



April 4, 2023

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street, S.W.
Room 10276
Washington, D.C. 20410-0500

RE: Proposed Rule Building on 2015 Affirmatively Furthering Fair Housing (AFFH) Rule (Document Number:2023-00625).

Dear HUD Staff,

This firm represents the National Multifamily Housing Council (“NMHC”), the National Apartment Association (“NAA”), and the National Leased Housing Association (NLHA (collectively, the “Associations”), and their tens of thousands of members – owners, managers, developers, and financiers in the nation’s multifamily housing industry – we provide these comments to the Department of Housing and Urban Development’s (“HUD” or the “Department”) Notice of Proposed Rulemaking (“NPRM”), dated as of February 9, 2023, entitled, “Affirmatively Furthering Fair Housing” (“AFFH”),¹ which seeks to implement the obligation to affirmatively further the purposes and policies of the Fair Housing Act under Title VIII of the Civil Rights Act of 1968 with respect to certain recipients of HUD funds. We appreciate and commend HUD’s ongoing commitment to the broader goal of advancing a more robust and comprehensive approach to fair housing analysis and planning, as well as its acknowledgement that certain changes need to be made to prior AFFH rulemaking that imposed significant burdens on impacted entities. In particular, we appreciate HUD’s goal of streamlining the process by which jurisdictions should collect data as well as plan and implement AFFH going forward.

The NPRM is an important first step toward streamlining the AFFH regulatory framework and encouraging a focused approach on key principles in the housing space, such as housing equity and inclusion. However, we believe improvements can be made to the NPRM and offer recommendations for HUD’s consideration. These changes would reduce unnecessary burdens on impacted entities while continuing to advance our shared goals with respect to AFFH and, more broadly speaking, increasing the scope and availability of affordable housing nationwide.

(I) Background:

NMHC and NAA represent the nation’s leading firms participating in the multifamily rental housing industry. NMHC represents the principal officers of the apartment industry’s largest and

¹ 24 CFR Parts 5, 91, 92, 93, 570, 574, 576, 903 and 983.

most prominent firms. The NAA is the trade association for owners and managers of rental housing. The NAA is comprised of 141 affiliated apartment associations and encompasses over 95,000 members, representing more than 11.6 million rental homes throughout the United States, Canada, and the United Kingdom. Our combined memberships engage in all aspects of the apartment industry, including ownership, development, management, and finance. NLHA is a vital and effective advocate for nearly 450 member organizations, including developers, owners, managers, public housing authorities, nonprofit sponsors and syndicators involved in government-related rental housing.

As you are aware, HUD's rulemaking activities with respect to the AFFH regulatory framework have a checkered history. In 2013, when the first iteration of the NPRM was issued by HUD, we submitted comments that not only praised HUD for seeking to advance the cause and positive results of AFFH but also raised several concerns with the proposed rulemaking. Our concerns included, but were not limited to:

The significant planning burdens imposed on public agencies, establishment of a process that would enable HUD to second-guess planning decisions made by local agencies, lack of details provided with respect to modeling and case studies as to how additional demographic data and measuring statistics thereof would work in practice, and most importantly, the lack of clarity around whether the data and other information collected by HUD could be used to impose additional burdens on private persons or increase enforcement activities against such persons.²

Thereafter, in 2015 (the "2015 AFFH rule"), following HUD's issuance of the AFFH Assessment Tool as a means to reduce the administrative, financial and other related compliance costs on impacted entities, we, together with other organizations, submitted comments:

Praising HUD for the AFFH Assessment Tool's ability to assist communities by giving them guidance to complete then-proposed assessments of fair housing, among other things, but also cautioning that (i) such rulemaking should not encourage states to enact or repeal applicable legislative statutes and (ii) the proposed rulemaking mischaracterized alleged "source of income" discrimination.³

Lastly, in response to HUD's 2018 issuance of the advance notice of proposed rulemaking related to AFFH, we not only expressed our appreciation for HUD's goal to advance AFFH but also provided recommendations for improvement, including, but not limited to:

HUD should (i) make the AFFH rule clearer to reduce regulatory impacts on state and local agencies; (ii) incentivize public agencies to focus on common barriers to the expansion of affordable housing (e.g., exclusionary zoning, high fees and assessments, excessive permitting, and others); (iii) restrict the availability of

² Comments of the Associations, RIN 2501-AD33, Docket No. FR-5173-P-01 "Affirmatively Furthering Fair Housing" (September 17, 2013).

