



September 17, 2013

Regulations Division  
Office of General Counsel  
451 7<sup>th</sup> Street S.W.  
Room 1026  
Department of Housing and Urban Development  
Washington, DC 20410-0500

Re: Docket No. FR-5173-P-01 RIN No. 2501-AD33: Affirmatively Further Fair Housing

The Council of State Community Development Agencies (COSCDA) represents state housing and community development agencies responsible for administering the Department of Housing and Urban Development (HUD) programs, including the Community Development Block Grant (CDBG) program, the HOME Investment Partnerships (HOME) program and the McKinney-Vento Homeless Assistance Programs. On behalf of the members of COSCDA, I respectfully submit the following comments and questions regarding the proposed rule, Affirmatively Further Fair Housing (AFFH).

COSCDA appreciates the opportunity to comment on the AFFH proposed rule. State housing and community development agencies that administer CDBG, HOME and the McKinney Vento programs certainly realize the importance of affirmatively pursuing the goals of the Fair Housing Act. Our members want to take steps proactively to overcome historic patterns of racial segregation, promote fair housing choice, and foster inclusive communities for all of their citizens. We appreciate the attempt HUD has made to provide a process that CPD grantees can follow to assure that they consider fair housing issues when determining the use of CPD funds. Too much time has passed without clear direction from HUD on the process to AFFH.

The proposed rule as written, however, falls short of the goal of clearly delineating the process that State CPD grantees must take in using funds to AFFH, as well as the reality of states' authority as grantees. In general, the process laid out in the rule is too vague, particularly regarding state responsibilities to AFFH, and does not recognize the role that states play in administering the CPD programs. In fact, the proposed regulations at p.43724 asks for more input from commenters in nineteen different subject areas, and asks for input regarding the state role.

The volume of these unanswered questions shows that HUD needs to more fully examine the impacts and potential impacts of the rule. We suggest that HUD evaluate comments from grantees and reissue the revised regulations for another round of rulemaking and comment, particularly including a separate section for state grantees. As grantees, we are concerned that HUD gets this right, and does not move forward with a rule that imposes a costly and time-consuming process, needing further revisions to a prematurely issued final rule, that then requires revisions down the road in light of real-life experience and dilemmas in implementing this regulation.

In general, HUD should realize the limitations that state CPD grantees have regarding fair housing issues in their states, and should adjust its expectations for what can be accomplished. There are deep, long-standing and broadly rooted causal factors for these conditions that the summary of the proposed rule acknowledges which extend beyond the authority, capacity or limited resources of the State and local government entities required to prepare an Assessment of Fair Housing (AFH). With dwindling funding from CPD, HUD should not expect that subsequent policies, actions, and resource allocations of the Consolidated Plan (Con Plan) or PHA planning process, along with the new AFH, can meaningfully address the causal factors for these conditions. Accordingly, the proposed rule should be revised to avoid fostering conflicting and unrealistic expectations via the proposed fair housing or Con Plan processes.

States will, regardless, continue to review the fair housing issues of the non-entitlement areas and will, to the extent possible considering existing resources and constraints discussed below, review actions taken by their subgrantees to address the identified goals of the AFH.

### **Specific Comments**

#### **The proposed regulation does not clearly define the geographic area to be covered in a State AFH**

HUD needs to acknowledge and accommodate the role of the state in program administration. The role of state grantees, particularly small rural states, in CPD programs is quite different than the role for entitlement grantees. States do not generally directly carry out activities, but use a method of distribution to award funds to units of general local government within the state which carry out the activities. This difference in local and state grantees should be acknowledged by HUD in the AFH process as it is in the Con Plan.

The proposed rule needs to clearly describe the geographic areas required to be covered by a state's AFH. COSCDA suggests that the rule indicate that state AFHs should cover only the non-entitlement jurisdictions, and should not be required to cover entitlement jurisdictions. Entitlement jurisdictions will be required to prepare their own AFH, therefore requiring the state to also complete an assessment of the same area would be redundant and a waste of time and money. If states choose to participate in regional

AFHs that include entitlement jurisdictions, they may do so and the AFH would include the entitlement jurisdictions.

The proposed rule places too much emphasis on metropolitan areas and, in many citations, neglects to include the “state” grantee when it lists and discusses HUD grantees (only “local governments” and “PHAs” are included).

