



National Association of Housing and Redevelopment Officials

630 Eye Street NW, Washington DC 20001-3736
(202) 289-3500 Toll Free: (877) 866-2476 Fax: (202) 289-8181

October 15, 2018

Regulations Division
Office of General Counsel
451 7th Street, SW, Room 10276
Washington, DC 20410-0001

Re: [Docket No. FR-6123-A-01] Affirmatively Furthering Fair Housing: Streamlining and Enhancements¹

To Whom It May Concern:

On behalf of the National Association of Housing and Redevelopment Officials (NAHRO), I would like to offer the following comments to the United States Department of Housing and Urban Development (HUD or the Department) in response to the notice titled “Affirmatively Furthering Fair Housing: Streamlining and Enhancements” published in the *Federal Register* on Thursday, August 16, 2018.

Formed in 1933, NAHRO represents over 20,000 housing and community development individuals and agencies. Collectively, our members manage over 970,000 public housing units, 1.7 million Housing Choice Vouchers (HCVs), and receive over \$1.5 billion in Community Development Block Grant (CDBG) and HOME Investment Partnerships (HOME) Program funding to use in their communities. NAHRO has the unique ability to represent public housing agencies, local redevelopment agencies, and other HUD grantees of all sizes and geography.

After a brief introductory section, this letter is divided into three sections. The first section provides a background and context on the affirmatively furthering fair housing (AFFH) rule. The second section provides broad principles that NAHRO believes should be followed in any revision streamlining the rule. The third section responds to the Department’s specific inquiries on how the rule should be revised.

Section I - Background

The duty to affirmatively further fair housing for recipients of Department of Housing and Urban Development (HUD) funding was created with the passage of Title VIII of the Civil Rights Act--known as the Fair Housing Act--in 1968. The Fair Housing Act stated that HUD must “administer the program and activities relating to housing and urban development in a manner affirmatively to further the policies” of

¹ All citations are informal.

Carl S. Richie, Jr., NCC, NAHRO Fellow, President; **Sunny Shaw**, PHM, CME, Senior Vice President; **Saeed Hajarizadeh**, Vice President-International Research and Global Exchange; **John T. Mahon**, PHM, Vice President-Housing; **Marsha J. Parham**, CME, Vice President-Professional Development; **Andy Rodriguez**, Vice President-Member Services; **Henrietta Snipes**, NCC, Vice President-Commissioners; **Mark Thiele**, CS-PHM, CME, CMVO, NCC, Vice President-Community Revitalization and Development; **Adrienne Todman**, Chief Executive Officer

fair housing.² To comply with the Fair Housing Act's duty to affirmatively further fair housing, HUD created the analysis of impediments (AI) process. Certain program participants could meet the AFFH requirements by submitting a certification that they would affirmatively further fair housing. To complete an analysis of impediments, program participants would have to identify impediments to fair housing choice within a jurisdiction and take appropriate actions to mitigate and address the effects of those impediments that were identified.

Two reports conducted by HUD and the Government Accountability Office (GAO) respectively found that there were certain issues with the analysis of impediments process. In 2009, a report from HUD titled "Analysis of Impediments Study" (HUD Study), by HUD's Office of Policy Development and Research found certain flaws in the analysis of impediments process.³ First, the report found that when a national sample of 70 AIs were requested, only 45 were produced.⁴ Additionally, many jurisdictions that did submit the AIs, submitted AIs that were out of date.⁵ Many of the AIs that were not out of date were not showing improvement.⁶ Many of the AIs reviewed also did not follow the guidance that HUD had promulgated.⁷ While the guidance was not binding, it still provided good recommendations for how to complete the AI. At the same time, the report noted that for smaller jurisdictions, it would not make sense for the entity to completely follow the guidance because all of the guidance's recommendations would not have been necessary or appropriate.⁸ The report also found that the AIs varied in quality, with some being of very high quality, while others were not.⁹ Finally, the report stressed that the AI was a local document, so it had to have local buy-in in order to drive funding decisions.¹⁰

