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Office of the General Counsel  
Rules Docket Clerk  
Department of Housing & Urban Development  
451 Seventh Street SW, Room 10276  
Washington, DC 20410-0001

**RE: Affirmatively Furthering Fair Housing: Streamlining and Enhancements,  
Docket No. FR-6123-A-01 – Comments in Support of the AFFH Rule**

Dear Rules Docket Clerk:

The Georgetown University Law Center's Civil Rights Clinic & Voting Rights Institute respectfully submits these comments for the U.S. Department of Housing and Urban Development's ("HUD") consideration.

**Our Expertise:** As a public interest law firm, we advance justice through litigation in a broad area of civil rights law. One of our core practice areas is Fair Housing. Relevant here, we have expertise in the Affirmatively Furthering Fair Housing Rule ("Rule"), administrative procedure, and rulemaking. In particular, we have carefully reviewed hundreds of public comments on the Rule and participant experiences using the Assessment of Fair Housing Tool ("AFH" or "Tool"). We believe the enclosed comments will aid HUD in faithfully executing a rulemaking process that more accurately reflects the experiences of entities that have actually used the Tool.

**Our Methodology:** To provide constructive feedback, we systematically analyzed hundreds of public comments on the Rule, including those cited by HUD in its Advance Notice of Proposed

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Rulemaking (“ANPR”).<sup>1</sup> First, we downloaded and manually reviewed each comment. Second, we uploaded the comments into a computer database and analyzed each one using a customized search mechanism coded for this project. Third, we evaluated comments using a uniform rubric that scores comments on the positive and negative attributes of the Rule, and further analyzed each comment’s sentiments regarding subcategories like the Rule’s scope, scale, and cost.

**Our Findings:** As detailed below, we find that HUD’s description of comments in the ANPR mischaracterizes and obscures the actual content of the comments, which were more positive than negative, and thus do not warrant overhaul of the existing Rule.<sup>2</sup> Rather, the nuanced and thoughtful comments suggest minor revisions to make the Rule more effective at achieving the objectives of the Fair Housing Act. *Together, 60% of all comments about the Rule were positive, while 29% were critical and 11% were neutral.*<sup>3</sup> Most importantly, entities that have actually used the Tool submitted detailed, favorable comments that deserve heightened attention because they reflect the most direct real-world experience with the Rule.

Ultimately, HUD’s description of the universe of comments demonstrates a fundamental misunderstanding of participant experience with the Rule. Accordingly, it is our position that HUD should keep the existing AFFH Rule and reinstate the Tool rather than revert to the less effective Analysis of Impediments (AI) process. A more detailed analysis follows.

**The ANPR mischaracterizes and obscures the actual public experience, most notably the positive experience of entities that have actually completed the AFH Tool.**

HUD concludes that the Tool is unworkable based on the high failure rate during the first round of submissions and the level of technical assistance provided in the initial round of AFHs. Moreover, HUD states that “most” comments were critical of the Rule, citing its complexity and the costs of completing an AFH. These characterizations are highly misplaced.

1. *HUD rushes to the unfounded conclusion that initial “failures” mean the Tool is unworkable in the long-term.*

Commenters disagree that the initial “failure” rate supports abandonment of the AFH Tool. First, the Rule was developed with considerable public input. In developing the Rule, HUD conducted listening sessions—in communities large and small—to gather stakeholder input. During the public notice and comment period, more than 1,000 public comments were submitted. Second, this thorough process resulted in a Tool that is *collaborative by design*. It envisions a feedback loop where participants and HUD work as partners to create the strongest AFH possible. As HUD states, 28% of AFH submissions were accepted *after* the program participants

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<sup>1</sup> Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, 82 Fed. Reg. 22344 (issued May 15, 2017); Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments, 83 Fed. Reg. 23922 (issued May 23, 2018); *see also* Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683 (issued Jan. 5, 2018).

<sup>2</sup> Affirmatively Furthering Fair Housing: Streamlining and Enhancements, 83 Fed. Reg. 40,713-14 (proposed Aug. 16, 2018).

