



State of California
Office of the Attorney General

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ATTORNEY GENERAL

October 15, 2018

Via Electronic Submission (Regulations.gov)

Aaron Santa Anna
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Regulations Division
Office of General Counsel
United States Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0001

Re: Comment from the State Attorneys General Regarding Amendments to HUD's Affirmatively Furthering Fair Housing Regulations (Docket No. FR-6123-A-01)

Dear Mr. Santa Anna:

This letter is submitted on behalf of the States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Oregon, Virginia, and Washington, and the District of Columbia, in response to the United States Department of Housing and Urban Development's (HUD) August 16, 2018 Advanced Notice of Proposed Rulemaking (ANPR)¹ regarding the agency's intention to revise its Affirmatively Furthering Fair Housing (AFFH) regulations.² The AFFH final rule, promulgated on July 16, 2015 after notice-and-comment rulemaking, was a significant step in fulfilling HUD's statutory obligation to affirmatively further fair housing.³ The undersigned Attorneys General write to express the critical importance of the AFFH rule to promoting fair housing choice in our local communities, and to urge HUD to preserve the core components of the rule that require localities to effectively overcome entrenched patterns of residential segregation, promote fair housing choice, and foster inclusive communities.

¹ Affirmatively Furthering Fair Housing: Streamlining and Enhancements, 83 Fed. Reg. 40,713 (Aug. 16, 2018).

² 24 C.F.R. pt. 5, 91, 92, 570, 574, 576, and 903.

³ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015).



I. HUD Must Not Abdicate Responsibility to Fulfill the Fair Housing Act's Mandate to Affirmatively Further Fair Housing

Racial segregation of our communities is a troubling and visible reflection of the racial and economic inequality in our country. For too long, communities across the country have been made up of separate and unequal societies divided along racial and ethnic lines.⁴ This continuing dynamic creates segregated communities of concentrated poverty that lack the educational and economic opportunities available in other communities, and results in severe intergenerational consequences for the most disadvantaged members of society. As state attorneys general, we are committed to providing access to opportunity for all of our States' residents, and believe one of the most powerful and effective mechanisms for doing so is to promote racial integration in our cities, towns, and neighborhoods.

HUD, as the federal agency that controls funding to thousands of state and local jurisdictions, is a critical partner in this regard, and must fulfill its statutory obligation under the Fair Housing Act of 1968 (FHA) to administer its programs and activities in a manner that affirmatively furthers fair housing. The FHA, as amended in 1988, sought to prohibit discrimination in home sales or rentals and other housing-related transactions on the basis of race, color, religion, sex, familial status, national origin, or disability. Passed shortly after the assassination of Dr. Martin Luther King, Jr. and at a time of extreme residential segregation and racial unrest in the United States, the FHA also requires that all federal housing programs, including HUD programs, be administered "in a manner affirmatively to further" the policies and purposes of the FHA "to provide, within constitutional limitations, for fair housing throughout the United States." *See* 42 U.S.C. §§ 3601, 3608(d), (e)(5). This provision requires HUD, as the primary agency responsible for implementing the FHA, to take actions to undo historic patterns of housing segregation, caused in significant part by the mortgage insurance policies of the Federal Housing Administration in prior decades that explicitly redlined neighborhoods based on race.⁵ *See NAACP, Boston Chapter v. HUD*, 817 F.2d 149, 155 (1st Cir. 1987) (Breyer, J.) (noting that Congress's goal in passing the FHA "reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases"). Unquestionably, HUD

⁴ Kerner Comm'n, Report of the National Advisory Commission on Civil Disorders (1968) ("[t]his is our basic conclusion: Our nation is moving toward two societies, one black, one white—separate and unequal").

⁵ NPR, A 'Forgotten History' Of How The U.S. Government Segregated America (May 3, 2017), available at <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>.

has a legal duty to promote balanced and integrated living patterns that provide opportunity to communities of color.

II. The AFFH Rule Is a Breakthrough Policy That Would Help Affirmatively Further Fair Housing

Until the issuance of the AFFH rule, HUD had failed to meet its obligation to enforce the FHA’s “affirmatively furthering fair housing” provision.⁶ Prior to the AFFH rule, HUD had promulgated regulations intended to implement this mandate by requiring jurisdictions to conduct an “Analysis of Impediments to Fair Housing Choice” (AI) as part of a “consolidated plan” setting forth their housing development goals. The AI process was meant to provide a framework for jurisdictions to identify obstacles to fair housing and plans for overcoming them, but has widely been criticized as an ineffective paper exercise. Criticism included the lack of requirements around the content and format of AIs, and the fact that HUD did not even require grantees to submit them for review, leading to a widespread lack of compliance.⁷ In short, jurisdictions continued to receive federal housing grant funding despite failing to meaningfully examine ways to desegregate their local communities and provide underserved communities with access to fair housing choice.