In 2010, the GAO also published a report, titled "Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans" (GAO Report) on the analysis of impediments process.¹¹ In a survey of 441 AIs, HUD found that many AIs were outdated and were not serving as effective planning documents to identify potential impediments to housing choice.¹² Some entities also were not preparing AIs or only completing them in a cursory fashion.¹³ Additionally, without timeframes, it was difficult for HUD to judge progress being made by the entity. Without officials signing the document, it was also unclear of the extent to which local officials were to be held accountable for the contents of the AI.¹⁴ Another weakness that the GAO found in the AI process was

² 42 U.S.C. § 3608(e)(5).

³ Policy Development Division, Office of Policy Development and Research, "Analysis of Impediments Study," January 27, 2009, <http://www.documentcloud.org/documents/365748-hud-reporting-compliance-report.html>.

⁴ Policy Development Division, p. 4.

⁵ Policy Development Division, p. 7.

⁶ Policy Development Division, p. 10.

⁷ Policy Development Division, p. 15.

⁸ Policy Development Division, p. 15.

⁹ Policy Development Division, p. 8.

¹⁰ Policy Development Division, p. 15.

¹¹ United States Government Accountability Office, "Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans," GAO-10-905, September 2010, <https://www.gao.gov/products/GAO-10-905>.

¹² United States Government Accountability Office, p. 13.

¹³ United States Government Accountability Office, pp. 14-15.

¹⁴ United States Government Accountability Office, pp. 19-21.

that there were few regulatory requirements, such as updating AIs regularly, following a specific format, or submitting them to HUD for review.¹⁵

In addition to identifying problems with the analysis of impediments, both the 2009 HUD study and the 2010 GAO report suggested improvements to the process. The 2009 HUD study made the following recommendations:

1. Provide enhanced guidance and assistance to increase completeness and quality of the AIs;
2. Find other possible revenue streams to ensure jurisdictions have funding sources for conducting AIs;
3. Update the 1996 Fair Housing Planning Guide; and
4. Provide public access to AIs.¹⁶

In addition, the 2010 GAO report also made certain recommendations:

1. The Department should establish standards for grantees to follow in updating their AIs and the format that they should follow in preparing the documents;
2. As part of the AI format, HUD should require that grantees follow timelines for implementing recommendations and the signatures of responsible officials;
3. The Department should require that program participants submit their AIs to HUD on a routine basis and that HUD staff should do the following:
 - a. Verify timeliness of the documents;
 - b. Determine whether the documents meet the formatting requirements;
 - c. Assess the progress the program participant made in addressing identified impediments; and
 - d. Ensure consistency between the AIs and other required grantee reports.¹⁷

To address these flaws, the Department initiated a rulemaking in 2013 from which the Affirmatively Furthering Fair Housing rule would emerge. At the end of the rulemaking process, the Affirmatively Furthering Fair Housing rule was finalized in 2015. The final Affirmatively Furthering Fair Housing rule differed substantially from the modest recommendations made in the earlier HUD study and GAO report.¹⁸ Later in 2015, HUD finalized the local government assessment tool. The purpose of the tool was to assist local governments complete their assessments of fair housing (AFHs). The tool was updated in 2017.¹⁹ While HUD published a final PHA tool, it never implemented the tool because HUD

¹⁵ United States Government Accountability Office, pp. 22-23.

¹⁶ Policy Development Division, Office of Policy Development and Research, "Analysis of Impediments Study," January 27, 2009, pp. 16-18.

¹⁷ United States Government Accountability Office, "Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans," GAO-10-905, September 2010, pp. 32-33.

¹⁸ See "Affirmatively Furthering Fair Housing," 80 Fed. Reg. 42,271 (2015), <https://www.federalregister.gov/d/2015-17032>.

