



March 6, 2018

Via Electronic Submission (Regulations.gov)

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

Re: Request for Comment - Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants (FR-5173-N-15; Docket ID: HUD-2018-0001)

Dear Mr. Pereira:

This letter is submitted on behalf of the State of California to oppose the United States Department of Housing and Urban Development's ("HUD") January 5, 2018 suspension¹ of its Affirmatively Furthering Fair Housing regulations (the "AFFH Rule").² The AFFH Rule, promulgated on July 16, 2015 after notice-and-comment rulemaking, was a significant step in fulfilling HUD's obligation to affirmatively further fair housing. The suspension of this rule undermines the State of California's efforts to promote fair housing choice in our local communities. For the reasons set forth below, HUD should reverse its decision to suspend this rule.

I. The Fair Housing Act's Mandate to Affirmatively Further Fair Housing Was Effectively Unfulfilled Until 2015

The Fair Housing Act of 1968, as amended in 1988 ("FHA") sought to outlaw 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

¹ Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Jurisdictions, 83 Fed. Reg. 683 (Jan. 5, 2018) ["AFFH Rule Suspension Notice"].

² Affirmatively Furthering Fair Housing, 80 Fed. Reg. 136 (July 16, 2015) (codified at 24 C.F.R. pt. 5, 91, 92, 570, 574, 576, and 903).

assassination of Dr. Martin Luther King, Jr. and at a time of extreme residential segregation in the United States, the FHA also required 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 required HUD, as the primary agency responsible for implementing the FHA, to take actions to undo historic patterns of housing segregation and promote balanced and integrated living patterns that provide opportunity to communities of color. See *NAACP, Boston Chapter v. HUD*, 817 F.2d 149, 155 (1st Cir. 1987) (collecting cases).

For decades, HUD failed to fully meet its obligation to enforce the Act’s “affirmatively furthering fair housing” provision.³ Indeed, it was not until 1995 that HUD promulgated regulations interpreting and implementing this mandate, when HUD began requiring jurisdictions to conduct an “Analysis of Impediments to Fair Housing Choice” (“AI”) as part of a “consolidated plan” that sets forth their housing development goals. The AI process was intended to identify obstacles to fair housing in addition to plans for overcoming them.⁴ If a jurisdiction failed to comply, it risked being denied funds from four formula block grant programs. These rules, however, were loosely enforced and became mostly a paper exercise. Many communities did not submit an AI knowing that HUD rarely reviewed them.⁵ In other words, jurisdictions continued to receive federal housing development dollars despite failing to meaningfully examine ways to desegregate their local communities and provide underserved communities with access to fair housing choice.

II. The AFFH Rule Was a Breakthrough Policy That Would Help Affirmatively Further Fair Housing for the First Time

A. Summary of the AFFH Rule

In July 16, 2015, after two years of consultation, HUD announced the AFFH Rule. This rule replaced the AI process with a new Assessment of Fair Housing (“AFH”) process. In the final rule notice, HUD concluded that the AI process, even if properly enforced, was inherently less effective than the new AFH process for various reasons. First, AIs did not require

³ Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law* (June 25, 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>.

⁴ HUD, *Fair Housing Planning Guide* (Mar. 1996), <https://www.hud.gov/sites/documents/FHPG.PDF>.

⁵ AFFH Rule, *supra* note 2, at 42272, 42312, 42348.

independent approval by HUD and were “generally not submitted to or reviewed by HUD.”⁶ Second, HUD noted that a longstanding citizen participation requirement requiring public feedback on consolidated plans was not required of the AI.⁷ Third, the parameters for and evaluation of the AI were not clear for either jurisdictions or HUD itself.⁸ And, finally, jurisdictions did not have access to HUD’s repository of national housing and demographic data when they conducted a fair housing assessment.⁹

