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SUBMITTED VIA REGULATIONS.GOV

Office of the General Counsel
Rules Docket Clerk
Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0001

Re: Comments in Response to HUD's Interim Final Rule on Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, Docket No. FR-6249-I-01

To Whom It May Concern:

The National Women's Law Center (the "Center") takes this opportunity to comment in support of the Department of Housing and Urban Development (HUD) Interim Final Rule entitled "Restoring Affirmatively Furthering Fair Housing Definitions and Certifications." In sum, based on the reasons detailed herein, the proposed changes in the Interim Final Rule would help to alleviate the serious harm that the Trump administration's 2020 Preserving Community and Neighborhood Choice (PCNC) Rule posed to low-income women and their families, their communities, and the nation.

The Center fights for gender justice – in the courts, in public policy, and in society – working across the issues that are central to the lives of women and girls. The Center uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes society and to break down the barriers that harm everyone – especially those who face multiple forms of discrimination. For more than 45 years, the Center has been on the leading edge of every major legal and policy victory for women.

I. Access to safe and affordable housing in integrated neighborhoods is vital to the well-being of women and girls.

Access to safe and affordable housing is crucial to good health,¹ nutrition,² education,³ and stable employment.⁴ Homeownership is also the largest source of wealth for women of color. Unfortunately, women—particularly women facing intersecting forms of discrimination—are significantly more likely than men to face housing instability, such as higher cost-burdens and eviction rates than white, non-Hispanic men,⁵ and more barriers to securing an affordable and accessible place to live in a neighborhood of their choosing. These are systemic challenges caused by the well-documented history of racial and gender discrimination in housing, such as redlining, residential segregation, subprime mortgage lending targeting women of color, and decades of divestment in public housing and other forms of rental assistance, as well as sexism and racism in our nation’s employment and larger economic systems.

The COVID-19 pandemic and resulting “she-cession” have exacerbated these longstanding gender and racial inequities. Between February and April 2020, women lost 12.1 million jobs.⁶ As of the end of June 2021, there were still over 3.8 million net jobs lost by women.⁷ Throughout this recession, just as pre-COVID, Black women, Latinas, and women with disabilities continue to face especially high unemployment.⁸ Asian, Black, and Latina women also are more likely to be behind on their rent or mortgage payments,⁹ raising the threat of eviction and foreclosure.

A. Access to fair housing impacts health outcomes for women and families.

¹ OPPORTUNITY STARTS AT HOME, HEALTH CARE ADVOCATES ARE HOUSING ADVOCATES, <https://www.opportunityhome.org/related-sectors/health/>; CTR. FOR OUTCOMES RES. AND ED. & ENTER. COMMUNITY PARTNERS, INC., HEALTH IN HOUSING: EXPLORING THE INTERSECTION BETWEEN HOUSING AND HEALTH CARE 7 (Feb. 2016), <https://www.enterprisecommunity.org/download?fid=5703&nid=4247>; KATHRYN BAILEY ET AL., CHILDREN’S HEALTHWATCH, OVERCROWDING AND FREQUENT MOVES UNDERMINE CHILDREN’S HEALTH 1-2 (Nov. 2011), www.issuelab.org/resources/13900/13900.pdf.

² OPPORTUNITY STARTS AT HOME, ANTI-HUNGER ADVOCATES ARE HOUSING ADVOCATES, <https://www.opportunityhome.org/related-sectors/hunger-housing/>.

³ OPPORTUNITY STARTS AT HOME, EDUCATION ADVOCATES ARE HOUSING ADVOCATES, <https://www.opportunityhome.org/related-sectors/education-housing/>.

⁴ OPPORTUNITY STARTS AT HOME, ECONOMIC MOBILITY ADVOCATES ARE HOUSING ADVOCATES, <https://www.opportunityhome.org/related-sectors/economic-mobility-housing/>.