<sup>3</sup> This percentage reflects the universe of comments that offered at least some substantive feedback. Comments that did not mention the Rule or offer any substantive feedback on the Rule were omitted.

submitted revisions and additional information in response to HUD’s technical assistance.<sup>4</sup> Given the Rule’s design, this is not evidence of failure. Moreover, it is no surprise that the first round of submissions required more technical assistance. By working with participants in the midst of the AFH process, HUD can ensure that each community receiving HUD funding has maximized its use of the community-specific data available to comply with the Fair Housing Act (“FHA”). It is imprudent to rush to the conclusion that the so-called “failure” rate in the first round of submissions means the Tool is unworkable.

The goal of this collaborative process is not simply to fill out paperwork. One commenter observed that AFHs produce materially better outcomes: “The fair housing plans developed under this rule will help jurisdictions use their federal housing and community development resources more strategically, thereby strengthening social and cultural ties and boosting economic prosperity.”<sup>5</sup> An AFH is a concrete process to implement housing policies with greater potential to achieve the objectives of the FHA.

Third, over half of all commenters do not want *any* part of the Rule rescinded, and many made only minor suggestions to strengthen the AFH process. Many saw the AFH as a valuable learning opportunity that will help their communities. For example, the High Cost Cities Housing Forum noted that “the clarity that came with the AFFH rule, the AFFH guidebook and the Assessment Tool provided local governments with much-needed direction and began a shift in operations by local governments toward a more focused fair housing approach. Moreover, requirements for all states and localities to complete an AFH created a community of practice for policymakers and practitioners to share best practices and accelerated our efforts to connect housing with opportunity.”

Fourth, another key theme emerged: many organizations felt the breadth and depth of community participation in the AFH process is superior and makes a meaningful difference. The AARP explained that the community participation provisions “are necessary because they encourage communities to develop greater capacity among community members, which will in turn enable residents to reimagine and positively impact the livability of their communities and their quality of life as they age.”<sup>6</sup>

Finally, some commenters observed that an increase in regional collaborations would improve efficiency, explaining that “the AFFH rule currently allows for HUD program participants . . . to engage in joint or regional collaborations, which HUD indicated in its AFFH rule preamble that the agency expected would not only improve fair housing planning but that collaborating grantees may be able to reduce costs through shared resources.”<sup>7</sup>

In short, the AFH Tool is favored by significantly more commenters—and disfavored by fewer—than HUD’s ANPR suggests. Moreover, HUD’s basis for suggesting the Tool is

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<sup>4</sup> 83 Fed. Reg. 40,714.

<sup>5</sup> Toledo Fair Housing Center, Comment Letter on Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, 82 Fed. Reg. 22344 (issued May 15, 2017).

<sup>6</sup> AARP, Comment Letter on Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments (July 16, 2018).

<sup>7</sup> The National Housing Law Project, Comment Letter on Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, 82 Fed. Reg. 22344 (issued May 15, 2017).

unworkable is not well supported by the initial “failure” rate or the comments. It is far too soon and there is far too little evidence to justifying scrapping the Tool.

## *2. Commenters oppose returning to the AI process.*

If HUD decides to rescind or make major changes to the Rule, it must answer the question of whether reverting to the AI process affirmatively furthers fair housing.

Many commenters favor the AFH, and oppose returning to the inferior AI process.

“The issues identified by HUD as reasons to withdraw the Tool are not at all addressed by use of the AI process. HUD alleges that the Tool caused grantees difficulty in developing a schema that would measure their progress in affirmatively further fair housing, and this misunderstanding resulted in certain AFH being returned to the grantee. However, HUD has not adopted any metric to measure whether this (a few inadequate AFHs) is better or worse than the AI process because, as HUD admitted it ‘generally did not require AIs to be submitted to HUD for review.’”<sup>8</sup>

Commenters generally do not want to return to the toothless AI process. One commenter said: “By returning to a system of AFFH compliance monitoring that the Government Accountability Office, in a 2010 report, found highly ineffective, HUD sends a clear message . . . that this Administration will not take on the challenge and fulfill its mandate to eliminate residential segregation. For years, under the previous Analysis of Impediments to Fair Housing (AI) process, HUD’s grantees failed to take their fair housing certifications seriously or meaningfully act to eliminate barriers to housing opportunity they identified.”<sup>9</sup>

In terms of cost of compliance, commenters believe the AI will be more costly than the AFH process. The sheer amount of data now available for creating strong AFHs means a participant will not have to spend money on data collection or hiring costly consultants to prepare an AI.