³ Comments of the applicable listed organizations, Docket No. FR-5173-N-08 "Affirmatively Furthering Fair Housing Assessment Tool" (August 7, 2015).

AFFH-related data to authorized public agencies; and (iv) focus more on the key source of the affordable housing crisis in the country: the lack of supply of affordable housing units, particularly multifamily housing units.⁴

Ultimately, now that HUD has reissued a more robust version of the previously proposed AFFH framework, we appreciate that the NPRM addresses some of our concerns, in particular, those related to reducing certain administrative and other burdens on program participants; however, other important concerns, such as the lack of guardrails around access to and use of data collected by HUD pursuant to AFFH requirements have not been meaningfully resolved. Accordingly, as HUD reviews public input provided in response to the NPRM going forward, we respectfully urge HUD to balance our shared goals of expanding affordable housing, and in particular certain ways in which the NPRM can do so (*e.g.*, limiting exclusionary zoning rules, etc.), while also providing meaningful changes to the proposed requirements to address other significant issues that will have wide-ranging impacts on various stakeholders in the housing industry.

(II) Comments on AFFH NPRM:

Equity Plans and Regulatory Impacts on Program Participants:

The NPRM outlines that Equity Plans are a modified version of the Assessments of Fair Housing performed under the 2015 AFFH Rule and are required to be submitted by such program participants to HUD for review and approval thereof. The Associations support HUD's efforts to simplify and provide greater flexibility regarding the analysis that program participants must perform as part of these Equity Plans. In fact, the replacement of the 2015 Assessments of Fair Housing with the now-proposed Equity Plans reflects a reduction in the data interpretation and written analysis in which program participants are required to engage. Under the Assessment Tool and previous iterations of the AFFH framework, program participants were required to answer over 100 questions and address over 40 contributing factors.⁵

In contrast, under the Equity Plan construct set forth in the NPRM, program participants are required to address a set of questions related to a number of key elements, including, but not limited to, segregation and integration; racially or ethnically concentrated areas of poverty; local and state policies and practices impacting fair housing; access to community assets; access to affordable housing opportunities; and access to homeownership and economic opportunity.⁶ In addition, the NPRM provides that Equity Plans must include certain specific information, including a description of the fair housing issues identified and identification of conditions that constitute the fair housing issue and protected class groups who are adversely affected, among other things.⁷

⁴ Comments of the Associations, RIN 2529-AA97, Docket No. FR-6123-A-01, "Affirmatively Furthering Fair Housing: Streamlining and Enhancements" (October 15, 2018).

⁵ Assessment of Fair Housing Tool for Local Governments, available at <https://www.hud.gov/sites/dfiles/FHEO/documents/Assessment-of-Fair-Housing-Tool-For-Local-Governments-2017-01.pdf>

⁶ NPRM at 8520.

⁷ See *Id.*

These efforts to streamline the administrative burden on program participants, particularly smaller entities with fewer resources, are appreciated. Further, we applaud the NPRM's extension of the HUD review process and tiered submission schedule that provides for certain larger program participants to submit Equity Plans prior to other entities, subject to certain conditions. For example, the NPRM provides for a 100-day HUD review period of submitted Equity Plans, subject to extension for "good cause."⁸ In addition, the NPRM provides more flexibility to program participants by establishing a construct whereby an additional 180-day approval period for Equity Plans may be granted if program participants provide certain "special assurances."⁹ This is an important and positive distinction from the 2015 AFFH rule that established a 60-day HUD review period with no concrete means of extension.¹⁰ Lastly, the NPRM proposes a tiered submission schedule whereby Equity Plans are due every five years, with a staggered start date based on certain criteria such as the amount of funding received by an applicable entity.¹¹ Separately, Public Housing Agencies are also required to submit Equity Plans every five years, with a staggered start date based on the applicable number of public housing units and vouchers.¹²

The concept of tiered submission timelines, taken together with additional reporting time periods, is an important mechanism for providing impacted entities with much-needed flexibility. That said, we are concerned that the NPRM's resolution for program participants who were unable to submit Equity Plans within the required timeframe may be too aggressive in that the NPRM requires the HUD Secretary to promptly initiate termination of funding and refuse to grant additional funding until such time as an applicable program participant has rectified its failures to comply with the proposed rules.¹³ We recognize that HUD needs to establish some means of accountability. However, we urge HUD to establish a measured response that includes a grace period. We also encourage HUD to conduct a deep analysis as to whether it has the funding as well as logistical and personnel-related resources to analyze, service, and ultimately process all such Equity Plans, so that program participants are not punished despite HUD's failure to process the information it is requesting under the NPRM.

