforts in drafting this proposed rule. While understanding that you will receive a considerable amount of feedback during this comment period, we must also stress that having a final rule issued as soon as possible is vital to

³¹ *Olmstead v. L.C.*, 527 U.S. 581 (1999).

³² Proposed § 903.2(d)(2)(ii), 78 Fed. Reg. at 43,742.

our continuing work as housing and civil rights advocates. Thank you for your consideration of these comments. If you have any questions regarding these comments, please contact Deborah Thrope, at (415) 546-7000, ext. 3124, dthrope@nhlp.org, or Renee Williams, (415) 546-7000, ext. 3121, rwilliams@nhlp.org.

Sincerely,



Marcia Rosen
Executive Director
National Housing Law Project

National Low Income Housing Coalition
The Public Interest Law Project
Legal Services of Northern California
Legal Services of Greater Miami, Inc.
Mid-Minnesota Legal Aid
Texas Rio Grande Legal Aid
Fair Housing Council of the San Fernando Valley
Western Center on Law and Poverty
California Rural Legal Assistance
Law Foundation of Silicon Valley
Sargent Shriver National Center on Poverty Law
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LAF Housing Practice Group
Sonoma County Housing Advocacy Group
Housing Preservation Project
Washington Legal Clinic for the Homeless
Accessible Community Housing of New Jersey
Boston Tenant Coalition
North Carolina Justice Center
Asian Americans Advancing Justice – Asian Law Caucus
Anne-Marie Mokritsky-Martin, Advocate