“Under the former rule, HUD grantees were responsible for collecting all of that data themselves. As a result, in light of the laborious nature of that data collection effort, many jurisdictions felt compelled to hire consultants to prepare their AIs for them. For the AFH, by contrast, HUD provides its grantees with substantial data covering many of the key topics of analysis. HUD specifically took this step in order to reduce the perceived need for grantees to hire consultants.”<sup>10</sup>

In other words, rescinding the Rule and returning to the AI process cannot possibly be a step toward affirmatively furthering fair housing. This would be a grave backward step and is unexplainable based on the Rule’s small sample size and feedback from commenters.

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<sup>8</sup> Fair Housing Justice Center, Comment Letter on Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments (July 23, 2018).

<sup>9</sup> Chicago Area Fair Housing Alliance, Comment Letter on Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, 82 Fed. Reg. 22344 (issued May 15, 2017).

<sup>10</sup> The Lawyers Committee for Civil Rights, Comment Letter on Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777, 82 Fed. Reg. 22344 (issued May 15, 2017).

3. *Most comments were not critical of the Rule, and thus HUD's assertion otherwise cannot be a reasonable basis for rescinding or overhauling the Rule as a matter of law.*

HUD states that “most” of the comments were critical of the Rule based on five observations. First, commenters wrote that the Rule failed to consider the scarcity of available resources and other program priorities.<sup>11</sup> “Many” commenters stated that the estimated time to complete an AFH was unrealistically low.<sup>12</sup> Small PHAs feared that compliance would cause them to incur disproportionate expenses.<sup>13</sup> “Other” commenters complained that the Rule was overly prescriptive.<sup>14</sup> Still, “others” noted deficiencies with the data program participants were required to use when completing their AFHs.<sup>15</sup>

Our review tells a different story.

In the Deregulation Notice, 44% of commenters supported the AFFH rule, 45% opposed the Rule, and 11% were neutral, meaning they merely had minor suggestions to improve the Rule. In the Withdrawal Notice, only 11% percent of commenters supported withdrawing the Tool, while a clear majority of 61% of commenters opposed withdrawing the Tool, and 29% were neutral and suggested changes to the Tool. Finally, an overwhelming majority of Extension Notice comments supported the Rule as well: 87% of commenters supported the Rule and only 11% opposed the Rule, while 2% were neutral.

In the ANPR, HUD states that scarcity of available resources was a major concern from commenters. *But the statistics say otherwise.* In the Deregulation Notice, only 20% of commenters were concerned with the costs associated with compliance of the new rule. The numbers were even lower in the Withdrawal Notice (7% of commenters) and the Extension Notice (5% of commenters).

HUD also states that “many” people complained that HUD drastically underestimated the time requirements for completing an AFH. Again, this was not a major concern for commenters. Less than half of the commenters expressed concern with the overall magnitude of work required to comply with the Rule, with 40% expressing concern. And still even fewer commenters expressed concern with the magnitude of work in the Withdrawal Notice (14% of commenters) and the Extension Notice (9% of commenters).

While some small PHAs feared the Rule would be costly, the criticisms of these PHAs focused on the Tool, which they have not actually used. In 2017, HUD announced that the Tool for PHAs had been approved but was not yet available for use.<sup>16</sup> HUD indicated that it would notify PHAs when the Tool could be used,<sup>17</sup> but no notice was issued.<sup>18</sup> Even so, at least twelve small PHAs

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<sup>11</sup> Affirmatively Furthering Fair Housing: Streamlining and Enhancements, 83 Fed. Reg. 40,714 (proposed Aug. 16, 2018).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Affirmatively Furthering Fair Housing Assessment Tool for Public Housing Agencies: Announcement of Final Approved Document, 82 Fed. Reg. 4373 (issued Jan. 13, 2017).

