

April 24, 2023

Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 7<sup>th</sup> Street SW, Room 10276  
Washington, DC 20410-0500

Re: Affirmatively Furthering Fair Housing (“AFFH”) Proposed Rule  
Docket No. FR-6250-P-01

To Whom It May Concern:

The Council of Large Public Housing Authorities (“CLPHA”), the MTW Collaborative, and Reno & Cavanaugh, PLLC (“Reno & Cavanaugh”) are pleased to submit comments to HUD’s proposed rule entitled “Affirmatively Furthering Fair Housing” published on February 9, 2023 (the “Proposed Rule”).

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. We support the nation’s largest and most innovative public housing authorities (“PHAs”) by advocating for policies and programs that most effectively serve low-income residents and provide them with long-term economic opportunities. Our members own and manage nearly half of the nation’s public housing program, administer a quarter of the Housing Choice Voucher (“HCV”) program, and operate a wide array of other housing programs. CLPHA members collectively serve over one million low-income households.

The MTW Collaborative represents public housing authorities (“PHAs”) participating in HUD’s Moving to Work Demonstration program (“MTW”). The MTW Collaborative monitors and advocates on behalf of MTW agencies’ interests and facilitates the sharing of information, best practices, and innovations between MTW agencies. Our membership includes those agencies currently participating in the MTW program and, upon implementation, will include public housing authorities newly designated as MTW pursuant to the expansion of the MTW program as authorized by Congress.

Reno & Cavanaugh has represented hundreds of PHAs throughout the country. The firm was founded in 1977, and over the past three decades the firm has developed a national practice that encompasses the entire real estate, affordable housing, and community development industry. Though our practice has expanded significantly over the years to include a broad range of legal and legislative advocacy services, Reno & Cavanaugh’s original goal of providing quality legal services dedicated to improving housing and communities still remain at the center of everything we do.

We applaud HUD's efforts to promote equity in housing. Fair housing is a necessarily complicated area implicating various policy concerns. Like HUD, PHAs are committed to affirmatively furthering fair housing and therefore appreciate HUD's efforts to streamline the AFFH requirements to enable PHAs to meet their AFFH obligations while minimizing administrative burden on PHAs. However, as explained in further detail below, the Proposed Rule not only continues to be administratively burdensome for PHAs but also requires PHAs to produce deliverables without providing PHAs with the necessarily tools to successfully do so while at the same time creating an enforcement framework that penalizes PHAs for failing to produce these deliverables. We also specifically answer a number of the 32 questions posed by HUD in the Proposed Rule below.

As a preliminary matter, we are deeply concerned that the Proposed Rule contemplates commencement of the Equity Plan process, including planning and community engagement, even before a final rule is issued. The obligations contemplated in the Proposed Rule should necessarily post-date the effective date of the final rule, and in any event the deadline to submit an Equity Plan should be at least 24 months after the effective date of the rule (not 1 year prior to the date for which a new consolidated plan is due, starting January 1, 2024, as currently provided in the Proposed Rule).

**The Proposed Rule does not adequately address the administrative and cost burden problems of the previous AFFH rule.**

Given the depth of analysis required of an Equity Plan, and the issues with the specific data gathering and analyses contemplated in the Equity Plan (see comments below), it is clear that PHAs are not equipped to undertake such Equity Plan process without third party assistance. PHAs are therefore likely to need consultant assistance to meet the Equity Plan requirements under the Proposed Rule, contrary to HUD's stated goal "that consultants, contractors, or complex data analysis are not required to produce an Equity Plan that can be accepted" by HUD.

Further, PHAs should have maximum flexibility in the Equity Plan process.

HUD should not require a minimum number of community engagement meetings but rather allow PHAs to determine how many meetings make sense for their community. HUD should not require PHAs to utilize specific types of technologies to conduct outreach and engagement but rather allow PHAs to decide such outreach and engagement logistics based on the PHA's particular resources and community access to technologies. Should HUD recommend certain technologies, HUD should provide the necessary financial resources and technical assistance for PHAs and their communities to access such technologies. HUD should not mandate how Equity Plans should be submitted to HUD but rather allow PHAs to choose whichever file format (e.g., MS Word, PDF, etc.) works for their particular Equity Plan. Further, HUD should provide multiple options for submission (including through a secure portal, via email, and through a webpage that allows uploads) of Equity Plans, each with the ability to provide immediate confirmation that the submission was successful and technical assistance for any submission issues.