Thus, HUD sought to improve upon the AI process in five major ways: (1) HUD created a standardized reporting process that it would systematically enforce for accuracy and completeness; (2) HUD would provide its national data to jurisdictions to be used when conducting their AFH; (3) the reports by jurisdictions identifying obstacles to fair housing would have to explicitly incorporate fair housing planning into their goals statements; (4) HUD adopted a new process to facilitate collaboration between jurisdictions; and (5) HUD added a requirement that jurisdictions conduct community meetings to gather public input as part of their AFH.¹⁰

B. Assessment of Fair Housing Process

Under the AFFH Rule, jurisdictions are now required to submit an accepted AFH before receiving approval for their consolidated plans.¹¹ As part of the new AFH process, HUD created an AFH Tool, comprising of a User Interface and a Data and Mapping Tool (“Assessment Tool”), that jurisdictions would use to complete an AFH.¹² The Assessment Tool consisted of a series of questions designed to help jurisdictions identify, among other things, fair housing issues pertaining to patterns of integration and segregation, racially and ethnically concentrated areas of poverty, disparities in access to opportunity, and disproportionate housing needs, as well as the contributing factors for those issues.¹³ The Assessment Tools also included instructions for preparing an AFH and standardized federal data that jurisdictions would have to consider when compiling their AFHs.¹⁴ Use of local data by jurisdictions to support their AFH would be subject to HUD’s determination that the local data was relevant, reliable, and statistically valid.¹⁵

⁶ AFFH Rule, *supra* note 2, at 42272, 42312, 42348.

⁷ *Id.* at 42315.

⁸ *Id.* at 42312.

⁹ *Id.*

¹⁰ *Id.* at 42273.

¹¹ *Id.* at 42311-12.

¹² *Id.* at 42355.

¹³ *Id.* at 42277, 42282, 42289, 42355.

¹⁴ *Id.* at 42273, 42289.

¹⁵ *Id.* at 42335, 42340.

In the notice announcing the adoption of the AFFH Rule, HUD emphasized the importance of sharing its national data. HUD stated 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.¹⁶ HUD also noted that the local data provided by jurisdictions would be “vital to understanding fair housing issues and further fair housing choice in a community.”¹⁷ Jurisdictions were therefore required to supplement HUD’s national data with their own readily available local data.¹⁸

The AFFH Rule also incorporated into the AFH process enforcement of a standardized review of the assessment documents.¹⁹ This was a major change because before the new Rule, as noted above, HUD had not meaningfully reviewed or assessed jurisdictions’ AIs.²⁰ When HUD received an AFH, it would deem the AFH to be acceptable or non-acceptable within 60 days.²¹ This determination would be based on whether the AFH was substantially completed and consistent with fair housing and civil rights law.²² 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 was not accepted. 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.²³

C. The Implementation of the AFFH Rule

The AFFH Rule was set to become effective on August 17, 2015. However, HUD acknowledged that the new AFH process was a substantial change from the previous process.²⁴ As such, although the rule became effective in 2015, HUD delayed the deadline for submission of the first AFHs until 2017 after a separate notice-and-comment period²⁵ “to provide all jurisdictions with considerable time to transition from the current AI approach to the new AFH

¹⁶ AFFH Rule, *supra* note 2, at 42275, 42289, 42306, 42314, 42330.

¹⁷ *Id.* at 42335.

¹⁸ *Id.* at 42340.

¹⁹ *Id.* at 42310-11.

²⁰ *Id.* at 42272, 42312, 42348.

²¹ *Id.* at 42313-15.

²² 24 C.F.R. § 5.154

²³ AFFH Rule, *supra* note 2, at 42311-12.

²⁴ *Id.* at 42346, 42348.