⁵ NAT’L WOMEN’S LAW CTR. & NAT’L LOW INCOME HOUSING COAL., GENDER AND RACIAL JUSTICE IN HOUSING 1-2 (May 2021), <https://nwlc.org/resources/gender-and-racial-justice-in-housing> [hereinafter “GENDER AND RACIAL JUSTICE”].

⁶ CLAIRE EWING-NELSON, NAT’L WOMEN’S LAW CTR., FOUR TIMES MORE WOMEN THAN MEN DROPPED OUT OF THE LABOR FORCE IN SEPTEMBER 1 (Oct. 2020), <https://nwlc.org/resources/four-times-more-women-than-men-dropped-out-of-the-labor-force-in-september/>.

⁷ CLAIRE EWING NELSON & JASMINE TUCKER, NAT’L WOMEN’S LAW CTR., 97% OF WOMEN WHO RETURNED TO THE LABOR FORCE IN JUNE ARE UNEMPLOYED AND LOOKING FOR WORK 1 (July 2021), <https://nwlc.org/resources/97-of-women-who-returned-to-the-labor-force-in-june-are-unemployed-and-looking-for-work/>.

⁸ GENDER AND RACIAL JUSTICE, *supra* note 5, at 5.

⁹ NAT’L WOMEN’S LAW CTR., NWLC ANALYSIS OF U.S. CENSUS BUREAU COVID-19 HOUSEHOLD PULSE SURVEYS, <https://nwlc.org/resources/nwlc-analysis-of-u-s-census-bureau-covid-19-household-pulse-surveys/>.

Safe, decent, affordable, and accessible housing is key to one's health and well-being.¹⁰ Women and families who are housing cost-burdened often have insufficient resources for other essential needs, including nutritious food and health care. Cost-burdened people are more likely to skip health care treatments or prescriptions because of cost, which is particularly harmful for women who are already more likely to delay needed medical care because of expenses.¹¹

Different forms of housing instability, including eviction, also aggravate mental health conditions.¹² Prior to the COVID-19 pandemic, low-income Black women who rent were nine times more likely than low-income white women who rent to be evicted.¹³ This exacerbates the heightened risk that women, particularly women of color, have of experiencing depression, anxiety, and high blood pressure.¹⁴ Further, unstable housing is particularly harmful to children's health, including developmental delays and mental health conditions, and the harm grows the longer a child experiences housing instability.¹⁵

When access to stable and affordable housing is limited, more women are forced to live in highly segregated and/or substandard housing. Housing segregation widens health disparities by determining access to schools, jobs, health care, and nutritious foods.¹⁶ In contrast, the availability of resources—such as public transportation to one's job, grocery stores with nutritious foods, and safe spaces to exercise—are all correlated with improved health outcomes.¹⁷

Substandard housing conditions—such as lead paint, poor ventilation or heat/cooling, and pest infestation—also pose a variety of health risks to women and girls.¹⁸ Women and families with low incomes are most likely to experience unhealthy housing and are typically least able to remedy them, contributing to disparities in health across socioeconomic groups.¹⁹

B. Access to fair housing impacts educational outcomes for women and families.

Gender justice, access to fair housing opportunities, and educational equity are deeply intertwined.

¹⁰ GENDER AND RACIAL JUSTICE, *supra* note 5, at 3.

¹¹ Nat'l Women's Law Ctr., Comment Letter on Proposed Rule on Affirmatively Furthering Fair Housing 3 (Mar. 2020), <https://nwlc.org/resources/nwlc-comments-to-the-u-s-department-of-housing-and-urban-development-on-affirmatively-furthering-fair-housing/> [hereinafter "NWLC 2020 AFFH HUD Comment"].

¹² GENDER AND RACIAL JUSTICE, *supra* note 5, at 3.

¹³ GENDER AND RACIAL JUSTICE, *supra* note 5, at 4.

¹⁴ NWLC 2020 AFFH HUD COMMENT, *supra* note 11, at 3.

¹⁵ NWLC 2020 AFFH HUD COMMENT, *supra* note 11, at 3.