Accordingly, we urge HUD to assess its technical, logistical, financial, administrative, and personnel-based capabilities to ensure it will be able to appropriately deal with all impacted entities under the NPRM in an efficient and effective manner. The Associations urge HUD to focus on its ability to provide technical and other data-specific assistance and servicing to various impacted entities, particularly smaller entities with fewer resources or less expertise. From upgrading data collection efforts to providing trainings and other beneficial resources to all stakeholders, HUD has a number of tools at its disposal, and we strongly recommend that HUD ensure it has enough tools and funding to service stakeholders across the country prior to finalizing the NPRM.

⁸ See *Id.* at 8528.

⁹ *Id.*

¹⁰ 2015 AFFH Rule at 42301.

¹¹ *Id.* at 8529.

¹² *Id.*

¹³ *Id.* at 8573

Ultimately, we support HUD's stated goal of streamlining these administrative requirements as compared to the requirements prescribed in previous iterations of AFFH proposed rulemakings. In fact, HUD's stated goal of allowing, "more time and energy to be spent on effective goal setting," is a good one. While in some cases, the NPRM has reduced certain regulatory burdens as described above, in many other cases, it misses the mark on fully meeting that objective. For example, the NPRM creates some additional regulatory burdens and provides for elements of public engagement that may not further HUD's stated goals and, worse, may prove counterproductive to the process. As outlined below, we caution against unnecessary public disclosure measures that will provide little benefit to individuals and residents, but instead will create new resource burdens and invite frivolous litigation.

Additional Regulatory Burdens on Program Participants and Lack of Guardrails Around Data-Collection Efforts:

As noted previously, the Associations in 2013, 2015 and 2018 outlined some of the regulatory burdens associated with overly complex data collection requirements. Efforts to streamline this process are appropriate and appreciated; however, the NPRM still seeks substantial information from program participants, which could ultimately stifle participation and lead to fewer consumers being served in an efficient and effective manner. As the Associations have outlined in the past, HUD should focus on practical solutions and work hand in hand with housing providers to increase affordable housing. This would lead to better outcomes in achieving fair housing goals than an approach that has a narrow focus on analyzing demographic trends, which are difficult for a federal agency to contextualize in a one-size fits all way.

In some instances, the NPRM requires program participants to submit, along with their Equity Plans, more information than was required by the 2015 AFFH rule, which does not align with the stated goal of streamlining the process. For example, program participants must engage with the public during the development of the Equity Plan, including on at least an annual basis. Specifically, the NPRM requires written feedback on approved Equity Plans, notifications of non-acceptance thereof, or other related communications, as well as annual progress updates to be published on the HUD website.¹⁴ While seemingly innocuous, these community engagement and public participation directives are, in practice, unnecessary and potentially hampering. Housing providers already regularly engage with communities as a practical and business necessity. Creating arbitrary timelines or undue additional engagement efforts that are not tailored to a specific need or goal is unnecessarily resource consuming.

In addition, as more fully described below, we share HUD's concern that public transparency is important. However, we urge HUD to tailor its public participation efforts in a way that does not burden housing providers' ability to create affordable housing opportunities in communities nationwide. We are concerned that many of the public transparency features included in the NPRM will have the unintended effect of inhibiting private and public sector investment in affordable housing. HUD notes in its Regulatory Impact Analysis that it estimates that compliance with these additional planning requirements would collectively cost program participants a total of \$5.2 million to \$27 million per year, which they argue is offset by the societal benefits provided. The Associations would argue that diverting these resources is not

¹⁴ *Id.* at 8569.

necessarily beneficial and does not provide direct benefits, particularly when those resources could be spent directly creating affordable housing opportunities.

The NPRM does not enact specific guardrails around access to, and use of, the data and information collected by HUD pursuant to the terms of the NPRM. Stakeholders, as required, are providing written analysis and data responding to questions about protected class groups, including people of color, individuals with disabilities, and other underserved communities. Since this information will now be publicly available, it is possible that sensitive or private information, such as health information protected by the Health Insurance Portability and Accountability Act¹⁵ related to persons with disabilities could in some way be either revealed or inferred. The NPRM states that “publication” means the public online posting of the Equity Plans and annual progress evaluations submitted to HUD for review on HUD-maintained webpages. It further notes that these webpages will include, among other things, a dashboard to track the status of a program participant’s AFFH planning and implementation-related activities and access to Equity Plan submissions, annual progress evaluation reports, and related notifications from the Department. It provides no detail or information about how information, such as information about specific disabilities that could identify certain health-related information about housing communities, will be protected in this process.