The AFFH rule replaced the AI with a requirement that program participants produce an Assessment of Fair Housing (AFH). Under the AFFH rule, jurisdictions are required to submit an accepted AFH before receiving approval for their consolidated plans and HUD funding.⁸ To enable local jurisdictions to satisfy the requirements of the AFH, HUD created an AFH data tool, which consists of a User Interface and a Data and Mapping Tool (Local Government Assessment Tool), that provided local jurisdictions

⁶ Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law* (Jun. 25, 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>.

⁷ U.S. Gov’t Accountability Office, GAO-10-905, *Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans* (2010), at 1, <https://www.gao.gov/assets/320/311065.pdf> (a review of over 400 AIs revealed that significant proportions were dated, lacking in content, failed to include timeframes for implementation, and/or were not signed off on by top officials); *see also* Nat’l Comm’n on Fair Housing and Equal Opportunity, *The Future of Fair Housing* (Dec. 2008), 10, available at <http://www.naacpldf.org/files/publications/Future%20of%20Fair%20Housing.pdf> (“HUD requires no evidence that anything is actually being done [to affirmatively further fair housing] as a condition of funding and it does not take adverse action if jurisdictions . . . fail to [do so]”).

⁸ AFFH final rule, *supra* note 3, at 42,311-12.

with instructions for preparing an AFH and access to national data on patterns of integration and segregation; racially and ethnically concentrated areas of poverty; disproportionate housing needs; and disparities in access to opportunity.⁹ HUD found that providing this data would help jurisdictions determine which factors contribute to fair housing issues, and that its failure to provide data in the past was one reason why the prior AI process was ineffective.¹⁰ HUD concluded that the local data provided by jurisdictions would be “vital to understanding fair housing issues and further fair housing choice in a community.”¹¹ Jurisdictions were therefore required to supplement HUD’s national data with their own readily available local data, including information obtained through the community participation process.¹² Use of local data by jurisdictions to support their AFHs would be subject to HUD’s determination that the local data was relevant, reliable, and statistically valid.¹³ The data-driven approach of the AFFH rule represented a marked shift from the AI regime, which lacked any such data requirements.

Further, under the AFFH rule, HUD for the first time held local jurisdictions accountable—through potential consequences to their HUD funding—for meaningfully addressing how their housing development plans would reduce patterns of segregation specific to their communities and expand access to opportunity. The agency established a standardized AFH review process wherein it would deem the AFH to be acceptable or non-acceptable within 60 days of receiving an AFH.¹⁴ This determination would be based on whether the AFH was substantially completed and consistent with fair housing and civil rights law.¹⁵ If a portion of a jurisdiction’s AFH, such as the analysis of a key issue, was not accepted, then the entire AFH for that jurisdiction would be rejected. Written notification of an AFH’s rejection would include the reasons for that decision and guidance on how the AFH should be revised to be accepted.¹⁶ Additionally, HUD worked closely with jurisdictions to provide guidance and technical assistance to help meet the AFH requirements. Further, anticipating that initial submissions would have more problems than later submissions because of the transition from conducting an AI to an AFH, HUD included a flexible resubmission framework that gave jurisdictions as much time as necessary to refile any rejected AFHs.¹⁷

⁹ *Id.* at 42,282, 42,289, 42,355.

¹⁰ *Id.* at 42,275, 42,289.

¹¹ *Id.* at 42,335.

¹² *Id.* at 42,335, 42,340.

¹³ *Id.*

¹⁴ 24 C.F.R. § 5.162(a)(1).

¹⁵ 24 C.F.R. § 5.162(a)(2).

¹⁶ 24 C.F.R. § 5.162(a)(1).

¹⁷ 24 C.F.R. § 5.162(c).

In sum, the AFFH rule holds promise to transform the HUD's obligation to affirmatively further fair housing from an empty promise to a means of putting the nation on a path to more integrated communities and expanded access to opportunity for our most vulnerable populations. The rule requires local jurisdictions to use data-driven approaches, identify locality-specific patterns of historic segregation, and enlist input from community stakeholders. It creates standards for holding those jurisdictions accountable. And it empowers HUD to provide local jurisdictions with tools and data to set meaningful goals and technical assistance to help achieve them.