Regarding consultation, the proposed rule states at 91.110 (2) that the “State shall consult with state and regionally-based organizations that represent protected class members...and other public and private fair housing service agencies, to the extent such agencies operate in the State.” COSCDA recommends that states be required to consult with entities in non-entitlement areas only and that the focus should be on these non-entitlement areas in these consultations. Consulting with entities in entitlement areas should be optional.

### **The proposed regulation does not clearly define the responsibilities of the State in assuring that its local subgrantees AFFH**

HUD needs to lay-out basic program parameters for states, and to clearly articulate the requirements that states have regarding their subgrantees’ efforts to AFFH.

States can provide incentives for their subgrantees to AFFH. The state can choose to fund non-entitlement communities that plan to address fair housing issues that are identified in the AFH. They can also, to the extent feasible, use HOME funds to directly address fair housing issues in non-entitlement areas.

On the other hand, the state is not a super-zoning board. Since states do not have authority over local land use decisions, they cannot require a local non-entitlement community to use CDBG funds specifically to provide affordable housing. There are too many local jurisdictions in large states to have individual assessments done, and review, oversight and engagement of these issues. In addition, state agencies that run CPD programs are not fair housing enforcers or investigators of discrimination complaints and HUD should recognize this. The state agency that is the CPD grantee, can’t force locals to take a particular action that could be most effective in addressing a fair housing issue. Rather, that is the obligation of the fair housing enforcement agencies that HUD funds to carry out those efforts.

### **HUD Data Quality On Fair Housing Measures is Poor**

The data that HUD is proposing to provide to grantees to assess fair housing in their jurisdictions is of poor quality. States are particularly concerned that the quality of HUD data for rural areas is poor, since many state CDBG grantees provide funds to small rural jurisdictions. We are concerned that HUD, or an entity seeking to challenge an AFH,

might use this data as a basis to force a change or unwarranted action in the AFH. The use of Moving to Opportunity (MTO) data in particular indicates that certain fair housing programs are not recommended since reports on its success are often in conflict.

HUD is proposing to use data derived from the American Community Survey (ACS). Sample sizes are small under the ACS, therefore the data developed from it is not accurate. The ACS has high margins of error, often over 20 percent in a given census tract and occasionally approaching 30 percent. Since the margins of error are so high, the “disproportionate housing needs” definition disparate impact percentage needs to be changed from 10% to 20% or higher in the more rural states and rural areas within all states.

Due to the poor quality of the data provided by HUD, many states have told COSCDA that they will not save money, contrary to what HUD surmises in the summary of the proposed rule. They predict that they will continue to need consultant services.

HUD data on mass transportation appears to be inaccurate, particularly for state non-entitlement jurisdictions, many of which are rural and do not have mass transit, nor an economically viable method of providing it. This measure should be updated to provide more accurate information.

Also, the term “community assets” is not clearly defined in the rule compared to the data sets HUD is providing. Different measures for community assets are included in different parts of the rule. COSCDA asks that these measures be clearly defined, including “access” to these assets.

Regarding the identification of significant disparities in access to community assets, HUD should provide recommended numerical benchmarks for determining what are “measurable differences in access” to the community assets. Particularly for those non-housing assets discussed in the definition, it is difficult for housing program administrators to determine what level of measurable difference constitutes a significant disparity.

Given the various geographies served, for each community asset for which analysis will be required, data should be provided at various levels of aggregation to permit States to utilize benchmark comparisons by city/county, region, or state as a whole.

The proposed rule is vague about the proposed weights to various input categories (transportation access, labor force participation, volume and toxicity of released chemicals) that will be used to assess fair housing. HUD needs to be specific regarding the relative weights and measures of the proposed community measures.

It is difficult to assess the quality or usefulness of the “template” that will be used by states to assess the HUD data and determine fair housing issues since the template is not available at the time of the publication of the proposed rule. HUD should allow grantees time to review the template as part of this proposed rule-making process.

Moreover, there are many unanswered questions about how HUD will impose the use of the indices for measuring disparities in the educational, health care, and transportation systems. While these issues should be addressed and included in the fair housing process, the amount of HUD resources does not have the ability to inform or control system changes in education, health care, and transportation.. Certainly representatives of these systems should be included in the planning process, and such issues considered, but it is unrealistic to expect that HUD's resources will be the "tail that wags these dogs".