¹⁶ NWLC 2020 AFFH HUD COMMENT, *supra* note 11, at 4.

¹⁷ NWLC 2020 AFFH HUD COMMENT, *supra* note 11, at 4.

¹⁸ NWLC 2020 AFFH HUD COMMENT, *supra* note 11, at 4.

¹⁹ P. BRAVEMAN ET AL., HOW DOES HOUSING AFFECT HEALTH?, ROBERT WOOD JOHNSON FOUND. 3–7 (May 2011), <https://www.rwjf.org/en/library/research/2011/05/housing-and-health.html>.

First, housing instability has negative impacts on education. Children who experience housing instability, including the trauma of experiencing homelessness, are more likely to have behavioral problems and struggle in school.²⁰ Homelessness is associated with an 87 percent greater likelihood of a child being pushed out of school.²¹ Access to housing, therefore, is critical to ensuring the future success and wellbeing of all students—including young women and girls—throughout the country.

In addition, limited access to integrated neighborhoods impacts educational opportunity. Racially segregated neighborhoods lead to racially segregated schools, which are often poorly resourced and economically disadvantaged. These disadvantages result in disparate educational opportunity and outcomes for students of color. Allowing for the continued concentration of poverty limits the resources available to schools in impoverished communities. Because of the decentralized nature of education funding, and the reliance on local property taxes, low-wealth communities are less able to provide sufficient funding for their schools, even when tax rates are high.

C. Access to fair housing impacts nutrition for women and families.

When families with low incomes spend high portions of their income on their rent, they struggle to pay for nutritious food and face higher food insecurity rates.²²

In addition, historical residential segregation has restricted neighborhood access to healthy foods and inhibits a family's ability to engage in healthy eating behaviors.²³ This negatively impacts nutrition for families in neighborhoods of color and is correlated with an increased chance of obesity.²⁴ Meanwhile, evidence suggests that an increase in access, availability, or consumption of healthy foods was associated with a significant decrease in body mass index.²⁵

D. Access to fair housing impacts women's employment outcomes.

Eviction and involuntary displacement due to unjust and discriminatory housing policies make it hard for workers to be present during scheduled work hours and may lead to job loss and prolonged unemployment.²⁶ Moreover, poor credit caused by housing instability more broadly can make it harder for individuals to obtain or maintain a job.²⁷

Addressing residential segregation is a key worker justice issue. The Brookings Institution analyzed the 10 largest Black-majority cities²⁸ and found that Black

²⁰ NWLC 2020 AFFH HUD COMMENT, *supra* note 11, at 5.

²¹ AMERICA'S PROMISE ALLIANCE, DON'T CALL THEM DROPOUTS: UNDERSTANDING THE EXPERIENCES OF YOUNG PEOPLE WHO LEAVE HIGH SCHOOL BEFORE GRADUATION 9, 28 (May 2014), <https://www.americaspromise.org/report/dont-call-them-dropouts>.

²² NWLC 2020 AFFH HUD COMMENT, *supra* note 11, at 7.

²³ NWLC 2020 AFFH HUD COMMENT, *supra* note 11, at 7.

²⁴ NWLC 2020 AFFH HUD COMMENT, *supra* note 11, at 8.

²⁵ NWLC 2020 AFFH HUD COMMENT, *supra* note 11, at 8.

²⁶ NWLC 2020 AFFH HUD COMMENT, *supra* note 11, at 8.

²⁷ NWLC 2020 AFFH HUD COMMENT, *supra* note 11, at 9.