¹⁹ The 2017 updated version of the local government tool can be found at the following web address: <https://www.hudexchange.info/resources/documents/Assessment-of-Fair-Housing-Tool-for-Local-Governments-2017-01.pdf>.

was overwhelmed with the task of publishing the appropriate relevant data for each PHA's jurisdiction.²⁰ The Department never finalized the Qualified PHA tool (for smaller PHAs) or the State Government tool.

In 2018, HUD implemented additional changes to the tools and the deadlines on which AFHs were due. Relying on information learned through experience administering the AFFH rule (and the 49 AFHs which HUD was able to review), HUD extended the deadline for local governments to submit their assessments by approximately two years (it varied depending on the specific deadline of the effected jurisdiction).²¹ The Department noted that program participants needed more time and technical assistance to complete their AFHs.²² A few months later, HUD published three additional notices. The first notice announced the withdrawal of the notice extending the deadline for the submittal of AFHs.²³ The second notice withdrew the revised local government tool.²⁴ The third notice noted that despite not having any active assessment tools, local governments, PHAs, and states still had to comply with the Fair Housing Act's duty to affirmatively further fair housing by conducting AIs and taking action to overcome the effects of identified impediments to fair housing.²⁵ Three fair housing groups challenged the decision both to withdraw the local government tool and to move toward a modified analysis of impediments process, but a federal judge dismissed the suit for multiple reasons.²⁶

In August of 2018, the Department published a notice titled "Affirmatively Furthering Fair Housing: Streamlining and Enhancements."²⁷ In it, HUD notes that it is committed to "achieving fair housing opportunity for all, regardless of race, color, religion, national origin, sex, disability, or familial status."²⁸ The Department also notes that the current rule is not "fulfilling its purpose to be an efficient means for guiding meaningful action by program participants."²⁹ In requesting public comments, the Department seeks to do the following: minimize burden, while still affirmatively furthering fair housing; create a process focused on results; provide for greater innovation and local control; seek actions that increase housing choice by increasing housing supply; and efficiently use HUD's resources.³⁰

²⁰ See "Affirmatively Furthering Fair Housing Assessment Tool for Public Housing Agencies: Announcement of Final Approved Document," 82 Fed. Reg. 4,373 (2017), <https://www.federalregister.gov/d/2017-00713>.

²¹ See "Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants," 83 Fed. Reg. 683 (2018), <https://www.federalregister.gov/d/2018-00106>.

²² 83 Fed. Reg. 684 (2018).

²³ See "Affirmatively Furthering Fair Housing: Withdrawal of Notice Extending the Deadline for Submission of Assessment of Housing for Consolidated Plan Participants," 83 Fed. Reg. 23,928 (2018), <https://www.federalregister.gov/d/2018-11143>.

²⁴ See "Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments," 83 Fed. Reg. 23,922 (2018), <https://www.federalregister.gov/d/2018-11146>.

²⁵ See "Affirmatively Furthering Fair Housing (AFFH): Responsibility To Conduct Analysis of Impediments," 83 Fed. Reg. 23,927 (2018), <https://www.federalregister.gov/d/2018-11145>.

²⁶ See *NFHA v. Carson*, <https://www.courtlistener.com/opinion/4527831/national-fair-housing-alliance-v-carson/>.

²⁷ See "Affirmatively Furthering Fair Housing: Streamlining and Enhancements," 83 Fed. Reg. 40,713 (2018), <https://www.federalregister.gov/d/2018-17671>.

²⁸ 83 Fed. Reg. 40,713 (2018).

²⁹ 83 Fed. Reg. 40,713 (2018).

³⁰ 83 Fed. Reg. 40,713 (2018).

Section II – Broad Principles

The National Association of Housing and Redevelopment Officials remains committed to following through on the promise of the Fair Housing Act and the duty to affirmatively further fair housing. To actually make progress in affirmatively furthering fair housing requires a workable process that produces results that are achievable given limited financial and capacity resources. To create a workable rule that delivers results while appropriately balancing the goals of the Fair Housing Act with the limited resources found in communities throughout the United States, NAHRO believes that there are certain principles that HUD should follow when rewriting the rule. These are broad principles that should be followed to the greatest extent possible when designing the new rule.

