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March 16, 2020

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

Re: Docket No. FR-6123-P-02  
HUD's Affirmatively Furthering Fair Housing Proposed Rule

To Whom It May Concern:

The Council of Large Public Housing Authorities ("CLPHA") and Reno & Cavanaugh, PLLC ("Reno & Cavanaugh") are pleased to submit comments to the U.S. Department of Housing and Urban Development's ("HUD's") Affirmatively Furthering Fair Housing proposed rule (the "AFFH 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. Our membership of more than seventy large public housing authorities ("PHAs") own and manage nearly half of the nation's public housing program, administer more than a quarter of the Housing Choice Voucher program, and operate a wide array of other housing programs. They collectively serve over one million low income households in the country.

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.

We agree with HUD that "affirmatively furthering fair housing is a necessarily complicated area implicating various policy concerns." We support efforts to minimize administrative burden on PHAs, provide for greater local control and innovation, and more efficiently use HUD resources. We welcome changes to AFFH that "establish that a PHA is generally required to AFFH only in

its programs and in the areas under its direct control” and further support approaches that would “highlight best practices and create a repository of ideas by drawing out the diffuse knowledge about fair housing held by local actors and encouraging policy experimentation.” We question, however, how the AFFH Proposed Rule accomplishes any of this.

Under the AFFH Proposed Rule, HUD seeks to incentivize AFFH by creating a metrics system in order to evaluate and rank jurisdictions and, based on this AFFH performance, reward high performing jurisdictions and require remedial or punitive measures of low performing jurisdictions. As explained in further detail below, this approach does not advance the mission of PHAs and of HUD to affirmatively further fair housing. Creating a system of winners and losers, where PHAs across the country will base their efforts to affirmatively further fair housing on how to score high on yet-to-be-determined metrics to avoid yet-to-be-identified punitive measures does not affirmatively further fair housing. Therefore, we urge HUD to withdraw the AFFH Proposed Rule.

**I. Efforts to achieve an adequate supply of quality affordable housing are not sufficient to meet affirmatively furthering fair housing obligations.**

We are concerned that the AFFH Proposed Rule shifts the focus from actions that affirmatively further fair housing to actions that simply address the economics of housing supply. As HUD is aware, public housing was developed decades ago, often in segregated neighborhoods that have been chronically underfunded and concentrated low-income housing, resulting in a substantial backlog of capital needs. CLPHA’s members are committed to ending segregation and to providing housing in areas of opportunity. CLPHA supports the current definition of AFFH:

*Taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.*

Under the AFFH Proposed Rule, HUD replaces taking meaningful action to address segregation and transform racially and ethnically concentrated areas of poverty and instead defines AFFH as “providing fair housing choice.” The AFFH Proposed Rule defines “fair housing choice” as encompassing:

- (i) *Protected choice, which means access to housing without discrimination;*
- (ii) *Actual choice, which means ... that information and resources are available to enable informed choice; and*
- (iii) *Quality choice, which means access to affordable housing options that are decent, safe, and sanitary, and, for persons with disabilities, access to accessible housing.*

It appears from these changes that HUD is abandoning efforts to address historic segregation and create areas of opportunity, changes which are contrary to the mission of CLPHA members.

## **II. A scoring metric that incentivizes achieving higher scores rather than effective affirmatively furthering fair housing measures will not serve our communities.**

HUD proposes to create a scoring metric that evaluates whether program participants are meeting their AFFH obligations and incentivizes improvement through various benefits. According to HUD, the proposed metric will utilize “a series of data-based measures to determine whether a jurisdiction (1) is free of adjudicated fair housing claims; (2) has an adequate supply of affordable housing throughout the jurisdiction; and (3) has an adequate supply of quality affordable housing.”

As a preliminary matter, we question how stakeholders may substantively respond to such scoring metrics when HUD has not provided any information about the specific metrics or the evaluation points. According to the AFFH Proposed Rule, HUD plans to publish a notice for public comment identifying the specific sources of data and the method for creating a jurisdiction’s metric score **after** a final rule is issued. HUD is therefore effectively proposing to bind jurisdictions to a final rule that uses a yet-to-be-determined scoring metric. This is unacceptable.

We further question how HUD can reconcile its recognition “that some jurisdictions will pioneer methods of advancing fair housing, which may not always succeed but nevertheless should not be punished for their ingenuity” with HUD’s proposal to rank all jurisdictions and impose punitive measures on those jurisdictions who are not deemed high performers. How are jurisdictions to be scored for innovative methods that nevertheless fail? Is HUD proposing that the existence of a plan, any plan, to advance fair housing is sufficient for a jurisdiction to meet its AFFH obligation? Or will failure of such plans result in a low performance score for the jurisdiction?