III. HUD Should Reverse Its Efforts to Delay and Dismantle the AFFH Rule

The undersigned Attorneys General are concerned that under this Administration, HUD has steadfastly undertaken efforts to delay and dismantle the AFFH rule. Prior to becoming the Secretary of HUD, Secretary Carson wrote an opinion piece where he dubbed the AFFH rule a doomed-to-fail attempt to resurrect the "failed socialist experiments of the 1980s." Secretary Carson concluded his opinion piece by stating that "entrusting the government to get [housing policy] right can prove downright dangerous."¹⁸ Secretary Carson has continued to share his skepticism of the AFFH rule in his official capacity, stating in 2017 that he would seek to "reinterpret" the AFFH rule.¹⁹ HUD already halted implementation of the rule earlier this year, and the agency's actions strongly suggest that the agency's goal of revising the rule is not motivated by a desire to further fair housing, but by a political calculation to rein in the agency's authority.²⁰ First, on January 5, 2018, HUD announced without notice-and-comment, effective immediately, that the reporting requirements of the AFFH rule would be suspended and ended all ongoing reviews of AFHs.²¹ Thereafter, on May 23, 2018, HUD withdrew the January 2018 suspension notice, and instead announced the withdrawal of

¹⁸ Ben Carson, Opinion, *Experimenting with failed socialism again* (July 23, 2015), <https://m.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish-/>.

¹⁹ Joseph Lawler & Al Weaver, *Ben Carson: HUD will 'reinterpret' Obama housing discrimination rule* (July 20, 2017), <http://www.washingtonexaminer.com/ben-carson-hud-will-reinterpret-obama-housing-discrimination-rule/article/2629178>.

²⁰ ANPR, *supra* note 1, at 40,713 ("[t]he highly prescriptive regulations give participants inadequate autonomy in developing fair housing goals as suggested by principles of federalism.")

²¹ Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683 (Jan. 5, 2018) (Suspension Notice); *see also* National Low Income Housing Coalition, *HUD Suspends Assessment of Fair Housing Submissions until after October, 2020* (Jan. 8, 2018), <http://nlihc.org/article/hud-suspends-assessment-fair-housing-submissions-until-after-october-2020>.

the Local Government Assessment Tool.²² Pursuant to the August 16, 2018 ANPR, the agency now suggests that the rule is fundamentally flawed for a number of reasons and seeks to modify the AFFH rule in its entirety.

There is no basis for a wholesale revision of the AFFH rule. In justifying each of these past actions addressing the AFFH rule, HUD has consistently relied on the same ill-founded concern that a high proportion of jurisdictions were not completing satisfactory initial AFH reports. Although HUD suggests its decision is based on the agency’s “experience over the three years since [the promulgation of the AFFH rule],” HUD has only received 49 AFH reports from October 2016 to December 2017.²³ Drawing from this limited sample, HUD took issue with the fact that about 31 *initial* submissions were not acceptable, and leapt to the conclusion that this was evidence that the AFH process was unworkable.²⁴ In fact, there is every reason to reach the *opposite* conclusion—i.e., that the AFFH rule has been working as intended. The AFH requirement was specifically intended to be robust and demanding, in contrast to the flawed and weak AI regime, and assumes that some submissions will initially be rejected. By the very design of the AFFH rule, the submission and review of AFHs would be an iterative process, through which HUD would provide necessary technical assistance and guidance to help jurisdictions revise their AFHs. And consistent with this scheme, 23 of the AFHs not initially accepted by HUD were subsequently accepted.²⁵ It is puzzling, therefore, that HUD focuses on the initial, as opposed to ultimate, acceptance rate as the metric of the rule’s effectiveness.

A closer examination of the substance of the AFHs reviewed by HUD confirm the success of the AFFH rule. One study of the 28 AFHs submitted to HUD between October 2016 and July 2017 (that is, the majority of the 49 on which HUD based its decision) compared those submissions to the AIs previously prepared by the same participants, and found striking improvements. Whereas the AIs contained nebulous goals, the AFHs contained more concrete ones:

²² Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments, 83 Fed. Reg. 23,922 (May 23, 2018) (Withdrawal Notice).

²³ *Id.* at 23,923.

²⁴ Suspension Notice, *supra* note 21, at 684; Withdrawal Notice, *supra* note 22, at 40,714.

²⁵ ANPR, *supra* note 1, at 40,714 (noting that 14 AFHs were accepted after “revisions and additional information in the form of addendums in response to HUD’s technical assistance.”); *see* Letter from Diane Yentel, President and CEO, National Low Income Housing Coalition at 2 (Mar. 6, 2018), available at <https://www.regulations.gov/document?D=HUD-2018-0001-0034> (noting that an additional 9 AFHs not initially accepted were ultimately accepted).