The National Association of Housing and Redevelopment also believes that HUD should look to the prior reports from HUD and GAO when looking to streamline the current rule. Those reports not only offered suggestions for things that PHAs, local governments, and states should do, but also offered suggestions on how HUD's responsibilities should be modified to better support the AFFH process (e.g., enhanced technical assistance, investing in the capacity at HUD to properly review submittals, finding a dedicated funding stream for local entities, etc.). A successful AFFH process will require changes by both local entities and HUD.

Entities Should Not Be Forced to Complete Analyses on Non-Housing Factors

As NAHRO has previously stated, housing agencies and other entities should not be forced to complete an analysis on non-housing related topics (e.g., transportation, education, infrastructure, etc.). These are topics that are outside the scope of what the housing agency does in its day to day activities, which revolve around the provision of decent, safe, and sanitary housing.³¹ Given that these topics are outside the scope of activities that most housing agencies engage in most of the time, they may not be the entities best positioned to provide this analysis.

While it is true that including non-housing topics in the analysis section may incentivize PHAs to work collaboratively with other entities to complete an Assessment of Fair Housing or vice-versa, NAHRO is concerned about the unfunded mandate it dictates. Frequently there is no pre-existing relationship between the PHA and some of the potential collaborative entities. The non-housing entities may also not be prepared to be helpful in the way that HUD envisions and may not be incentivized to work with the PHA. Given the heterogeneity of different communities, NAHRO believes that PHAs should be given the option to collaborate.

Entities Should Not Be Forced to Complete Analyses Outside Their Jurisdictions

While there is great value in common collaboration to inform future plans, NAHRO is concerned that entities should not be forced to complete analyses of areas outside of their own jurisdiction. Local governments and PHAs are experts in their communities, but may not necessarily be as well versed in areas outside of those communities. Due to the lack of expertise on the housing markets (and potentially other topics that the rule previously insisted be commented on) outside of their jurisdiction, they may not be well positioned to comment on those areas. The entities in those areas are best

³¹ While other entities may have non-housing responsibilities, the AFFH should focus on housing for these entities.

positioned to provide the analyses for those areas. While it is true that including areas outside of an entity's jurisdiction in the analysis section may incentivize PHAs to work collaboratively with other entities to complete an Assessment of Fair Housing, NAHRO advises caution in the assumption that sister agencies will be as responsive as HUD desires. Given the heterogeneity of different communities, NAHRO believes that PHAs should be given the option to collaborate with other entities, but with the opportunity to describe why collaboration may not work.

In publication of the final AFFH rule, HUD notes that federal case law requires a regional analysis in the assessment of fair housing. To support this conclusion, HUD references *Thompson v. HUD*, but does not supply a legal analysis of why the district court case compels HUD to include a mandatory regional analysis. While an analysis of the case is outside the scope of this comment letter, NAHRO does not believe that there is language in the opinion that explicitly states that assessments of fair housing must include regional analyses. While that case, and others in different jurisdictions, may emphasize the need to think regionally in certain contexts, it does not follow from this need that a regional analysis must be included and made mandatory in a future rule. If HUD continues to believe that it is required by courts to include a mandatory regional analysis, NAHRO encourages HUD to publish a detailed legal analysis for why a regional analysis is mandatory.

Additional Funding is Required to Properly Conduct Assessments of Fair Housing

As HUD itself mentioned in its 2009 HUD study, additional funding streams are required for entities to complete assessments of fair housing. Optimally, there should be a dedicated funding stream (not a set-aside of existing funds). This would ensure that entities that are required to complete this process have the capacity to do so.

While NAHRO understands that Congress controls the amount appropriated for activities, HUD has within its power the ability to request additional funding in its annual budget. If HUD believes in the purposes of the Fair Housing Act and its concomitant duty to affirmatively further fair housing, HUD should provide the fiscal support to fulfill this duty. Creating an obligation without funding for fulfilling the obligation amounts to not committing to the obligation. The biggest impediments to wide scale implementation of the current AFFH rule were the overly complex nature of the assessment process which was not proportionate to the capacity of the entities implementing it, and the lack of funding for those entities to increase their capacity such that they would be able to successfully complete the process.

