

April 24, 2023

Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW, Room 10276  
Washington, DC 20410-0500

Re: Affirmatively Furthering Fair Housing (“AFFH”) Proposed Rule  
Docket No. FR-6250-P-01

To Whom It May Concern:

The Council of Large Public Housing Authorities (“CLPHA”), the MTW Collaborative, and Reno & Cavanaugh, PLLC (“Reno & Cavanaugh” or “R&C”) are pleased to submit comments to HUD’s proposed rule entitled “Affirmatively Furthering Fair Housing” published on February 9, 2023 (the “Proposed Rule”).

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. We support the nation’s largest and most innovative public housing authorities (“PHAs”) by advocating for policies and programs that most effectively serve low-income residents and provide them with long-term economic opportunities. Our members own and manage nearly half of the nation’s public housing program, administer a quarter of the Housing Choice Voucher (“HCV”) program, and operate a wide array of other housing programs. CLPHA members collectively serve over one million low-income households.

The MTW Collaborative represents PHAs participating in HUD’s Moving to Work Demonstration (“MTW”) program. The MTW Collaborative monitors and advocates on behalf of MTW agencies’ interests and facilitates the sharing of information, best practices, and innovations between MTW agencies. Our membership includes the initial 39 PHA agencies participating in the MTW program, as well as PHAs newly designated as MTW pursuant to the expansion of the MTW program as authorized by Congress.

Reno & Cavanaugh has represented hundreds of PHAs throughout the country. The firm was founded in 1977, and over the past three decades the firm has developed a national practice that encompasses the entire real estate, affordable housing, and community development industry. Though our practice has expanded significantly over the years to include a broad range of legal and legislative advocacy services, Reno & Cavanaugh’s original goal of providing quality legal services dedicated to improving housing and communities still remains at the center of everything we do.

The Proposed Rule defines “affirmatively furthering fair housing” as “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation, eliminate inequities in housing and related community assets, and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.” By this definition, PHAs operate every single day to affirmatively further fair housing. Unlike the Biden Administration’s Justice40 Initiative that sets “a goal that 40 percent of the overall benefits of certain Federal investments flow to disadvantaged communities that are marginalized, underserved, and overburdened by pollution,”<sup>1</sup> PHAs commit 100 percent of their resources to produce and preserve affordable housing in their communities. PHAs serve the “marginalized, underserved, and overburdened” in their communities through their public housing and Housing Choice Voucher programs. Through this service to their communities, PHAs take meaningful actions every day to combat discrimination, overcome patterns of segregation, eliminate inequities in housing, and foster inclusive communities.

Like HUD, PHAs are committed to affirmatively furthering fair housing and therefore appreciate HUD’s efforts to streamline the AFFH requirements to enable PHAs to meet their AFFH obligations while minimizing administrative burden on PHAs. We applaud HUD’s efforts to promote equity in housing. Fair housing is a fundamental and critical component of the mission of PHAs and many of the challenges PHAs now face in their ongoing AFFH efforts are the result of federal policies from decades ago that did not promote fair housing goals. It is also a necessarily complicated area implicating various policy concerns.

However, as explained in further detail below, the Proposed Rule fails to provide PHAs with the necessary tools to produce the contemplated AFFH deliverables. At the same time, the Proposed Rule creates an enforcement framework that penalizes PHAs for failing to produce these deliverables. The Proposed Rule also continues to be administratively burdensome and arguably constitutes an unfunded mandate.

As a preliminary matter, we are deeply concerned that the Proposed Rule contemplates commencement of the Equity Plan process, including planning and community engagement, even before a final rule has been issued. As currently proposed, the Equity Plan for program participants with larger housing portfolios is to be submitted 24 months after the effective date of the final rule or 365 calendar days prior to the date for which a new 5-year plan or new consolidated plan is due, **whichever is earlier**. In practice, this would mean that a PHA whose plan or consolidated plan is due in 2024 would be required to submit its Equity Plan **this year**. This is an impossible deliverable. Therefore, in response to Question 13 in the Proposed Rule, it is our position that the PHA obligations contemplated in the Proposed Rule should logically and necessarily post-date the effective date of the final rule, and in any event the deadline to submit an Equity Plan should be at least 24 months after the effective date of the rule.