<sup>17</sup> *Id.*

<sup>18</sup> *See supra* note 3.

stated in their comments that the Tool exceeded the capacities of their resources.<sup>19</sup> These claims are speculative at best, as no PHA has used the Tool, and thus has not determined that it actually requires additional expenses. Furthermore, the Rule takes affirmative steps to prevent financial burdens to small PHAs and clarifies that they do not need to hire outside consultants when completing their AFHs.<sup>20</sup> HUD would be prudent to look to the actual experience of the local governments that have used the Tool, detailed below.

Although some commenters stated that the Rule was overly prescriptive, the majority of commenters were not concerned about the amount of guidance. Specifically, 13% of commenters for all three notices stated that the Rule was overly prescriptive, whereas 87% of commenters did not express concern over the amount of guidance. Indeed, nearly twice as many commenters (24%) praised the Rule for providing much needed guidance to local governments and agencies. According to the Poverty and Race Research Action Council, the Rule “enables jurisdictions to become fully compliant with their own AFFH mandates and supplies them with legal clarity regarding the application of this responsibility in the state, local, or PHA context.”<sup>21</sup>

Finally, data deficiency was of limited concern. Although 6% of all comments described deficiencies in the data provided by HUD to participants, nearly twice as many (11%) commenters remarked favorably on the usefulness of the data. Many that supported the Rule noted that the data “provide[d] jurisdictions with much-needed structure and resources to conduct a meaningful assessment of barriers to housing opportunity.”<sup>22</sup> Ultimately, for all three notices, the vast majority of commenters (83%) did not mention the data provided to program participants under the Rule, suggesting that it was not of concern to them.

*4. Entities that have actually used the AFH Tool submitted positive comments, which warrant heightened weight because they describe real-world experiences.*

The cities of Seattle, New York, and Los Angeles submitted positive comments informed by their actual experiences using the AFH Tool. In June 2017, HUD reviewed and accepted a joint AFH submitted by the City of Seattle and the Seattle Housing Authority.<sup>23</sup> The cities of New York and Los Angeles similarly submitted AFHs to HUD. However, HUD did not review their AFHs due to the two-year extension.<sup>24</sup> All three cities spoke highly of the AFH Tool.

According to Los Angeles, the AFH process was “thoughtful and engaging, and therefore, time well spent to develop a set of meaningful goals and strategies that were ultimately embraced by the City Council and the Mayor of Los Angeles.”<sup>25</sup> Likewise, New York City stated that “the

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<sup>19</sup> See, e.g., Wayland Housing Authority, Comment Letter on Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777 (June 9, 2017).

<sup>20</sup> *Supra* note 3.

<sup>21</sup> Poverty and Race Research Action Council, Comment Letter on Reducing Regulatory Burden; Enforcing the Regulatory Reform Agenda Under Executive Order 13777 (June 14, 2017).

<sup>22</sup> See, e.g., Fair Housing Center of Western Michigan, Comment Letter on Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments (Mar. 1, 2018).

<sup>23</sup> City of Seattle Human Services Department, Comment Letter on Affirmatively Furthering Fair Housing: Extension of Deadline for Consolidated Plan Participants (Mar. 6, 2018).

<sup>24</sup> Los Angeles Housing + Community Investment Department, Comment Letter on Affirmatively Furthering Fair Housing: Extension of Deadline for Consolidated Plan Participants (Mar. 6, 2018).

<sup>25</sup> *Id.*

guidance provided in the AFFH rule, the AFFH guidebook, and the Assessment Tool was more helpful than previous guidance and contributed to a shift in operations toward a more focused fair housing approach.”<sup>26</sup>

Seattle and New York City specifically emphasized the value of the data and technical assistance provided by the AFH Tool. Indeed, New York City explained that the data and related mapping functionality of the Tool was one of its “most critical resources” and allowed “localities *of all sizes* to understand and address patterns of segregation and unequal access to opportunity.”<sup>27</sup> Seattle also explained that the AFH mapping, database, and technical resources have ongoing value to jurisdictions beyond the actual assessment.<sup>28</sup> In particular, the Tool provides “access to regional comparison information for many aspects of housing development, transit, school proficiency, and concentrations of poverty.”<sup>29</sup>