Housing Agencies Should be Able to Complete Any Required Assessments without Having to Hire a Consultant

Whatever process is required by the streamlined rule for planning its affirmatively furthering fair housing processes (for simplicity, it will be referred to as the Assessment of Fair Housing in this comment letter), should be completed by agencies without the need to hire a consultant. After discussing this topic with our membership, we have found that most PHAs would have been forced to use a consultant to finish their Assessment of Fair Housing under the current AFFH rule. Given the fiscal and staff capacity constraints under which most PHAs and other entities must operate under, this is unreasonable, and would lead to an unworkable process.

The current rule imposes a jurisdictional analysis that is too complex to be effectively completed by staff without specific statistical and mapping knowledge. As housing providers, most staff at PHAs have comparative advantages that lie in providing affordable housing services, but likely not in providing complex statistical community-wide data analysis. We are concerned that without adequate resources and internal staff capacity, PHAs will not be able to conduct this required assessment. Department staff should ensure the AFFH process is one that can be conducted with resources available to PHAs.

The Department Should Accept and Approve Assessments for Entities That Have Made a Good Faith Effort to Comply with the AFH Process

The Department should include a good faith safe harbor clause specifying that if a PHA or other entity makes a good faith effort to comply with this regulation and submits a fair housing assessment, then HUD will not only accept the assessment, but also approve it. The Department should not accept assessments without also approving them. Additionally, if HUD has not evaluated an assessment within 90 days, then the assessment should be deemed approved by HUD.

Entities that Do Not Receive Full Funding or Funding at a Certain Threshold Should Be Able To List the Lack of Federal Funding as a Reason for Not Successfully Mitigating and Addressing Certain Impediments to Fair Housing

Entities that do not receive certain levels of funding should be able to list the lack of funding as a reason for not successfully mitigating and addressing certain identified impediments. For example, if an assessment lists starting a mobility program as a way to mitigate the effects of concentrated areas of poverty, but a program participant was not able to meet this goal of starting a program because of lack of funding, the program participant should be able to note this and have HUD automatically accept this as a valid justification.

The Department should automatically accept these justifications if funding in certain accounts does not meet a threshold level. For example, if a PHA that has Public Housing and Section 8 Housing Choice Vouchers does not receive at least a 90 percent proration for its Operating Fund and a 90 percent proration for its Administrative Fees, the PHA should be able to list that as a rationale for why they were unable to successfully mitigate and address certain impediments, which absent other explicit reasons, HUD should accept as a valid justification.

The Department Should Provide Clear Guidance and Update it Regularly So That the Guidance Is Never Out of Sync with the Regulatory Requirements

After the Department designs the new assessment process, it should immediately provide guidance that clearly explains what program participants are responsible for. This guidance should be regularly updated (and labeled with the last time it was updated), so program participants are aware of how new the guidance is and whether it is still applicable. The National Association of Housing and Redevelopment Officials recommends at least two documents for each category of program participant (local government, PHA, Qualified PHA, state, etc.)—one large comprehensive document that clearly explains all responsibilities in detail and a shorter document (no longer than 15 pages) that provides a

clear overview and enough information to satisfactorily complete an assessment.³² The Department should invest additional money and staff time to making sure that these documents are well written, timely, and updated regularly.

The Assessment Process Should Provide a Greater Emphasis on Place-Based Solutions

While NAHRO understands that there is much research showing the benefits of moving to areas of opportunity for many households (and we support mobility programs and incentives for those entities which wish to implement them), we remain concerned that mobility, solely, is not a viable long-term solution to poverty.³³ There are two reasons for this. First, it is unclear how scalable mobility programs are. Irrespective of the incentives, it is unlikely that every single individual (or enough in an area) will move to an area of opportunity and receive the concomitant benefits. Second, there has not been enough research conducted on the effects on residents who remain in an area, when others in the area are incentivized to move out. The Department should make sure that any future assessment process takes into account actions that benefit place-based solutions.