### **Mapping tool should be substantially improved for states**

HUD's proposed mapping tool should be revised to make it useful to states. The pilot data tool mapping function is difficult for states to use, given the large geographic area from which data for the AFH may need to be analyzed. While it appears that the tool works well for an entitlement jurisdiction, the experience is not as clear for analyzing statewide non-entitlement area data. The mapping tool does not show data within state boundaries, individual counties, entitlement and non-entitlement jurisdictions so that grantees can understand what the data illustrates. Data of all types should be adjusted for state geographic areas.

### **HUD needs to clarify the conditions for HUD rejection of the AFH**

The proposed rule is not clear regarding the conditions when the AFH can be rejected by HUD. In some places, the rule states that AFHs will only be rejected based on incompleteness. However, in section 5.162(b)(2) it states that "*Failure to include a required element includes an assessment whose priorities or goals are materially inconsistent with the data and other evidence available to the jurisdiction.*" This could read that HUD could disagree with a grantee's priorities and goals for resolving the state or jurisdiction's fair housing issues.

COSDA suggests that the AFH should only be rejected for incompleteness, and not based on goals identified to address fair housing issues. The "material inconsistent with the data" statement is vague, and provides too much leeway to HUD to reject an AFH, particularly since different field offices interpret rules differently. Determination of the "primary determinants" for fair housing issues is often inherently arguable, vulnerable to differing interpretations and prioritization. Also, HUD has acknowledged problems with data accuracy, so basing a rejection on a grantee's interpretation of inaccurate data may be unreasonable. If a field office believes that a grantee should adopt an alternate approach to addressing fair housing issues, it should contact the grantee for a discussion, rather than reject the AFH. HUD also, of course, has the legal authority to take action if fair housing problems remain after the grantee uses its approach.

HUD states in its Regulatory Impact Analysis that "*the impact (of actions taken by grantees to AFFH) will depend on a complex interaction of a broad set of judgments and decisions by the jurisdictions, other jurisdictions, private and non-profit actors, and families, both in protected classes and not.*" Therefore states should be provided

maximum feasible deference in assessing the state of fair housing and in determining the best actions for their state to address FH issues.

### **The development of the AFH should not precede the Con Plan**

The regulation states at §5.160(a) that the AFH must be submitted to HUD before the Con Plan. The AFH should not precede the Con Plan, but should be developed as part of the Con Plan and should not be separate. If the AFH is submitted significantly ahead of the Con Plan, grantees would be in a constant planning and reporting cycle which would drain staff time and resources from effective implementation and monitoring of identified goals and objectives of both the AFH and Con Plan.

Initial AFHs are to be submitted 270 days before the start of a program year. This is too long before submission of the Con Plan. For example, state grantees would have to start the AFH/Con Plan process in mid-December of 2013 to meet a 2016 due date, or almost 2 and ½ years before the Con Plan would become effective. With this length of time since the start of the development of the AFH, the data that is used for the AFH may not be valid by the time the AFH is submitted. The data should be fresh when grantees are thinking about fair housing at the same time Con Plans are being developed.

COSCEA recommends that HUD integrate the AFH provisions with the Con Plan, without requiring a separate, prior AFH development and approval process. The proposed rule would require analysis and goal setting of fair housing factors such as demographic, socio-economic and housing conditions in the AFH separate from and preceding similar conditions required to be analyzed in the Con Plan, while driving goals and resource distribution of the Con Plan. This would represent unnecessarily redundant analysis, and be confusing to the public during duplicate citizen participation hearings. The needs analysis of the Con Plan is relevant to the AFH goal setting and should be conducted concurrently.

HUD should reassess and shorten the AFH process – by reducing data elements, considering integration of the AFH into the Con Plan and by reducing its own review process/timeframes to focus on providing technical assistance in the development and implementation of the AFH.

### **AFH requirements should apply to next Con Plan cycle**

When the AFFH rule is finalized, the requirements should apply to the next 5-year Con Plan cycle for grantees. Until the rule is finalized, states and local governments should not be required to go backward and do an AFH if the state already submitted a Con Plan, and updated the AI, or if a Plan is due soon. The submission requirement should also allow time for HUD to provide adequate training and technical assistance on the new requirements.

### **Rule should clarify states' roles regarding PHAs**

Many PHA issues need to be clarified. The rule is too vague regarding what requirements will be made for voucher-only PHAs, and also of small PHAs that might have only one or two jurisdictions.