Following a program participant’s submission of an Equity Plan, HUD will have the ability to open compliance reviews, and members of the public will be able to file complaints directly with HUD regarding a program participant’s AFFH-related activities.¹⁶ This seems problematic in that members of the public may be monitoring private consumer information, such as the scope of a person’s disabilities in specific communities, that could be used for a host of inappropriate reasons. Similar complaint portals at other agencies have also seen a host of problems. For example, consumers often use the complaint system for mere inquiries that would be better addressed by businesses themselves. While we understand that HUD’s goals are very well intended, it must consider the unintended consequences of allowing the public to have all of this information without any research or data supporting what exactly the upside of this will be.

A complaint may be submitted to HUD by an individual, an association, or another organization that alleges that a program participant has failed to comply with their obligation to adhere to the AFFH rule.¹⁷ In addition, the NPRM also suggests that there should be an annual progress evaluation regarding the progress made on each goal set forth in an Equity Plan.¹⁸ These progress evaluations will be submitted to HUD, and HUD will make them publicly available on a HUD-maintained website. The NPRM states that the “annual progress evaluation ensures that goal implementation stays on track and that progress (or lack thereof) is disclosed to the public.”¹⁹ In reality, it is unlikely that most members of the public would find value in evaluating the technical work of a specific industry or business. More likely, we are concerned that HUD is creating a situation whereby private attorneys and trial associations will benefit from the ample opportunity to garner information to engage in meritless private litigation.

¹⁵ 110 Stat. 1936

¹⁶ *Id.* at 8558.

¹⁷ *See Id.*

¹⁸ *Id.* at 8559.

¹⁹ *Id.* at 8519.

Notably, this year in March, HUD submitted a Final Rule reinstating the 2013 Discriminatory Effects Rule, restoring HUD’s Discriminatory Effects Standard. The rule reinstates HUD’s 2013 Discriminatory Effects Rule and repeals its 2020 rule governing Fair Housing Act (FHA) disparate impact claims. As noted in the HUD fact sheet,²⁰ the 2013 rule made clear that “discriminatory effects” include both “disparate impact”—when a policy is facially neutral but affects people in protected classes differently—and “perpetuation of segregation,” — when a policy creates, reinforces, or perpetuates segregated housing patterns but does not necessarily have a disparate impact; the 2020 Rule eliminated the definition of “discriminatory effects” and any reference to “perpetuation of segregation.” The Associations have long raised concerns that HUD’s 2013 Rule failed to provide housing providers with the clarity needed to manage properties and execute necessary business practices without running afoul of the FHA.

Thus, HUD’s recent changes, combined with publicly available lists of data about the treatment of persons in protected classes, could potentially be used in a FHA²¹ claim. This creates the very real possibility of an increase in litigation. In its recent press release,²² HUD acknowledged that part of the goal of reinstating the 2013 discriminatory effects rule is codifying long-standing caselaw for adjudication of FHA cases under the discriminatory effects doctrine, for cases filed administratively with HUD, and for federal court actions brought by private plaintiffs. Even if such litigation is brought and not deemed justified, particularly in light of Supreme Court precedent in this area, and therefore dismissed by the judicial system, businesses can still incur significant costs and resource burdens fighting it.

The fact that the NPRM does not set forth a comprehensive framework outlining guardrails around the use of and access to the data and information collected by HUD pursuant to the NPRM reinforces the notion that problems will result. Attorneys who seek to bring cases to receive an award of legal fees and certain advocacy groups may use the publicly available data to create an adverse relationship with the housing industry. Ultimately, encouraging litigation or other adversity will not benefit communities in need of affordable housing; instead, this will only serve to increase costs and stymie new building and participants in the marketplace.

We appreciate the goal of seeking to hold bad actors accountable and eliminate discrimination, but HUD already has sufficient statutory authority to impede the efforts of participants in the marketplace that are not working in good faith. As we have noted in the past, the AFFH process should be a carrot, not a stick. The goal of fair housing will be most efficiently and effectively achieved by treating housing providers as partners.