The Department Should Closely Follow All Requirements of the APA and Any Other Process Requirements Required by Law

As HUD is contemplating making refinements to the Affirmatively Furthering Fair Housing rule, we urge HUD to be vigilant about following all of the requirements in the Administrative Procedure Act (APA) and any other relevant legislation which may impose additional process requirements. Properly following all of these requirements will ensure that rulemaking will not have to be reopened after these changes have been made.

Section III – Responses to HUD’s Inquiries

This section provides specific responses to HUD’s inquiries.

What type of community participation and consultation should program participants undertake in fulfilling their AFFH obligations? Do the issues under consideration in affirmatively furthering fair housing merit separate, or additional, public participation and consultation procedures than those already required of program participants in preparing their annual plans for housing and community development (*i.e.*, the Consolidated Plan/PHA Plan)? Conversely, should public input on AFFH be included as part of the Consolidated Plan/PHA Plan public involvement process?

Entities should have the option of selecting whether they want to have a separate AFFH process or whether they want to have it integrated into their Consolidated Plan or PHA Plan. After speaking with various entities of different sizes within our membership, we found that generally larger and mid-sized entities would like a separate AFFH process.

³² If it is not possible to create a 15 page guidance document that completely explains assessment process in detail, then the assessment process is too complex and needs to be simplified.

³³ Raj Chetty, Nathaniel Hendren, and Lawrence F. Katz, “The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment,” http://www.equality-of-opportunity.org/images/mto_paper.pdf.

They would prefer separate processes to ensure the goals and intent of each consultation is achieved without jeopardizing the federal funding necessary to provide safe, decent, and affordable housing.

Our smaller entities have said that they would prefer a process that is more integrated with the PHA administrative plan or the consolidated plan. They believe that as long as the final assessment of fair housing process is sufficiently streamlined that it would best fit into their schedules as a part of the administrative plan or consolidated plan.³⁴

How should the rule weigh the costs and benefits of data collection and analysis? Should the proposed rule allow program participants to develop or use the data of their choice? Alternatively, should HUD require the use of a uniform data set by all program participants in complying with their AFFH obligation? Should it vary by the nature of the program participant? Instead of a data centric approach, should jurisdictions be permitted to rely upon their own experiences? If the latter, how should HUD assess this more qualitative approach?

The Department of Housing and Urban Development should still collect and publish its own housing data. Other entities that wish to supplement the HUD data with their own local data should be allowed to do this, but it should not be a requirement.

The Department should not require the use of a uniform data set. First, many jurisdictions and many entities may want to supplement their data. The Department's rule should be structured such that there is flexibility in this area. The type of program participant should not make a difference in this case. Irrespective of the entity, the entity should be able to pick whether it wants to use HUD's data, a combination of HUD data and its own data, or solely its own data. Second, national HUD data will not be equally reliable in all jurisdictions. Depending on the characteristic of the jurisdiction, the quality of the data may differ. Forcing agencies to use data that they know is dated or flawed is ill-advised.

Entities should have the option of whether to use a data centric approach or whether to use an experiential structure and allow them the opportunity to defend the decision. At the very least, smaller entities should have this option, given the size and capacity of the state to conduct rigorous analysis.

These narrative analyses should be assessed by looking to the recommendations of the 2010 GAO report. The 2010 GAO report suggested that these affirmatively furthering fair housing analyses should be assessed by verifying the timeliness of the documents; determining whether the documents meet the formatting requirements; assessing the progress the program participant made in addressing identified impediments; and, ensuring consistency between the AFH and other required grantee reports. In assessing the progress the program participant made, there should be a presumption that if the entity submitting the AFH states that progress has been made, then there has been progress made unless another entity submits clear and convincing data that explicitly shows that progress has not been made.