Further, while PHAs embrace AFFH goals, we also want to ensure that in finalizing and implementing the rule, HUD adequately considers the limited tools and control PHAs have had, both historically and currently, to promote fair housing. Not only is PHA funding grossly inadequate, but many decisions about the location and design of public housing were made

---

<sup>1</sup> Information on the Justice40 Initiative is available at: <https://www.whitehouse.gov/environmentaljustice/justice40/>.

decades ago and PHAs do not have access to land or development resources which would be required to now remake the public housing landscape. In addition, many public housing communities strongly oppose restrictions on reinvesting federal funds to recapitalize or replace existing developments in neighborhoods where residents have deep social and economic roots. Even in the HCV program, which by program design has a greater likelihood of promoting mobility, PHAs are highly constrained by factors such as fair market rents (“FMRs”) and allowable payment standards in incentivizing moves to non-impacted neighborhoods. We have made similar comments below in response to particular questions posed by HUD in the Proposed Rule and encourage HUD to take these into account.

**I. HUD Has Not Made Adequate Current and Historic Demographic Data Available to PHAs to Conduct the Equity Analyses Required Under the Proposed Rule.**

The Proposed Rule requires PHAs to address specific questions regarding demographics, segregation and integration, racially or ethnically concentrated areas of poverty (“R/ECAPs”), access to community assets and affordable housing opportunities, and local policies and practices impacting fair housing in their geographic area of analysis. However, data sets for these 5 identified areas do not exist for every “geographic area of analysis” across the country and certainly do not exist with historic data to enable substantive analysis of “changes over time” as required by the Proposed Rule.

We applaud HUD’s commitment to exploring possible improvements to the existing AFFH-T Data & Mapping Tool as well as other approaches to facilitating data analysis and making HUD-provided data as useful and easy to understand as possible. We also welcome HUD’s commitment to continuing to provide additional tools, maps, and data sets, as well as “technical assistance that would highlight key points to help program participants understand what those maps and tables show.” However, PHAs need to be able to work with and manipulate the data in order to provide practical and constructive feedback if any such data and tools will be of any assistance during the Equity Plan process. It is therefore crucial that all contemplated tools and data sets in the Proposed Rule be made available to PHAs at least 24 months prior to any Equity Plan submission deadline.

Lastly, we are encouraged that HUD continues to acknowledge that AFFH goals and progress are often specific to the PHA’s community and limited by the PHA’s jurisdictional circumstances. In recognition of this, in response to Question 3 and its subparts and Question 8e in the Proposed Rule, it is our recommendation that HUD provide PHAs with the maximum flexibility to use available data sets and data sources PHAs deem appropriate for their Equity Plan analyses, regardless of whether such data is nationally uniform. HUD should not require PHAs to use specific data sets.

## **II. The Accountability and Transparency Mechanisms Contemplated in the Proposed Rule Expose PHAs to Greater Liability and Unnecessarily Frustrate the AFFH Decision-Making Authority and Process of PHAs.**

The Proposed Rule contemplates that “HUD will have the ability to open compliance reviews, and members of the public will be able to file complaints directly with HUD regarding a program participant’s AFFH-related activities.” These enforcement mechanisms are deeply concerning to PHAs.

There is a fundamental conflict with HUD’s statement in the Proposed Rule that “tangible fair housing outcomes will be locally driven based on the fair housing issues that are presented by local circumstances,” on the one hand, and a mechanism that allows any individual member of the public to challenge a PHA’s AFFH-related activities. HUD states in the Proposed Rule that it “does not intend this complaint and compliance review process to supplant” the PHA’s planning process, and “also does not intend the complaint process to be a forum to challenge program participants’ day-to-day activities that have little nexus to the AFFH obligation.” However, the collective experience of the CLPHA membership, the MTW Collaborative, and R&C’s dispute resolution practice counsels that this is exactly what will happen under the Proposed Rule. Issues of equity, fair housing, and housing opportunity are complicated by the fact that PHAs (a) are underfunded, understaffed, and generally under-resourced, and (b) do not have authority or control over zoning and land use regulations, state, federal, and private funding, and where individuals ultimately choose to live. This reality necessarily means there will be individuals who disagree with a PHA’s AFFH decisions and believe that a PHA has taken action “that is materially inconsistent with the obligation to affirmatively further fair housing.”