(III) Supplemental Policy Solutions HUD Should Consider As It Reviews Public Input Related to the NPRM:

²⁰ Discriminatory Effects Final Rule Fact Sheet, available at https://www.hud.gov/sites/dfiles/FHEO/documents/DE_Final_Rule_Fact_Sheet.pdf/

²¹ 42 U.S.C. § 3602(i); 3613(a).

²² HUD Restores “Discriminatory Effects” Rule, *available at* https://www.hud.gov/press/press_releases_media_advisories/hud_no_23_054 (March 17, 2023)

While our above comments provide a range of appreciation for the NPRM, as well as suggested improvements for HUD's consideration, we respectfully take this opportunity to reinforce some of the suggestions we have offered in response to past rulemakings that remain applicable today:

- **Focus on the True Barriers to Expanding Affordable Housing:** Key barriers to expanding affordable housing include, but are not limited to, exclusionary zoning, excessive permitting and approval processes, environmental review requirements, high fees and assessments imposed on developers, and most notably, the lack of incentives for further development of multifamily housing to increase the nationwide supply thereof. While HUD's goals related to the NPRM and the AFFH concept broadly speaking are laudable, the NPRM does not substantively address these barriers. We urge HUD to take the time to supplement the NPRM in such a way as to address these barriers in a robust and effective manner. We are happy to connect with HUD and/or others in the administration to discuss the most effective ways to address such barriers in a fair and balanced manner. The National Apartment Association (NAA) conducted a national survey to better understand the barriers that impact the new supply of apartments.²³
- **Consider a Pilot Program or Limited Approach to Determine Regulatory Impacts:** In previous iterations of the AFFH rulemaking, even consumer advocates have asserted that many of the regulatory burdens imposed on state and local entities are simply too complex and burdensome. Accordingly, rather than unilaterally imposing a new set of requirements on such entities, we ask HUD to consider implementing a pilot program or other limited approach initially so that all stakeholders can get a better understanding of the regulatory impacts. This should include whether the proposals contained in the NPRM will truly provide much-needed regulatory and administrative relief and flexibility.
- **HUD Must Enact Guardrails Around the Use of and Access to the Data Collected by HUD Pursuant to the NPRM:** As we have expressed in our previous iterations, we again emphasize our concern related to third-party use of and access to the data collected by HUD pursuant to the NPRM. Particularly, we are concerned about the means by which it can be used to further illegitimate litigation, private and public enforcement activities based on data that would not ordinarily be available for such use, and enforcement obligations on private housing providers and developers. We urge HUD to consider enactment of a comprehensive framework designed to limit the use of such data to authorized public agencies that truly advance the AFFH goals underlying the NPRM. Efforts to increase the supply of needed affordable housing and the ability to raise needed private capital to invest in housing will be undermined without stronger guardrails.
- **Focus on Housing Supply and Common Ground with Consumer Advocacy Organizations:** The primary and uniform solution to the nation's affordable housing crisis is to expand the supply of affordable housing, including multifamily housing. Private housing providers and developers are known to be the lowest-cost source for multifamily housing from a financial perspective. In fact, encouraging the private sector to develop more multifamily housing is the least expensive way for HUD to meet its overall goal of providing

²³ U.S. Barriers to Apartment Construction Index, available at <https://www.naahq.org/us-barriers-apartment-construction-index> (June 26, 2019).

more affordable housing to all Americans. Consumer groups often share the goal of better and more housing, and have participated frequently in the comment periods during the various iterations of the AFFH proposal in 2013, 2015, 2018, and 2021. While there is often disagreement in the method for getting there, the thousands of comments and participation in the process have signaled that HUD's one-size-fits-all solutions need to continue to be improved upon. There is agreement among both industry and consumer groups that there is a greater need for housing, and multifamily housing presents an affordable option to meet these goals.

(IV) Conclusion

The Associations continue to support the original AFFH goal to reduce housing discrimination and promote fair housing. Narrowing data collection efforts in this NPRM is a step in the right direction for balancing industry concerns about unnecessary regulatory burdens. However, several parts of the NPRM encourage the public, which often does not have the resources to contextualize raw data or technical requirements, to police the industry. This is problematic for several reasons, not the least of which is that attorneys seeking to target the industry so they can generate legal fees have the most to gain, while those working to provide affordable housing will derive little benefit from an adverse public complaint process. The Associations also have privacy concerns surrounding the release of more data publicly and believe that HUD needs to further consider parameters in this area of its proposal. In sum, the new proposals to make several aspects of this process public and the seeming goal of inviting public scrutiny are misguided and should be reconsidered.

Thank you for your attention to these concerns.

Sincerely,



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