²⁵ Prior to publication of the AFFH rule, HUD underwent a separate notice-and-comment process to determine whether to provide a later AFH submission deadline for certain entities, including, in particular, small entities, that are subject to the rule. *See* Affirmatively Furthering Fair Housing: Re-Opening Public Comment Period on Subject of Later First AFH Submission Date for Certain Entities, 80 Fed. Reg. 2062 (Jan. 15, 2015) [“Submission Date Comment Period”].

approach.”²⁶ Other jurisdictions were then required to submit their AFHs on a staggered 5-year deadline.²⁷

During the two-year window between the AFFH Rule announcement and its implementation, HUD sought to closely work with jurisdictions to provide guidance on meeting their AFH requirements. 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 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.^{31,32} Further, anticipating that initial submissions would have more problems than later submissions because of the transition to a new process, HUD adopted in the AFFH Rule a flexible resubmission framework that gave jurisdictions as much time as necessary to refile any rejected AFHs.^{33,34}

Given the time and technical assistance that jurisdictions were given to prepare for the AFH process, HUD predicted that jurisdictions could produce acceptable AFHs.³⁵ However, HUD also noted that it would attempt to improve the rule if it found that jurisdictions were nonetheless having trouble producing acceptable AFHs. For example, if HUD noted that jurisdictions were having trouble submitting both an AFH and a separate consolidation plan, HUD would consider the option of merging those two documents.³⁶

²⁶ AFFH Rule, *supra* note 2, at 42349, 42351.

²⁷ *Id.* at 42314.

²⁸ See 24 C.F.R. § 5.154(d)(4)(iii).

²⁹ AFFH Rule, *supra* note 2, at 42287, 42311.

³⁰ *Id.* at 42327, 42342, 42345.

³¹ Emily Badger & John Eligon, *Trump Administration Postpones an Obama Fair-Housing Rule* (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/upshot/trump-delays-hud-fair-housing-obama-rule.html>.

³² HUD, *AFFH Assessment Tools, Resources, and Training Material* (Dec. 2017), <https://www.hudexchange.info/programs/affh/resources/#training>.

³³ AFFH Rule, *supra* note 2, at 42316.

³⁴ During the rulemaking process, HUD revised 24 C.F.R. § 5.162(c) to allow for a more flexible resubmission deadline because “there may be circumstances where program participants will require more than 45 days to resubmit an AFH” that HUD did not accept. See AFFH Rule, *supra* note 2, at 42316.

³⁵ AFFH Rule, *supra* note 2, at 42312.

³⁶ *Id.* at 42342.

III. HUD Reinstated the Ineffective AI Process When It Suspended the AFFH Rule

On January 5, 2018, HUD published a notice that it was, effective immediately, suspending the AFFH Rule until 2024 for a majority of jurisdictions.³⁷ HUD stated that it was suspending the AFFH Rule because, “[b]ased on the initial AFH reviews, HUD believes that [jurisdictions] need additional time and technical assistance to adjust to the new AFH process and complete AFH submissions that can be accepted by HUD.”³⁸

In 2017, HUD found that 35 percent of 49 AFH submission were not acceptable, and that jurisdictions struggled to develop meaningful goals and metrics.³⁹ HUD also noted that “significant staff resources are required when deciding an AFH will not be accepted.” HUD’s notice implicitly reasoned that a lack of time and technical assistance caused these issues, and therefore suspending the AFFH Rule would help remedy these issues. HUD stated that it would use this time to improve its Data and Mapping Tool and the User Interface. HUD also stated this extra time would help its staff provide additional technical assistance to jurisdictions.

In place of the suspended AFFH Rule, HUD instructed jurisdictions to return to the former AI process—a process HUD had previously noted was inherently less effective than the AFH process. In fact, HUD also announced that it was discontinuing its current review of AFHs, and that jurisdictions preparing to resubmit a corrected AFH were no longer required to do so. Initially, HUD encouraged jurisdictions to use Assessment Tools when completing their consolidated plans.⁴⁰ However, eleven days after the AFFH Rule suspension notice, HUD published a Frequently Asked Questions (“FAQs”) document on its website.⁴¹ In it, HUD stated that it intends to use the suspension to improve the AFH process, and announced that its Assessment Tools User Interface was no longer available.⁴² The User Interface served as an

³⁷ The FAQs notes that, if a local jurisdiction’s next consolidated plan is due on or before October 31, 2020, its first AFH submission will not be due to HUD until 2024. *See* FAQs, *infra* note 44, at 4. A majority of jurisdictions’ consolidated plans (an estimated 72%) were due before October 2020. *See* AFFH Rule, *supra* note 2, at 42357; *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>.