It is important that HUD clearly identify the standard upon which PHA compliance with AFFH will be evaluated. In response to Question 15 in the Proposed Rule, we request that HUD provide assurance to PHAs that HUD’s acceptance of an Equity Plan is sufficient to demonstrate compliance. Such safe harbor is crucial to ensuring that a PHA’s AFFH decision-making is not in fact unnecessarily frustrated or frivolously challenged.

While we appreciate HUD’s commitment “to providing further guidance as to the alleged conduct that HUD will accept as meriting an investigation,” such guidance should be developed with PHA-input and issued prior to implementation of a final AFFH rule. PHA-input is key in developing this guidance as PHAs have encountered FHEO enforcement that is fragmented, with different FHEO offices and regions offering contradictory guidance, novel and inconsistent interpretations of federal law, and excessively-punitive enforcement of fair housing policy. Greater clarity as to how PHAs may meet their AFFH obligations is therefore necessary prior to any compliance and enforcement liability attaching to PHAs.

### **III. The Proposed Rule Fails to Consider How Moving to Work Agencies Can Play a Critical Role in Promoting AFFH by Increasing Housing Choice and Expanding Access to Affordable Housing by Non-MTW Agencies.**

When considering how PHAs can work together to affirmatively further fair housing, we encourage HUD to look at the activities of MTW agencies and seek ways in which similar flexibilities can be afforded to non-MTW PHAs. Indeed, promoting housing choice is a statutory purpose of the MTW program. For example, many MTW agencies have used their MTW flexibilities to increase landlord participation through landlord incentives and other initiatives. HUD's implementation of MTW expansion even includes a cohort dedicated to evaluating the role of landlord incentives in increasing landlord participation in the HCV program. The more landlords that are willing to participate in the HCV program, the more housing choice families will have. However, as non-MTW agencies are currently limited to only using Administrative Fees or other non-Federal funds to provide such incentives, their ability to do so is severely limited. We encourage HUD to explore ways in which non-MTW agencies can use additional tools to implement landlord incentives as well as other regulatory and administrative flexibilities that would enable such agencies to expand housing choice and access to advance AFFH goals.

In addition, we remind HUD of the opportunities afforded to both MTW and non-MTW agencies alike in the "regionalization" provisions contained in Section 239 of the Fiscal Year (FY) 2016 Appropriations Act (P.L. 114-113), which we believe could be instrumental in helping agencies fulfill their AFFH obligations. The statute allows MTW agencies and non-MTW agencies to administer assistance under Section 8 and 9 of the 1937 Act jointly across multiple neighboring jurisdictions to promote efficiencies and greater housing choice for low-income persons. The ability for MTW agencies and non-MTW agencies to collaborate and promote MTW goals, including increased housing choice, could assist PHAs and their residents in accessing and expanding affordable housing options.

While we note that HUD's Office of Public and Indian Housing published Notice PIH 2023-08 on April 7, 2023, to implement these provisions of the law, we believe that the limited methods for regional consortia presently permitted by HUD do not fully capture the flexibility afforded to MTW and non-MTW agencies in the statute, are overly restrictive, and may make entering into regional consortia untenable for MTW agencies and partner agencies alike. In Notice PIH 2023-08, HUD would only allow regional consortia between MTW and non-MTW agencies when: (1) there is a consolidation or transfer of public housing and/or HCV programs operated by the MTW and non-MTW agency; or (2) the MTW agency and non-MTW agency enter into a Management Agreement and agree not to apply MTW funding flexibility to the non-MTW agency. We fear that these limited options may actually disincentivize agencies from cooperating in the manner most likely to advance AFFH goals. Instead, HUD should allow MTW agencies to propose alternate methods of regional consortia beyond those listed in Notice PIH 2023-08.