- Paramount, California, committed to making (by explicit deadlines) specific amendments to its zoning ordinance to make its housing more inclusive, such as allowing group homes for people with disabilities in residential zones;
- Temecula, California, committed to the goal of amending its zoning codes to allow for 100 affordable housing units in census tracts that do not have high poverty rates;
- New Orleans, Louisiana, promised to increase homeownership by Section 8 voucher recipients by 10 percent annually;
- Chester County, Pennsylvania, committed to creating 35 new affordable rental units in high opportunity neighborhoods;
- El Paso County, Colorado, similarly promised to assist in the development of 100 publicly supported affordable housing units in areas of opportunity.²⁶

The requirements of the AFFH rule have also led to significant community engagement and participation by local authorities to learn about barriers to fair housing choice in local communities and how to address them.²⁷ Undeniably, public engagement processes under the AFFH rule have been much more robust across the board than under the AI regime.

Rather than dismantling the AFFH rule, the agency should recognize it as an important tool to help overcome entrenched residential segregation and devote resources to ensure its successful implementation. While current HUD leadership claims that it cannot possibly provide the level of technical assistance that would be needed to help grantees bring their AFHs into compliance, HUD pledged to provide jurisdictions with this assistance when it promulgated the rule in 2015. For example, although jurisdictions were responsible for identifying metrics to measure how to improve fair housing,²⁸ HUD noted that it would “provide examples of outcomes that may reasonably be achieved

²⁶ See Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance* (Sep. 15, 2017) (working paper) at 14, 20-24, 32-33, available at <https://furtheringfairhousing.mit.edu/affh-research>.

²⁷ AFFH final rule, *supra* note 3, at 42,292; see also Letter from Lisa C. Barrett, Director of Federal Policy, PolicyLink (Mar. 6, 2018), <https://www.regulations.gov/document?D=HUD-2018-0001-0058> (detailing efforts in New Orleans, Louisiana); Letter from Caroline Peattie, Executive Director, Fair Housing Advocates of Northern California (Mar. 5, 2018), <https://www.regulations.gov/document?D=HUD-2018-0001-0037> (detailing efforts in Marin County, California); Letter from Kathy Brown, Boston Tenant Corporation (Mar. 8, 2018), <https://www.regulations.gov/document?D=HUD-2018-0001-0039> (detailing efforts in Boston, Massachusetts).

²⁸ 24 C.F.R. § 5.154(d)(4)(iii).

through the new AFH process” to help guide jurisdictions and examples of incomplete AFHs that jurisdictions can learn from.²⁹ HUD also reiterated that it was “committed to providing technical assistance to all jurisdictions throughout the process as promptly as possible.”³⁰ As such, HUD provided consultants, regional trainings, webcasts, and a hotline that jurisdictions could call for help.³¹ Further, while the initial wave of AFHs may require significant technical assistance to bring jurisdictions into compliance as they adjust from the AI regime, jurisdictions will improve their ability and require less technical assistance to submit acceptable AFHs in the future as the AFH becomes embedded into their processes. In recognition of the critical nature and broad scope of HUD’s mission and mandate to affirmatively further fair housing, the agency must secure the necessary resources to ensure the successful implementation of the AFFH rule.

IV. Any Revisions to the AFFH Rule Must Retain the Core Features that Make the Rule Effective

In determining what proposed changes to make to the AFFH rule, the agency must retain the core features of the rule that make the rule effective and not revert to the failed regime of the past. These include the following:

1. The AFFH rule must continue to condition grant funding on an acceptable AFH as determined by HUD pursuant to a standardized and thorough review process. This system of accountability that requires local jurisdictions to demonstrate how federal dollars will be used to affirmatively further fair housing underpins HUD’s entire mission to meaningfully tackle the societal harms posed by entrenched segregation at the local level. AFHs must also assess whether progress was achieved since submission of the prior AFH, and the nature and frequency of reporting should be such that HUD can monitor the progress made by jurisdictions on an ongoing basis.
2. The AFH must include an assessment of the conditions within the jurisdiction that restrict fair housing choice or access to opportunity; identify and prioritize contributing factors; and establish acceptable fair housing priorities and goals that can be achieved through specific and measurable strategies and actions. Only through reviewing a jurisdiction’s detailed analysis of the local obstacles to fair housing choice, rather than a mere summary of goals, can HUD meaningfully

²⁹ AFFH final rule, *supra* note 3, at 42,287, 42,311.