³⁸ AFFH Rule Suspension Notice, *supra* note 1, at 684.

³⁹ *Id.* at 684-85.

⁴⁰ *Id.* at 685.

⁴¹ HUD, *Frequently Asked Questions (FAQs)* (Jan. 16, 2018), <https://www.hudexchange.info/resources/documents/FAQs-Extension-of-Deadline-for-Submission-of-Assessment-of-Fair-Housing-for-Consolidated-Plan-Participants.pdf> [“FAQs”].

⁴² *Id.* at 4-5.

online form jurisdictions would fill out to complete and submit their AFHs, and provided jurisdictions with the most recent version of HUD's national data.^{43,44}

IV. HUD Suspended the AFFH Rule Without Notice-and-Comment

In 2015, the deadline for initial AFHs under the AFFH Rule was delayed to 2017 following a separate notice-and-comment process.⁴⁵ In contrast, on January 5, 2018, HUD announced the suspension of the AFFH Rule without undertaking any notice-and-comment. HUD's decision to suspend the AFFH Rule "unquestionably is a substantive regulation delay, which ordinarily would require notice and comment." See *Open Communities All. v. Carson*, No. CV 17-2192, 2017 WL 6558502, at *10 (D.D.C. Dec. 23, 2017) (holding that a two-year delay was a substantive regulation delay). The notice suspended the AFH process, including HUD's review of already submitted AFHs, the obligation of jurisdictions to resubmit rejected AFHs, and the obligation of other jurisdictions to submit their first AFHs. HUD has therefore effectively replaced the AFH process with the former AI process for all but the few jurisdictions that have already submitted successful AFHs. Even assuming the AFFH Rule is eventually reinstated, AFHs would not need to be submitted until 2024 for the vast majority of jurisdictions. Courts have uniformly imposed the APA's notice-and-comment requirement on such changes to a final rule. See *Clean Air Council v. Pruitt*, 862 F.3d 1, 6–9 (D.C. Cir. 2017) ("An agency issuing a legislative rule . . . may not alter such a rule without notice and comment."); *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004) ("altering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the standard[]"); *Nat. Res. Def. Council, Inc. v. U.S. EPA*, 683 F.2d 752, 762 (3d Cir. 1982) ("If the effective date were not part of an agency statement such that material alterations in that date would be subject to the rulemaking provisions of the APA, . . . an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date.") (internal quotation marks omitted). Accordingly, HUD's notice to suspend the AFFH Rule violates the APA.

V. HUD's Concerns Do Not Justify Suspension of the AFFH Rule

HUD's decision to suspend the AFFH Rule is not rationally connected to the reasons offered by the agency. Based on its review of 49 initial AFH submissions, HUD asserts that the AFFH Rule failed to provide jurisdictions with sufficient time or technical assistance to comply

⁴³ HUD, *Assessment of Fair Housing Tool for Local Governments* (Jan. 2017), <https://www.hudexchange.info/resource/5216/assessment-of-fair-housing-tool-for-local-governments/>.

⁴⁴ HUD, *AFFH UI Training* (Apr. 27, 2016), <https://www.youtube.com/watch?v=XyICfq6rKTg>.

⁴⁵ Submission Date Comment Period, *supra* note 25; AFFH Rule, *supra* note 2, at 42349, 42351.

with AFH requirements, and that jurisdictions had trouble developing proper housing development goals and metrics using the Assessment Tool. As a threshold matter, under the AFFH Rule, jurisdictions had already been given a significant adjustment period to prepare for the new AFH process.⁴⁶ Furthermore, the AFFH Rule does not impose on jurisdictions any deadline to resubmit an AFH. Rather, the rule gave jurisdictions as much time as necessary to refile their AFHs. HUD did not need to suspend the rule in order to give jurisdictions the necessary time to revise and resubmit their AFHs.