For example, MTW agencies ought to be able to use regional consortia to jointly administer a portion of an agency's Section 8 program, providing the non-MTW agency with all of the statutory, regulatory, and funding flexibilities of the MTW agency, for example through landlord incentives, without requiring the agency to consolidate or transfer their entire program. While

the Section 8 program is set up to promote mobility within a PHA's jurisdiction, regional consortia between MTW and non-MTW agencies would increase the geographic area in which residents could search for housing without the administratively burdensome need to port out and port in a resident seeking to use their voucher elsewhere.

When not constrained by overly-burdensome regulations or statutory requirements, MTW agencies have found ways to streamline operations, more efficiently utilize Federal dollars, and increase housing choice in ways that align with the goals of AFFH. When finalizing and implementing an AFFH Final Rule, HUD should consider the work of MTW PHAs and seek ways to scale up their innovations to non-MTW agencies. Increased flexibility for non-MTW PHAs would assist these agencies in meeting their AFFH obligations and serve as a prime example of how statutory and regulatory relief can promote AFFH goals.

#### **IV. The Proposed Rule Does Not Adequately Address the Administrative and Cost Burden Problems of the Previous AFFH Rule.**

Given the depth of analysis required of an Equity Plan, the issues with the specific data gathering and analyses contemplated in the Equity Plan (see comments below), and the long-term underfunding of public housing, it is clear that PHAs are not equipped to undertake such Equity Plan process without third party assistance. PHAs are on the front lines of promoting equity and fair housing goals in a very difficult regulatory and political environment and are therefore likely to need consultant assistance to meet the Equity Plan requirements under the Proposed Rule, contrary to HUD's stated goal "that consultants, contractors, or complex data analysis are not required to produce an Equity Plan that can be accepted" by HUD.

Further, in response to Question 1 in the Proposed Rule, PHAs should have maximum flexibility in the Equity Plan process to reduce the burden on PHAs. In response to Question 5a, HUD should not require a minimum number of community engagement meetings, but rather allow PHAs to determine how many meetings make sense for their community. HUD should not require PHAs to utilize specific types of technologies to conduct outreach and engagement but rather allow PHAs to decide such outreach and engagement logistics based on the PHA's particular resources and community access to technologies. Should HUD recommend certain technologies, then it should provide the necessary financial resources and technical assistance for PHAs and their communities to access such technologies. In response to Question 9, HUD should not mandate how Equity Plans should be submitted to HUD, but rather allow PHAs to choose whichever file format (e.g., MS Word, PDF, etc.) works for their particular Equity Plan. Further, HUD should provide multiple options for submission (including through a secure portal, via email, and through a webpage that allows uploads) of Equity Plans, each with the ability to provide immediate confirmation that the submission was successful and technical assistance for any submission issues.

#### **V. Specific Comments to Equity Plan Requirements**

Under the Proposed Rule, PHAs are required to address specific questions regarding (1) demographics, (2) segregation and integration, (3) R/ECAPs, (4) access to community assets and affordable housing opportunities, and (5) local policies and practices impacting fair housing in their geographic area of analysis. We provide specific comments to certain questions below.

*(1) Demographics.*

*(i) What are the current demographics of the geographic area of analysis by protected class group (race, color, national origin, religion, sex, familial status, and disability) and how have those demographics changed over time?*

PHAs do not routinely maintain or have access to demographic information by race, color, national origin, religion, sex, familial status, and disability for the entire “area where a public housing agency is authorized to operate,” let alone “circumstances outside the service area that impact fair housing issues within the service area.” Furthermore, a state or federal action could arguably “impact fair housing issues” within a PHA’s service area. It is unduly burdensome to require a PHA to include in its analysis all such outside circumstances.

*(2) Segregation and integration.*

*(i) Which areas within the geographic area of analysis have significant concentrations of particular protected class groups, including racial/color/ethnic groups, national origin groups, particular limited English proficient (LEP) groups, individuals with disabilities, and other protected class groups? Which, if any, of these areas extend beyond the boundaries of the service area?*

The Proposed Rule does not define what HUD considers “significant concentrations.” It is therefore unclear whether HUD will defer to what a PHA considers a “significant concentration” or if HUD will reject a PHA’s Equity Plan because HUD disagrees with the PHA’s definition.