³⁰ *Id.* at 42,327.

³¹ HUD, *AFFH Assessment Tools, Resources, and Training Material* (Dec. 2017), <https://www.hudexchange.info/programs/affh/resources/#training>.

assess whether a jurisdiction's identified priorities and strategies will affirmatively further fair housing.

3. The AFFH rule must continue to promote locally-driven goals and priorities for advancing fair housing choice, while providing oversight to ensure the identified goals and priorities will actually address obstacles to fair housing choice. HUD should not abdicate its responsibility by giving localities complete discretion to define their own goals and priorities. The absence of federal oversight creates disincentives for localities to avoid confronting deep-rooted contributing factors to the lack of fair housing choice, such as siting decisions by local zoning boards, zoning ordinances or laws that limit housing development, and local residency preferences.
4. Jurisdictions must have access to the tools to identify the conditions within the jurisdiction that restrict fair housing choice or access to opportunity through a data-driven approach such as the Local Government Assessment Tool. HUD is in the best position to provide this data, as well as meaningful technical assistance. The use of national data, coupled with reliable local data, allows jurisdictions to fully understand the obstacles to fair housing choice in their communities, and helps local officials determine how best to allocate scarce housing resources. HUD should ensure that data tools are complete and accurate, and supplemented by reliable and unbiased local data, such that HUD can objectively review the sufficiency of a jurisdiction's AFH.
5. Broad-based community participation and consultation to incorporate public input specifically regarding fair housing choice and access to community assets must remain a part of the AFH. In particular, jurisdictions should be expected to engage not only with agencies and organizations that serve the community's housing needs, but also with local residents who historically have been marginalized, to encourage them to participate in the planning process. The AI process was ineffective in part because it failed to incorporate participation by members of the community, and the agency must ensure that public consultation in this regard continues to be a meaningful part of the AFH process.
6. The AFFH rule must continue to provide for joint or regional AFHs because fair housing issues cross jurisdictional boundaries, and a framework must be provided to incentivize jurisdictions to jointly advance regional fair housing priorities and goals.

Finally, it would be inappropriate for HUD to create a safe harbor within the AFFH rule shielding jurisdictions from liability based on levels of effort associated with specific

actions to affirmatively further fair housing. Such a safe harbor has no place in the context of a rule that HUD has made clear is “a planning rule, not a rule directed to the enforcement of the duty to affirmatively further fair housing.”³² Indeed, given that the AFFH rule should be “focused primarily on accomplishing positive results,”³³ a safe harbor would only serve to weaken HUD’s ability to hold jurisdictions accountable for making progress toward affirmatively furthering fair housing goals and priorities.

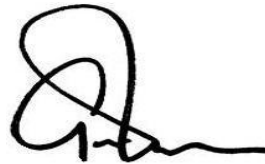
V. Conclusion

HUD has conceded that, fundamentally, the former AI process did not meaningfully fulfill the agency’s mandate to affirmatively further fair housing. The AFFH rule was designed to replace this paper exercise with a data-driven approach to analyzing and assessing whether local jurisdictions’ housing development plans would, in fact, affirmatively further fair housing. HUD should ensure the successful implementation of the AFFH rule by committing the necessary resources to provide guidance and technical assistance to local jurisdictions submitting their initial AFHs. Even if HUD believes revisions to the rule are necessary—although we believe they are not—the agency must retain the core components of the rule that require localities to take meaningful actions to overcome entrenched patterns of residential segregation.

Sincerely,



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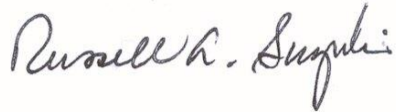
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³² AFFH final rule, *supra* note 3, at 42,313.

³³ ANPR, *supra* note 1, at 40,713.



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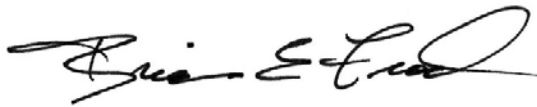
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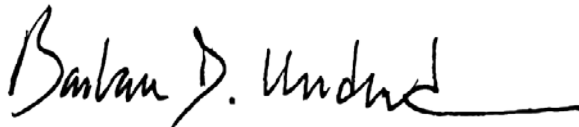
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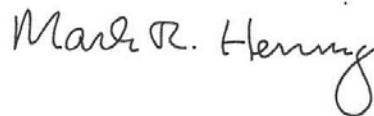
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