The purported need for additional technical assistance also does not withstand scrutiny. It has been widely reported that initial submissions were rejected for minor errors, like failing to separately file an AFH and a consolidation plan, and that most rejected AFHs were successfully resubmitted after making the necessary changes.^{47,48} If true, these reports show that minor and correctable filing mistakes resulted in the rejection of initial submissions, not insufficient technical assistance. HUD could have undertaken a process of modifying the rule to not require AFHs and separate consolidation plans. As discussed above, HUD specifically contemplated when it implemented the AFFH Rule that if this became an issue with the initial submissions, it would study how the AFHs and consolidated plans could be merged. This issue does not warrant suspension of the rule. And even if some jurisdictions were initially unable to comply with substantive AFH requirements, this failure may simply reflect the fact that the AFH process is a more robust and demanding one as compared with the former AI process. HUD pledged to provide jurisdictions with necessary technical assistance to help them resubmit corrected AFHs. As noted above, HUD ensured the AFH process would be an iterative one, in which jurisdictions would be given examples of reasonable goals and metrics and also samples of AFHs to guide their submission of successful AFHs. HUD continues to have every tool at its disposal to provide jurisdictions with necessary technical assistance.

HUD's failure to justify the complete suspension of the AFFH Rule raises significant concerns. Under the APA, an agency action is unlawful and may be set aside if it is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Agency action is arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency"); *see also Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 611 (D.C. Cir. 2017) (an agency must examine the relevant data and articulate a "satisfactory explanation for its action, including a rational connection between

⁴⁶ See 24 C.F.R. § 5.160(a) (outlining various staggered submission deadlines beginning in 2017).

⁴⁷ Jeff Andrews, *The fair housing rule Ben Carson's HUD wants to delay, explained* (Jan. 26, 2018), <https://www.curbed.com/2018/1/26/16930056/affirmatively-furthering-fair-housing-rule-hud-delay-explained>.

⁴⁸ Emily Badger & John Eligon, *supra* note 31.

the facts found and the choice made”) (quoting *State Farm*). Here, HUD has offered no explanation why it cannot deliver improved technical assistance, or make adjustments to the Assessment Tool, while continuing to enforce the AFFH Rule. Indeed, HUD’s decision to suspend the AFFH Rule—and effectively revert to the old AI process—inexplicably and directly contradicts its previous findings that the AFH process is more effective than the AI process. See *Sierra Club v. Salazar*, 177 F. Supp. 3d 512, 537–38 & fn. 25 (D.D.C. 2016) (finding that an agency’s actions were arbitrary and capricious where the agency’s “guidelines state one thing, while the [agency] is doing another”). Accordingly, HUD’s decision to suspend the AFFH Rule is not supported by the reasons the agency has offered.

VI. The AFFH Rule Should Be Reinstated Immediately

We are concerned that HUD shows no desire to effectuate the AFFH Rule. Based only on the initial wave of 49 submissions out of a potential 1,200 AFHs—an exceedingly small sample size—HUD has conclusively determined that jurisdictions misunderstand the AFH requirements, despite having every tool at its disposal to ensure jurisdictions can successfully satisfy its requirements. Indeed, despite stating that it is still committed to implementing the AFFH Rule,⁴⁹ HUD’s other actions accompanying the suspension of the AFFH Rule suggest that HUD intends ultimately to revoke the AFFH Rule and return to the former AI process. For example, HUD immediately stopped its review of already submitted AFHs and postponed various scheduled AFFH regional trainings, reflecting a complete reversal in the agency’s stated willingness to help jurisdictions prepare acceptable AFHs.⁵⁰ And, while in the AFFH Rule suspension notice HUD initially encouraged jurisdictions to continue to use the Assessment Tool even as part of the AI process, HUD subsequently took the Assessment Tools User Interface offline, thus preventing jurisdictions from accessing HUD’s latest national data.⁵¹ Furthermore, HUD states in the FAQs that it intends to reassess the entire AFH process.⁵² Rather than giving the AFFH Rule a chance to work, HUD appears intent on returning to the former AI process based on a fundamental disagreement with the purposes of the underlying law and its requirement to affirmatively further fair housing.