Further, the Proposed Rule defines the “geographic area of analysis” for PHAs to include the area where the PHA is authorized to operate, the Core-Based Statistical Area (“CBSA”), locations where vouchers administered by the PHA are or could be utilized, and “circumstances outside the service area that impact fair housing issues within the service area.” In response to Question 7, HUD’s proposed “geographic area of analysis” is confusing at best. It is even more confusing in this context. If a PHA’s “geographic area of analysis” already includes “circumstances outside of the service area,” it is completely unclear what HUD means by “*Which, if any, of these areas extend beyond the boundaries of the service area?*”.

*(ii) How have patterns of segregation and integration in particular geographic areas changed over time?*

It is unclear what analysis HUD requires in this subsection. The question presupposes that “patterns of segregation and integration” exist in a particular geographic area. What constitutes a “pattern”? What is considered a change? And what does “over time” mean?

*(iv) What public or private policies or practices, demographic shifts, economic trends, or other factors may have caused or contributed to these patterns?*

PHAs do not have the expertise, resources, or access to data necessary to conduct the analysis required under this subsection. What is considered a public policy or practice? What is considered a private policy or practice? What is a demographic shift? What is the definition of an economic trend? Is it HUD's expectation that PHAs can identify these things let alone analyze whether these factors "may have caused or contributed" to patterns of segregation and integration?

*(3) R/ECAPs.*

*(ii)(a) How have the demographics and location of R/ECAPs changed over time? Has concentration of protected class groups within each R/ECAP increased or decreased? (b) Describe the conditions in R/ECAPs that limit access to opportunity for the residents who live there, including housing costs and cost burden, housing quality, housing instability, displacement, source of income discrimination, and eviction risk. How have these conditions changed over time?*

Source of income discrimination has only in recent years been widely recognized as an equity and fair housing issue. Even with this recognition, it is still difficult to detect as private landlords may cite other bases for denying housing when the true reason is the use of public assistance. It is therefore premature for HUD to require PHAs to conduct an analysis regarding source of income discrimination, let alone an analysis regarding source of income discrimination over time.

The Proposed Rule also does not define what "eviction risk" means nor identify what, if any, data sets or tools exist to assist in the analysis of such "eviction risk."

*(v) What public or private policies or practices, demographic shifts, economic trends, or other factors may have caused or contributed to these patterns?*

PHAs do not have the expertise, resources, or access to data necessary to conduct the analysis required under this subsection. What is considered a public policy or practice? What is considered a private policy or practice? What is a demographic shift? What is the definition of an economic trend? Is it HUD's expectation that PHAs can identify these things let alone analyze whether these factors "may have caused or contributed" to patterns of racially or ethnically concentrated areas of poverty?

*(4) Access to community assets and affordable housing opportunities.*

*(ii) Of PHA participants, describe which protected class groups experience significant disparities in access to the following community assets:*

- (1) Education;*
- (2) Employment;*
- (3) Transportation;*



- (4) Low-poverty neighborhoods;*
- (5) Environmentally healthy neighborhoods;*
- (6) Affordable housing opportunities and homeownership opportunities; and*
- (7) Other community assets.*

*Which protected class groups on the PHA's waiting list or who want to be on the PHA's waiting list experience significant disparities in access to the community assets identified in paragraph (e)(4)(ii)(A) of this section based on available local data and local knowledge?*

The Proposed Rule does not specifically define what “environmentally healthy neighborhoods” means. Under the definition of “community assets,” the Proposed Rule seemingly includes clean air, clean water, and access to healthy food as part of “environmentally healthy neighborhoods” but further clarification from HUD is warranted. Additionally, what does “access to healthy food” mean?

*(vi) Describe whether individuals with disabilities who participate in or who are eligible to participate in the PHA's programs, services, and activities experience barriers that deny individuals with disabilities access to opportunity and community assets in the geographic areas of analysis with regard to the following: (A) Accessible and affordable housing; (B) Accessible government facilities and websites; (C) Accessible public infrastructure; (D) Reliable and accessible transportation; (E) Accessible schools and educational programs, and in particular, high-performing schools and educational programs; (F) Employment; and (G) Community-based supportive services.*

HUD must first develop data sets that track accessible government facilities and websites, accessible public infrastructure, accessible transportation, and accessible schools and education programs for every geographic area of analysis to enable PHAs to conduct the analysis contemplated in this subsection. PHAs are not qualified to make such accessibility determinations. Also, what does HUD mean by “reliable” transportation?