HUD acknowledges in the AFFH Proposed Rule that “[j]urisdictions can advance fair housing in ways that HUD officials cannot predict because HUD lacks the extensive localized knowledge of State or local officials.” HUD further states in the AFFH Proposed Rule that it aims to “allow for the flexibility and innovation necessary to best further fair housing nationwide, recognizing that fair housing is an especially difficult and complex policy area because of the competing considerations that go into promoting fair housing and other valid governmental priorities.” However, while we generally agree with these acknowledgements, they are inadequate in the face of HUD’s intention merely “to create a ‘dashboard’ that would allow jurisdictions to anticipate where they would rank and therefore plan ahead accordingly.” Rather than advancing fair housing nationwide, HUD is creating a system where jurisdictions innovate in anticipation of their ranking. This is further complicated by the fact that a specific jurisdiction’s ranking will depend on the movement of every other jurisdiction.

## **III. Adjudicated fair housing claims is not an appropriate factor in determining whether a jurisdiction has met its AFFH obligations.**

In the AFFH Proposed Rule, HUD proposes to measure whether a jurisdiction is meeting the “protected choice” component of “advancing fair housing choice” by considering the number of HUD or Department of Justice (“DOJ”) adjudicated fair housing claims the jurisdiction has had for a particular period. This is problematic for a number of reasons.

First and foremost, to equate the absence of adjudicated fair housing claims with the conclusion that the jurisdiction is free of housing discrimination is to assume that all housing discrimination results in an adjudicated finding. As HUD has acknowledged, each jurisdiction is uniquely situated and faces its own set of challenges to affirmatively further fair housing. For example, the existence of a zealous advocacy community may account for why Jurisdiction A has adjudicated fair housing claims and Jurisdiction B does not. Perhaps PHAs in Jurisdiction C have more resources to devote to their grievance processes than PHAs in Jurisdiction D and as such are able to resolve more fair housing issues before they are raised with HUD or DOJ than Jurisdiction D. The fact that most residents in Jurisdiction E are apathetic to filing anything with any agency, HUD or DOJ or otherwise, may be why no complaints are filed in Jurisdiction E. Perhaps Jurisdiction F has abundant reserves and is able to settle all claims. Even in just these handful of examples, the number of adjudicated fair housing claims will likely vary because of factors that have nothing to do with whether discrimination is present within the jurisdiction.

Additionally, even when a fair housing claim is filed, whether it actually proceeds to final adjudication is often subject to factors that have nothing to do with discrimination. The particular HUD investigator or Administrative Law Judge may prefer reaching a final adjudication rather than entering a conciliation agreement. Perhaps the jurisdiction's civil rights agency efficiently processes all claims referred by HUD and as such all fair housing claims filed with HUD in that particular jurisdiction get to final adjudication with the jurisdiction's civil rights agency rather than HUD. In both of these examples, whether the jurisdiction has any HUD adjudicated fair housing claims depends on procedural matters and not whether discrimination is present within the jurisdiction.

Lastly, we note that HUD is right to be "concerned that taking into account adversely adjudicated civil rights cases which were not brought by HUD or DOJ will unduly encourage PHAs to settle civil rights claims rather than risk an adverse ruling affecting the PHAs standing with HUD." This concern highlights a much broader problem inherent in the AFFH Proposed Rule. Jurisdictions and stakeholders within the jurisdiction will necessarily consider how each of their actions may affect their standing with HUD because the AFFH Proposed Rule changes the focus from affirmatively furthering fair housing to achieving a high score on HUD's yet-to-be-determined metrics system.

In our view, the history of fair housing in this country counsels against the AFFH Proposed Rule. HUD has the statutory authority and responsibility to administer the Fair Housing Act and to affirmatively further fair housing. We question whether the AFFH Proposed Rule is consistent with HUD's statutory obligations not only to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further" fair housing but also its obligation to "cooperate with and render technical assistance to Federal, State, local, and other public or private agencies, organizations, and institutions which are formulating or carrying on programs to prevent or eliminate discriminatory housing practices." 42 U.S.C. § 3608. The AFFH Proposed Rule does nothing to affirmatively further fair housing or render technical assistance and instead seeks to create competition among jurisdictions where "winners" will be rewarded with (often monetary) benefits and "losers" will face punitive measures that will hinder their ability to carry out their AFFH obligations. We therefore urge HUD to withdraw its AFFH Proposed Rule.

Thank you for the opportunity to comment on the AFFH Proposed Rule. If you have any questions, please do not hesitate to contact us.

Sincerely,



Sunia Zatterman  
Executive Director  
CLPHA



Stephen I. Holmquist  
Member  
Reno & Cavanaugh, PLLC