**HUD has not made adequate current and historic demographic data available to PHAs to conduct the equity analyses required under the Proposed Rule.**

The Proposed Rule requires PHAs to address specific questions regarding demographics, segregation and integration, racially or ethnically concentrates areas of poverty (R/ECAPs), access to community assets and affordable housing opportunities, and local policies and practices impacting fair housing in their geographic area of analysis. However, data sets for these 5 identified areas do not exist for every “geographic area of analysis” across the country and certainly do not exist with historic data to enable substantive analysis of “changes over time” as required by the Proposed Rule.

We applaud HUD’s commitment to exploring possible improvements to the existing AFFH-T Data & Mapping Tool as well as other approaches to facilitating data analysis and making HUD-provided data as useful and easy to understand as possible. We also welcome HUD’s commitment to continuing to provide additional tools, maps, and data sets, as well as “technical assistance that would highlight key points to help program participants understand what those maps and tables show.” However, PHAs need to be able to work with and manipulate the data in order to provide practical and constructive feedback if any such data and tools will be of any assistance during the Equity Plan process. It is therefore crucial that all contemplated tools and data sets in the Proposed Rule be made available to PHAs at least 24 months prior to any Equity Plan submission deadline.

Lastly, we are encouraged that HUD continues to acknowledge that AFFH goals and progress are often specific to the PHA’s community and limited by the PHA’s jurisdictional circumstances. In recognition of this, HUD should also provide PHAs with the maximum flexibility to use available data sets and data sources PHAs deem appropriate for their Equity Plan analyses, regardless of whether such data is nationally uniform. HUD should not require PHAs to use specific data sets.

**The accountability and transparency mechanisms contemplated in the Proposed Rule expose PHAs to greater liability and unnecessarily frustrates the AFFH decision-making authority and process of PHAs.**

The Proposed Rule contemplates that “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.” These enforcement mechanisms are deeply concerning to PHAs.

There is a fundamental conflict with HUD’s statement in the Proposed Rule that “tangible fair housing outcomes will be locally driven based on the fair housing issues that are presented by local circumstances,” on the one hand, and a mechanism that allows any individual member of the public to challenge a PHA’s AFFH-related activities. HUD states in the Proposed Rule that it “does not intend this complaint and compliance review process to supplant” the PHA’s planning process, and “also does not intend the complaint process to be a forum to challenge program participants’ day-to-day activities that have little nexus to the AFFH obligation.” However, the collective experience of the CLPHA membership and R&C’s dispute resolution practice

counsels that this is exactly what will happen under the Proposed Rule. Issues of equity, fair housing, and housing opportunity are complicated by the fact that PHAs (a) are underfunded, understaffed, and generally under-resourced, and (b) do not have authority or control over zoning and land use regulations, state, federal, and private funding, and where individuals ultimately choose to live. This reality necessarily means there will be individuals who disagree with a PHA's AFFH decisions and believe that a PHA has taken action "that is materially inconsistent with the obligation to affirmatively further fair housing."

While we appreciate HUD's commitment "to providing further guidance as to the alleged conduct that HUD will accept as meriting an investigation," such guidance and safe harbors should be developed with PHA-input and issued prior to implementation of a final AFFH rule. PHA-input is key in developing this guidance and safe harbors as PHAs have encountered FHEO enforcement that is fragmented, with different FHEO offices and regions offering contradictory guidance, novel and inconsistent interpretations of federal law, and excessively-punitive enforcement of fair housing policy. Greater clarity as to how PHAs may meet their AFFH obligations is therefore necessary prior to any compliance and enforcement liability attaching to PHAs.

### **Specific Comments to Equity Plan Requirements**

Under the Proposed Rule, PHAs are required to address specific questions regarding (1) demographics, (2) segregation and integration, (3) R/ECAPs, (4) access to community assets and affordable housing opportunities, and (5) local policies and practices impacting fair housing in their geographic area of analysis. We provide specific comments to certain questions below.