*(vii) What public or private policies or practices, demographic shifts, economic trends, or other factors may have caused or contributed to these patterns?*

PHAs do not have the expertise, resources, or access to data necessary to conduct the analysis required under this subsection. What is considered a public policy or practice? What is considered a private policy or practice? What is a demographic shift? What is the definition of an economic trend? Is it HUD's expectation that PHAs can identify these things let alone analyze whether these factors “may have caused or contributed” to patterns of barriers to access to community assets and affordable housing opportunities?

*(5) Local policies and practices impacting fair housing.*

*(i) How do local laws, policies, ordinances, and other practices impede or promote the siting of affordable housing and use of HCV in well-resourced areas of opportunity? (include both policies under the PHA's direct control (e.g. preferences, types of housing designations,*

*creation and retention of units for large families) and municipal or State policies (e.g. zoning and land use policies, ordinances, or regulations, eviction policies and procedures) known to the PHA to impact the siting of affordable housing and voucher mobility). Describe the boundaries of the PHA's service area and the PHA's mobility and portability policies and activities. Is there a need for services, improved access to economic opportunity, or place-based investments to assist the PHA's assisted residents or the neighborhoods where its housing developments or HCV are located?*

How local laws, policies ordinances, and other practices impede or promote the siting of affordable housing is a complicated analysis—one that PHAs do not have the necessary resources or expertise to conduct. It is also unclear what HUD considers “other practices” that may impede or promote the siting of affordable housing.

Further, there are several issues with HUD's definition of “well-resourced areas.” The Proposed Rule defines “well-resourced areas” as areas within a PHA's “geographic area of analysis that have high-quality and well-maintained community assets (in view of local economic circumstances) ... which afford residents genuine access to opportunity (e.g. transportation, infrastructure, high performing schools, economic opportunity, etc.) as a result of public and private investments.” The Proposed Rule does not define what is considered “high-quality” or “well-maintained” in terms of community assets. The Proposed Rule further does not define what “genuine access” means. Lastly, it is not clear what is considered “a result of public and private investments.”

## **CONCLUSION**

It is clear that the majority of the questions and issues to be addressed in the Equity Plan are outside the purview of PHAs. We therefore advocate that HUD remove PHAs from the definition of “program participant” and restrict Equity Plan requirements to jurisdictions and insular areas, though welcome HUD providing incentives for PHAs to partner with these program participants in a joint Equity Plan. Alternatively, we ask that HUD create a pilot program with a diverse group of program participants, including PHAs, to test the proposed Equity Plan framework and improve the Proposed Rule prior to universal implementation.

In any event, in light of our substantial comments and other unsettled issues, it is clear that substantive work is needed before a final rule may be implemented. HUD must:

- develop the tools and data sets contemplated in the Proposed Rule and make such tools and data sets available to PHAs at least 24 months prior to any Equity Plan submission deadline;
- clearly identify the standard upon which PHA compliance with AFFH will be evaluated; and
- work with PHAs to develop the guidance contemplated in the Proposed Rule regarding “alleged conduct that HUD will accept as meriting an investigation” and issue such guidance prior to implementation of a final AFFH rule.

We strongly recommend that HUD consider our comments and those from other interested parties, release a revised version of the Proposed Rule, and allow for subsequent rounds of comments before issuing a final rule.

Thank you for the opportunity to submit these comments to the Proposed Rule. CLPHA, the MTW Collaborative, and Reno & Cavanaugh look forward to working with HUD on this and future rulemaking.

Sincerely,




Sunia Zaterman  
Executive Director  
CLPHA



Tracey Scott  
President  
MTW Collaborative



Stephen I. Holmquist  
Member  
Reno & Cavanaugh, PLLC



Iyen A. Acosta  
Member  
Reno & Cavanaugh, PLLC