



National Association of Housing and Redevelopment Officials

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August 13, 2020¹

The Honorable Benjamin S. Carson, Sr. M.D.
Secretary
Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410

Dear Secretary Carson:

The Department of Housing and Urban Development recently published a rule titled “Preserving Community and Neighborhood Choice.” We would like to express the National Association of Housing and Redevelopment Officials’s (NAHRO’s) concern on the merits of the rule and the process by which this rule was promulgated.

On August 7, 2020, HUD published a rule titled “Preserving Community and Neighborhood Choice.” The rule redefines how Department of Housing and Urban Development (HUD or the Department) grantees would comply with the Fair Housing Act’s duty to affirmatively further fair housing. In Section VI of the *Federal Register* notice in which the rule was published, titled “Notice-and-Comment-Does-Not-Apply,” the Department states that the “Administrative Procedure Act exempts from notice-and-comment rulemaking any ‘matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.’” It also states that “[b]ecause this rule applies only to the AFFH obligation of grantees, it is exempt under the [Administrative Procedure Act].” Finally, the notice states that the Department has a policy to not use the exemption, but that HUD has waived this policy because the rule has “been subject to extensive public debate.”

The National Association of Housing and Redevelopment Officials is troubled by the process by which this rule was promulgated. The Department chose to use a questionable legal theory to subvert the normal notice-and-comment process. Whether the Department’s legal analysis that the Administrative Procedure Act’s (APA’s) normal requirement for notice-and-comment rulemaking may be set aside in this scenario is correct or not, the Department should not have set aside its own policy, which states that HUD shall use notice-and-comment rulemaking in all cases. NAHRO has previously written in a comment letter on the Affirmatively Furthering Fair Housing rule that “[NAHRO] urge[s] 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.”

Notice-and-comment rulemaking is an essential component of liberal democracy and necessary for open, transparent government beholden to the American people. Notice-and-comment rulemaking ensures that when a federal agency creates a regulation, which has the net effect of a law, over a vast and diverse country, the agency has properly considered the perspectives of those who are affected by the regulation. This ensures that the regulation does not have unintended effects never considered by the promulgating agency. By circumventing this process, the Department has imposed a new regulation by fiat, without considering the input of its stakeholders.

¹ All citations are informal.

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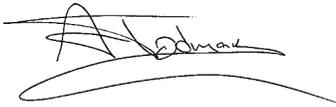
The Department has failed to consider how its rule will impact communities throughout the country, leaving a substantial chance that this rule will cause great harm to many communities.

The Department is incorrect that the new “Preserving Community and Neighborhood Choice” rule has “been subject to extensive public debate.” Prior versions of the rule, which have varied substantially from the rule currently promulgated, are what have been debated by the public. This regressive version of the rule has not been recently discussed, nor was it requested by any portion of HUD’s stakeholder community.

Additionally, in its comments to the AFFH rule published earlier this year, NAHRO stated that the “proposed definition deemphasizes the underlying Fair Housing Act.” This rule goes even further in unnecessarily retooling the intent of affirmatively furthering fair housing and continues to distance the application of AFFH from the goals of the Fair Housing law.

For these reasons, NAHRO asks that HUD withdraw this rule and use the proper notice-and-comment process to make any further changes in how HUD grantees must implement the Fair Housing Act’s duty to affirmatively further fair housing.

Sincerely,



Adrienne Todman
Chief Executive Officer



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CC:

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