*(1) Demographics. (i) What are the current demographics of the geographic area of analysis by protected class group (race, color, national origin, religion, sex, familial status, and disability) and how have those demographics changed over time?*

PHAs do not routinely maintain or have access to demographic information by race, color, national origin, religion, sex, familial status, and disability for the entire "area where a public housing agency is authorized to operate," let alone "circumstances outside the service area that impact fair housing issues within the service area." Furthermore, a state or federal action could arguably "impact fair housing issues" within a PHA's service area. It is unduly burdensome to require a PHA to include in its analysis all such outside circumstances.

*(2) Segregation and integration.*

*(i) Which areas within the geographic area of analysis have significant concentrations of particular protected class groups, including racial/color/ethnic groups, national origin groups, particular limited English proficient (LEP) groups, individuals with disabilities, and other protected class groups? Which, if any, of these areas extend beyond the boundaries of the service area?*

The Proposed Rule does not define what HUD considers “significant concentrations.” It is therefore unclear whether HUD will defer to what a PHA considers a “significant concentration” or if HUD will reject a PHA’s Equity Plan because HUD disagrees with the PHA’s definition.

Further, the Proposed Rule defines the “geographic area of analysis” for PHAs includes the area where the PHA is authorized to operate, the Core-Based Statistical Area (“CBSA”), locations where vouchers administered by the PHA are or could be utilized, and “circumstances outside the service area that impact fair housing issues within the service area.” HUD’s proposed “geographic area of analysis” is confusing at best. It is even more confusing in this context. If a PHA’s “geographic area of analysis” already includes “circumstances outside of the service area,” it is completely unclear what HUD means by “Which, if any, of these areas extend beyond the boundaries of the service area?”.

*(ii) How have patterns of segregation and integration in particular geographic areas changed over time?*

It is unclear what analysis HUD requires in this subsection. The question presupposes that “patterns of segregation and integration” exist in a particular geographic area. What constitutes a “pattern”? What is considered a change? And what does “over time” mean?

*(iv) What public or private policies or practices, demographic shifts, economic trends, or other factors may have caused or contributed to these patterns?*

PHAs do not have the expertise, resources, or access to data necessary to conduct the analysis required under this subsection. What is considered a public policy or practice? What is considered a private policy or practice? What is a demographic shift? What is the definition of an economic trend? Is it HUD’s expectation that PHAs can identify these things let alone analyze whether these factors “may have caused or contributed” to patterns of segregation and integration?

*(3) R/ECAPs. (ii)(a) How have the demographics and location of R/ECAPs changed over time? Has concentration of protected class groups within each R/ECAP increased or decreased? (b) Describe the conditions in R/ECAPs that limit access to opportunity for the residents who live there, including housing costs and cost burden, housing quality, housing instability, displacement, source of income discrimination, and eviction risk. How have these conditions changed over time?*

Source of income discrimination has only in recent years been widely recognized as an equity and fair housing issue. Even with this recognition, it is still difficult to detect as private landlords may cite other bases for denying housing when the true reason is the use of public assistance. It is therefore premature for HUD to require PHAs to conduct an analysis regarding source of income discrimination, let alone an analysis regarding source of income discrimination over time.

The Proposed Rule also does not define what “eviction risk” means nor identify what, if any, data sets or tools exist to assist in the analysis of such “eviction risk.”

*(v) What public or private policies or practices, demographic shifts, economic trends, or other factors may have caused or contributed to these patterns?*

PHAs do not have the expertise, resources, or access to data necessary to conduct the analysis required under this subsection. What is considered a public policy or practice? What is considered a private policy or practice? What is a demographic shift? What is the definition of an economic trend? Is it HUD’s expectation that PHAs can identify these things let alone analyze whether these factors “may have caused or contributed” to patterns of racially or ethnically concentrated areas of poverty?

*(4) Access to community assets and affordable housing opportunities. (ii) Of PHA participants, describe which protected class groups experience significant disparities in access to the following community assets:*

- (1) Education;*
- (2) Employment;*
- (3) Transportation;*
- (4) Low-poverty neighborhoods;*
- (5) Environmentally healthy neighborhoods;*
- (6) Affordable housing opportunities and homeownership opportunities; and*
- (7) Other community assets.*

*Which protected class groups on the PHA’s waiting list or who want to be on the PHA’s waiting list experience significant disparities in access to the community assets identified in paragraph (e)(4)(ii)(A) of this section based on available local data and local knowledge?*

The Proposed Rule does not specifically define what “environmentally healthy neighborhoods” mean. Under the definition of “community assets,” the Proposed Rule seemingly includes clean air, clean water, and access to healthy food as part of “environmentally healthy neighborhoods” but further clarification from HUD is warranted. Additionally, what does “access to healthy food” mean?