Regarding states, HUD needs to clarify which PHAs states are required to consult with and what role, if any, they have in regards to PHAs in non-entitlement jurisdictions who fall under the state's Con Plan but fail to meet their fair housing goals. Moreover, there is no authority for HUD to require the state to help PHAs remedy their fair housing violations. However, language in §91.110 (a) (1) requires state actions by using the words "will address" and "will provide" rather than indicate states may or may not choose to address public housing authority needs.

Coordination with the PHA planning process may be difficult due to different due dates.

Regarding consultation by states, only statewide public housing authorities must be consulted in developing an AFH. The proposed rule contains language in §91.110 (a) (1) "The State shall consult with any state housing agency administering public housing (PHA) concerning consideration of public housing needs, planned programs and activities, the AFH..." The language should indicate clearly that it is only statewide housing authorities that must be consulted. If HUD's intent was broader, that language should be limited to "representatives of public housing authorities covered by the state's Consolidated Plan" not all public housing authorities.

Further, states should not be held responsible for assuring that PHAs implement their required fair housing remedies. HUD should also clarify that PHAs in entitlement communities cannot join in with the state's AFH.

### **Technical assistance should be provided for state grantees**

Based on HUD's question related to technical assistance (TA) needs, below are some areas where States may need additional TA in doing an AFH due to the large number of localities or PHAs potentially covered by a State AFH, and shrinking staff resources to do implementation and monitoring:

1. Use of the AFH data tool when populating it with data from different areas of the State, including map analysis Use of the AFH Template, as proscribed in the final rule
2. Data analysis, trend identification, action planning

Form of TA that would be helpful prior to submission of the AFH include:

1. Individual TA from HUD or HUD consultants, and
2. In-person training, where States discussed their AFH planning processes, uses of data, recommended actions, and progress/challenges with implementation.

3. State-focused webinars are not recommended as the primary form of assistance for the new AFFH requirements.

HUD must realize that state grantees need state-focused training. HUD training and technical assistance for CPD programs has focused on materials that were developed with the circumstances of local PJs in mind. Material with particular relevance to states is sometimes missing or appears to be an afterthought. Hands-on training specifically designed for states would be the best approach to reaching the goals of this proposed rule. Consistent training of field office staff is necessary to assure that reliable information, assistance and TA is provided to state grantees.

### **The proposed certification should be modified**

The proposed certification language at section 91.325(a)(1) should be modified to include reference to consideration of the “totality of the evidence” of a program participant in meeting its obligation to affirmatively further fair housing. Requiring that program participants certify that: “it will take no action that is materially inconsistent with its obligation to affirmatively further fair housing” is too broad of a legal standard, and may result in increased litigation spurred by individual instances, or decisions of the State or a state recipient that one or more parties may feel is inconsistent with an AFH, even though a State’s actions, on the whole, affirmatively further fair housing as set forth under the AFH and other related program requirements. These decisions may be related to non-housing community assets over which State housing program administrators have no knowledge or control, or may relate to actions of individual state recipients over which the state has no legal authority.

### **The rule should not discourage investment in low-income areas of minority concentration**

Finally, HUD should be careful to assure that the rule is not used to shift public resources away from low-income areas of minority concentration. We do not want grantees to interpret the proposed rule as an encouragement to essentially red-line low-income areas of minority concentration from receiving CPD funds as a way of deconcentrating poverty. These communities continue to need revitalization/reinvestment, anti-displacement programs, and alleviation of substandard housing conditions, consistent with the purposes and requirements of some of the core programs governed by the Con Plan, as well as other HUD and other community development programs. Grantees should be given the flexibility to determine fair housing goals and actions that should include improving low-income neighborhoods of color, as well as improving social and physical mobility, and providing opportunities to live in other areas that might have access to better education, jobs and services. The policies contained in an AFH should focus on providing options to allow equal choice in housing, free from discrimination, not imposing a massive shift of funding to one geographic area based on social and demographic data.

### **Conclusion / Next Steps**

COSCD A has offered to work with HUD offices in the development of proposed regulations such as these. If a diverse group of states had been consulted on this proposed process, the regulations would have been clearer on a workable state role in AFFH. We suggest that HUD convene a group of states to further discuss these issues. COSCD A can help to develop the group.

Sincerely,

A handwritten signature in black ink, appearing to read "Dianne E. Taylor". The signature is written in a cursive, flowing style.

Dianne E. Taylor  
Executive Director