³⁴ Some of our smaller entities have suggested using the affirmative fair housing marketing plan from the multi-family side as the sole requirement for smaller entities to meet their duty to affirmatively further fair housing.

How should PHAs report their AFFH plans and progress? Should jurisdictions be required to provide a detailed report of the analysis performed or only summarize the goals? How often should program participants be required to report on their AFFH efforts? Should the proposed rule retain or revise the current timeframes for required AFFH submissions? Should program participants continue reporting annually on their AFFH actions and results in their program plans and annual performance reports or, given the long-term nature of many AFFH goals, should the reporting period be longer? Should planning and/or results be integrated into existing report structures, such as Consolidated Plans and Consolidated Annual Performance and Evaluation Reports (CAPERs), or utilize an alternative structure.

Housing agencies should be given the option of whether they want to submit a detailed analysis or whether they want to submit summarized goals. Depending on how the rule is structured, this may not matter. If HUD acceptance of the policy is based on process requirements (i.e., making sure that the documents were submitted on time or making sure the formatting is correct) then whether the entire analysis or a summary is submitted may not be that relevant. Whether the assessment is submitted or not, it will still be made public.

If the assessment process is integrated into other processes (i.e., the consolidated plan or the annual plan) then the frequency of these other processes will determine how frequently a housing agency must complete its assessment. Absent this integration, a period of approximately five to ten years between assessments seems appropriate, but HUD should allow opportunity for amendments, should local conditions shift.

If the Department should choose to retain the current timeframes for AFFH submissions, it should be very clear about when submissions are due for each entity for which this applies. It has been NAHRO's experience that many entities, especially smaller entities, were confused about the submission timeline for the current rule.

As mentioned in other portions of this letter, entities should have the option of whether they want to integrate the assessment process in current structures or keep them as separate processes.

Should the proposed rule specify the types of obstacles to fair housing that program participants must address as part of their AFFH efforts, or should program participants be able to determine the number and types of obstacles to address? Should HUD incentivize program participants to collaborate regionally to identify and address obstacles to collaborate regionally to identify and address obstacles to affirmatively furthering fair housing, without holding localities accountable for areas outside of their control? Should HUD incentivize grantees and PHAs to collaborate in the jurisdiction and the region to remove fair housing obstacles? What are examples of obstacles that the AFFH regulations should seek to address? How might a jurisdiction accurately determine itself to be free of material obstacles?

The proposed rule should not specify the types of obstacles to fair housing that program participants must address as part of their AFFH efforts. This would be overly prescriptive. Entities should be able to prioritize obstacles to address. The Department may want to set guidelines regarding statutorily protected classes. Other statuses should be analyzed based on local data and identified needs.

How much deference should jurisdictions be provided in establishing objectives to address obstacles to identified fair housing goals, and associated metrics and milestones for measuring progress?

Entities should be given the maximum deference to establish their own objectives, to address obstacles to identified fair housing goals, to create metrics, and to establish milestones to measure progress that is available while still meeting the statutory requirements of the Fair Housing Act. As HUD's 2009 report stated, the assessment should serve as a local planning document.³⁵ Its primary function should be to assist the jurisdiction in setting up a planning process to affirmatively further fair housing. How it achieves the goal of affirmatively furthering fair housing should be designed by the local entity or community. Being overly prescriptive in this respect will be counterproductive given the difference in housing markets and communities all over the country. Depending on the particular demographic mix of an area and the distribution of people, the obstacles, metrics, and milestones will necessarily be very different.

How should HUD evaluate the AFFH efforts of program participants? What types of elements should distinguish acceptable efforts from those that should be deemed unacceptable? What should be required of, or imposed upon, jurisdictions with unacceptable efforts (other than potential statutory loss of Community Development Block Grant, HOME, or similar funding sources)? How should HUD address PHAs whose efforts to AFFH are unacceptable?