*(vi) Describe whether individuals with disabilities who participate in or who are eligible to participate in the PHA’s programs, services, and activities experience barriers that deny individuals with disabilities access to opportunity and community assets in the geographic areas of analysis with regard to the following: (A) Accessible and affordable housing; (B) Accessible government facilities and websites; (C) Accessible public infrastructure; (D) Reliable and accessible transportation; (E) Accessible schools and educational programs, and in particular, high-performing schools and educational programs; (F) Employment; and (G) Community-based supportive services.*

HUD must first develop data sets that track accessible government facilities and websites, accessible public infrastructure, accessible transportation, and accessible schools and

education programs for every geographic area of analysis to enable PHAs to conduct the analysis contemplated in this subsection. PHAs are not qualified to make such accessibility determinations. Also, what does HUD mean by “reliable” transportation?

*(vii) What public or private policies or practices, demographic shifts, economic trends, or other factors may have caused or contributed to these patterns?*

PHAs do not have the expertise, resources, or access to data necessary to conduct the analysis required under this subsection. What is considered a public policy or practice? What is considered a private policy or practice? What is a demographic shift? What is the definition of an economic trend? Is it HUD’s expectation that PHAs can identify these things let alone analyze whether these factors “may have caused or contributed” to patterns of barriers to access to community assets and affordable housing opportunities?

*(5) Local policies and practices impacting fair housing. (i) How do local laws, policies, ordinances, and other practices impede or promote the siting of affordable housing and use of HCV in well-resourced areas of opportunity? (include both policies under the PHA’s direct control (e.g. preferences, types of housing designations, creation and retention of units for large families) and municipal or State policies (e.g. zoning and land use policies, ordinances, or regulations, eviction policies and procedures) known to the PHA to impact the siting of affordable housing and voucher mobility). Describe the boundaries of the PHA’s service area and the PHA’s mobility and portability policies and activities. Is there a need for services, improved access to economic opportunity, or place-based investments to assist the PHA’s assisted residents or the neighborhoods where its housing developments or HCV are located?*

How local laws, policies ordinances, and other practices impede or promote the siting of affordable housing is a complicated analysis – one that PHAs do not have the necessary resources or expertise to conduct. It is also unclear what HUD considers “other practices” that may impede or promote the siting of affordable housing.

Further, there are several issues with HUD’s definition of “well-resourced areas.” The Proposed Rule defines “well-resourced areas” as areas within a PHA’s “geographic area of analysis that have high-quality and well-maintained community assets (in view of local economic circumstances) ... which afford residents genuine access to opportunity (e.g. transportation, infrastructure, high performing schools, economic opportunity, etc.) as a result of public and private investments.” The Proposed Rule does not define what is considered “high-quality” or “well-maintained” in terms of community assets. The Proposed Rule further does not define what “genuine access” means. Lastly, it is not clear what is considered “a result of public and private investments.”

## CONCLUSION

It is clear that the majority of the questions and issues to be addressed in the Equity Plan are outside the purview of PHAs. We therefore advocate that HUD remove PHAs from definition of “program participant” and restrict Equity Plan requirements to jurisdictions and insular areas, though welcome HUD providing incentives for PHAs to partner with these program participants in a joint Equity Plan. Alternatively, we ask that HUD create pilot a program with a diverse group of program participants, including PHAs, to test the proposed Equity Plan framework and improve the Proposed Rule prior to universal implementation. In any event, in light of our substantial comments and other unsettled issues, we strongly recommend that HUD consider our comments and those from other interested parties, release a revised version of the Proposed Rule and allow for subsequent rounds of comments before issuing a final rule.

Thank you for the opportunity to submit these comments to the Proposed Rule. CLPHA and Reno & Cavanaugh look forward to working with HUD on this and future rulemaking.

Sincerely,



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