Most tellingly, prior to becoming the Secretary, 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

⁴⁹ FAQs, *supra* note 41, at 4.

⁵⁰ HUD, *AFFH Regional Trainings* (Feb. 2018), <https://www.hudexchange.info/programs/affh/affh-trainings/>.

⁵¹ FAQs, *supra* note 41, at 4.

⁵² *Id.* at 5.

“entrusting the government to get [housing policy] right can prove downright dangerous.”⁵³ 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.⁵⁴ Secretary Carson’s prior statements strongly suggest that HUD’s suspension of the AFFH Rule was not motivated by a desire to assist jurisdictions to affirmatively further fair housing, but rather to end what Secretary Carson viewed as a governmental overreach. *See N.E. Coal. on Nuclear Pollution v. Nuclear Regulatory Comm’n*, 727 F.2d 1127, 1130–31 (D.C. Cir. 1984) (in cases where the purported rationale for agency action is pretextual, it must be set aside without further inquiry); *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1986) (defining agency action as arbitrary when the its “stated rationale...mask[s] the true basis for [the agency’s] decision”) (internal quotations and citations omitted). HUD is mandated under the FHA to administer its programs and activities in a manner that affirmatively further fair housing, and the agency has in fact promulgated the AFFH Rule in recognition of the fact that this duty had not been fulfilled. Accordingly, HUD must reinstate the AFFH Rule immediately.

VII. Even If HUD Chooses to Move Forward with the Rule Suspension, It Should Take Steps to Fulfill Its Obligation to Affirmatively Further Fair Housing

In the AFFH Rule notice, HUD outlined various reasons why the AI process was inherently less effective than the AFH process. Principal among them was that HUD had not seriously implemented its own AI requirements. Now, in suspending the AFFH Rule, HUD has halted its current AFH reviews and expressed concern that AFH reviews use significant staff resources. Thus, HUD’s notice suspending the AFFH Rule has signaled to jurisdictions a return to the former paradigm. HUD should clarify that, unlike before, it will now strictly enforce the AI process and hold jurisdictions accountable for their use of federal housing development dollars.

HUD also noted that the AI process was ineffective in part because it failed to incorporate participation by members of the community. HUD did not cite the burden created by the community participation requirement as a reason for suspending the AFFH Rule. As such, HUD should at minimum apply a citizen participation requirement to the AI process to ensure that jurisdictions are meaningfully considering community perspectives on ways to affirmatively further fair housing.

⁵³ Ben Carson, *Experimenting with failed socialism again* (July 23, 2015), <https://m.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish-/>.

⁵⁴ 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>.

Finally, HUD should reactivate and make available to jurisdictions the array of Assessment Tools created by the AFFH Rule, and reaffirm its original statement encouraging jurisdictions to use Assessment Tools to undertake their AIs. HUD has noted that without the availability of data that is integral to the Assessment Tools, the fair housing impact of jurisdictions' consolidated plans cannot be effectively assessed. The Assessment Tools should be made available to the jurisdictions that are willing to engage in this analysis in the formulation of their consolidated plans.

VIII. 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 housing development plans would in fact affirmatively further fair housing. The suspension of the rule and removal of the Assessment Tools have undermined the ability of the State of California to use the AFHs submitted by our local jurisdictions for our own statewide review of fair housing needs. Therefore, HUD should reverse its suspension of the AFFH Rule, and take steps to address any concerns identified in the initial AFH submissions while maintaining the AFFH Rule. HUD should further reverse its decision because the AFFH Rule suspension violates the requirements of the APA. If HUD maintains the existing suspension, we request that HUD at minimum meaningfully enforce the AI process with a citizen participation requirement, and provide jurisdictions and the public with continued access to the Assessment Tools.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Satoshi Yanai". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Satoshi Yanai
Acting Senior Assistant Attorney General
California Department of Justice
Civil Rights Enforcement Section