The Department should evaluate the AFFH efforts of program participants in the same way that it should evaluate the narrative submission of AFHs mentioned earlier. Specifically, the Department should assess acceptable efforts by looking to the recommendations of the 2010 GAO report. The 2010 GAO report suggested that affirmatively furthering fair housing analyses should be assessed by verifying timeliness of the documents; determining whether the documents meet the formatting requirements; assessing the progress the program participant made in addressing identified impediments; and, ensuring consistency between the AFH and other required grantee reports.³⁶ In assessing the progress the program participant made, there should be a presumption that if the entity submitting the AFH states that progress has been made, then there has been progress made unless another entity submits clear and convincing data that explicitly shows that progress has not been made.

For those entities (either PHAs or participating jurisdictions) that provide unacceptable efforts, HUD should impose constraints that incentivize resubmittal of assessments that meet the stated requirements. The Department's goal should not be to impose punitive measures, but rather to work with entities that are not meeting their requirements so that they are able to re-submit acceptable assessments.

Additionally, it is crucial that no single submittal should ever warrant a loss of potential statutory funds. Instead there should be a repeated pattern of willful neglect in completing the assessments over several submittal cycles or a demonstrated systemic problem before funds are withheld.

³⁵ Policy Development Division, Office of Policy Development and Research, "Analysis of Impediments Study," January 27, 2009, p. 18.

³⁶ United States Government Accountability Office, "Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions' Fair Housing Plans," GAO-10-905, September 2010, pp. 32-33.

Should the rule specify certain levels of effort on specific actions that will be deemed to be in compliance with the obligation to affirmatively further the purposes and policies of the Fair Housing Act (i.e., “safe harbors”), and if so, what should they be?

Yes, the rule should specify certain levels of effort on specific actions that will be deemed to be in compliance with the obligation to affirmatively further the purposes and policies of the Fair Housing Act. To be in compliance with the obligation to affirmatively further goals of the Fair Housing Act, the submitted assessment of fair housing should have met all procedural requirements. These procedural requirements include submitting the documents on time, meeting the formatting requirements, identifying how the program participant worked toward at least addressing one impediment toward fair housing, and ensuring consistency between reports. If these process requirements are not met, the community should be allowed the opportunity to detail the cause.

In reviewing assessments, if HUD chooses not to approve an assessment, then it should tell the entity specifically what is wrong with the assessment. It should be clear on how to correct the error.

Are there any other revisions to the current AFFH regulations that could help further the policies of the Fair Housing Act, add clarity, reduce uncertainty, decrease regulatory burden, or otherwise assist program participants in meeting their AFFH obligations?

The National Association of Housing and Redevelopment Officials recommends that HUD make the following definitional changes.

Affirmatively furthering fair housing means taking actions that are rationally related to overcoming patterns of segregation and fostering inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking actions that are rationally related to 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.

Remove the current definition of *Meaningful actions*.

Qualified public housing agency (Qualified PHA). Refers to a PHA:

1. For which the sum of:
 - i. The number of public housing dwelling units administered by the PHA; and
 - ii. The number of vouchers under section 8(o) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)), excluding those vouchers which serve particular, special populations, administered by the PHA is 1250 or fewer;³⁷ and

³⁷ Although in the past NAHRO has advocated for a higher unit count for Qualified PHAs or streamlined inserts in local government tools after reviewing the number, we believe that 1,250 units would make the most sense given HUD’s internal scheme for PHA size classification.

2. That is not designated under section 6(j)(2) of the United States Housing Act of 1937 as a troubled PHA and does not have a failing score under the Section 8 Management Assessment Program (SEMAP) during the prior 12 months.

The National Association of Housing and Redevelopment Officials appreciates the opportunity to comment on the affirmatively furthering fair housing rule. We remain firmly committed to the goals of the Fair Housing Act and the duty to affirmatively further fair housing. We look forward to working with the Department to create a workable rule that meets all statutory obligations, while balancing the fiscal and capacity constraints of housing agencies and local governments.

Sincerely,

A handwritten signature in black ink, appearing to read 'GB', with a long horizontal line extending to the right.

Georgi Banna, Esq.
Director of Policy and Program Development