New York also found the community participation provision to be a significant element in creating a truly exhaustive AFH that properly considers all sides of fair housing issues. It said that “[c]ommunity participation provides a more nuanced understanding of underlying barriers to housing choice and access to opportunity, helping us prioritize contributing factors and develop goals that adequately respond to local challenges. Community input also provides a rich narrative of how fair housing issues affect the everyday lives of residents, especially when quantitative data on a specific population or protected class is limited.”<sup>30</sup> Community participation does not merely produce a stronger AFH; New York discovered that these provisions generated enhanced confidence of citizens in their local government: “We believe meaningful community participation also helps to build local ownership of the fair housing planning process to ensure outcomes have legitimacy and longevity, and strengthens trust and relationships between the City and local communities, especially those traditionally left out of government decision-making processes.”<sup>31</sup>

Seattle wisely observed that the community participation provision is a key feature, and not a bug, of the rule. “[T]he 2015 AFFH rule was crafted to make community engagement pivotal to the successful completion of an AFH. This includes the requirement to provide open access to the public to bring forth concerns in the drafting stages of the AFH, provide the opportunity for stakeholders to submit comments on a draft analysis, and ensure that jurisdictions reply to comments submitted in the public comment process.”<sup>32</sup> A fair housing plan cannot and should not be considered complete unless members of the community have had an opportunity to inform the process of their lived experiences.

HUD should give heightened weight to the actual experiences of Seattle, New York, and Los Angeles, as opposed to the speculative concerns of small PHAs. Moreover, HUD should preserve the data, technical assistance, and community participation features that were critical to the Tool’s success.

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<sup>26</sup> New York City Department of Housing Preservation and Development, Comment Letter on Affirmatively Furthering Fair Housing: Withdrawal of Assessment Tool for Local Governments (July 18, 2018).

<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> *Supra* note 24.

<sup>29</sup> *Id.*

<sup>30</sup> *Supra* note 27.

<sup>31</sup> *Id.*

<sup>32</sup> *Supra* note 24.

## **Answers to Specific Questions in the Advance Notice of Proposed Rulemaking:**

**Question 1 on Community Participation:** HUD should continue to require these critical opportunities for valuable community participation in developing AFHs and Consolidated Plans. The Rule as currently written ensures all relevant stakeholders have a voice in their community's housing plans. Broad participation is an indispensable element of fair housing planning and non-discriminatory development. The Rule guarantees that housing officials will not continue to make decisions without at least hearing from the groups most affected by their housing plans. In addition, community participation must also be required in the development of Consolidated Plans. Requiring community participation will ensure that robust fair housing goals are supported and implemented as defined by members of the public.

**Question 3 on Reporting:** Required reporting is the only way to affirmatively further fair housing. Participants should be required to report in partnership with their jurisdiction. Consistent with comments we have reviewed, the current frequency for jurisdictions to submit reports—3 to 5 years with annual progress updates—is appropriate.

**Question 4 on Outcomes:** The final Rule does not mandate specific outcomes for the planning process. Rather, the Rule sets out basic parameters by requiring that the AFH set goals, establish metrics and milestones, and identify the contributing factors and related fair housing issues the goals are designed to address. As New York City explains, “[T]he goals section is a critical component of the Assessment Tool that binds program participants to concrete actions.”<sup>33</sup> Jurisdictions must continue to give highest priority to those factors that limit or deny fair housing choice or access to opportunity, or negatively impact fair housing or civil rights compliance. Although obstacles vary by locality, they typically include areas of poverty and segregation, affordable housing, education, nutrition, environment, health, employment, and transportation. HUD should also continue to encourage collaboration among program participants in order to address fair housing issues from a broader perspective.

**Question 5 on Local Deference:** The Rule is not “highly prescriptive.” Local jurisdictions have the authority to define their goals, metrics, and milestones in a manner that responds to input from local community members. In so doing, the Rule provides local community residents with greater input, ensures that jurisdictions understand local priorities, and produces strategies that reflect those priorities. Nevertheless, we believe that Rule should be even more prescriptive when jurisdictions are addressing disparities in fair housing that result from racial segregation and extreme poverty. Specifically, all jurisdictions should be required to set goals and meet those goals using uniform metrics.

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<sup>33</sup> *Supra* note 27.