²⁸ Defined as "cities with a population of 50% or more Black residents, including those who identify as mixed race or biracial." ANDRE M. PERRY, BROOKINGS INST., BLACK WORKERS ARE BEING LEFT BEHIND BY FULL

unemployment rates in 2017 ranged from 3.9 percent to 10.8 percent higher than white unemployment rates.²⁹ In response to HUD's 2020 Proposed Rule on Affirmatively Furthering Fair Housing, the Center analyzed 2018 unemployment data for some of the same cities and identified disparities by race and sex in most places:³⁰

- **Disparities based on sex and race:** In Baltimore, the 2018 unemployment rate for white, non-Hispanic people was three percent. White, non-Hispanic men fared better with a two percent unemployment rate, while white, non-Hispanic women had a 4.2 percent unemployment rate and Black women had a 7.7 percent unemployment rate. In Hampton, VA, the unemployment rate for white, non-Hispanic men was 1.2 percent but was 5.1 percent for white, non-Hispanic women and 10.1 percent for Black women.
- **Disparities based on sex:** In Newark, NJ, the unemployment rate for white, non-Hispanic men was a 2.9 percent but 12.1 percent for white, non-Hispanic women and 11.3 percent for Black women.
- **Disparities based on race:** In New Orleans, white, non-Hispanic women had an unemployment rate of 3.4 percent while Black women had an unemployment rate of 7.7 percent.

Research also indicates that jobs in predominantly white communities that are inaccessible by public transportation can be hard for people of color with low incomes in segregated neighborhoods to access.³¹ Moreover, disparities in educational outcomes for students of color in segregated neighborhoods impact the ability for many people of color to access quality jobs.³²

E. Residential segregation makes it harder for women with low incomes to access public programs to meet basic needs for their families.

Women of color, and women more generally, face a higher risk of economic insecurity throughout their lives.³³ As a result, public programs provide critical assistance to many women and families to help meet their basic needs.³⁴ However, some benefit offices may be inaccessible by public transportation. If programs have in-person requirements, or families are unable to access the internet to complete online applications, it can be hard for women with low incomes to access public benefits programs.³⁵

EMPLOYMENT (June 26, 2019) <https://www.brookings.edu/blog/the-avenue/2019/06/26/black-workers-are-being-left-behind-by-full-employment/>.

²⁹ *Id.*

³⁰ NWLC 2020 AFFH HUD COMMENT, *supra* note 11, at 9-10.

³¹ See, e.g., MARGERY AUSTIN TURNER & KARINA FORTUNY, URBAN INST., RESIDENTIAL SEGREGATION AND LOW-INCOME WORKING FAMILIES 5 (Feb. 2009), <https://www.urban.org/sites/default/files/publication/32941/411845-Residential-Segregation-and-Low-Income-Working-Families.PDF>.

³² *Id.*

³³ JASMINE TUCKER ET AL., NAT'L WOMEN'S LAW CTR., BY THE NUMBERS: DATA ON KEY PROGRAMS FOR THE WELL-BEING OF WOMEN & THEIR FAMILIES 1 (Jun. 2021), <https://nwlc.org/resources/by-the-numbers-data-on-key-programs-for-the-well-being-of-women-their-families/>.

³⁴ *Id.*

³⁵ NWLC 2020 AFFH HUD COMMENT, *supra* note 11, at 11-12.

II. The Affirmatively Furthering Fair Housing (AFFH) mandate is vital to overcoming barriers to fair housing for women and families.

Since its enactment in 1968, the FHA has imposed a duty on all federal agencies and their funding recipients to affirmatively further fair housing.³⁶ The duty to affirmatively further fair housing applies to all protected classes under the FHA: race, color, national origin, sex, disability status, familial status, and religion. One key element of this duty is addressing discrimination and segregation.

In *N.A.A.C.P. v. Secretary of HUD*, the court noted that the Fair Housing Act's legislative history "suggests an intent that HUD do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to *assist in ending discrimination and segregation*, to the point where the supply of genuinely open housing increases."³⁷ Other landmark cases acknowledge the role of housing as a platform for access to opportunity in all areas of life—highlighting the connection between housing and quality education, transportation, and environmental health.³⁸ In the Interim Final Rule, HUD acknowledges the role that discriminatory policies and practices have historically played, and continue to play, in our nation's communities.

Discrimination and segregation are also closely related to other disparities in housing. For example, the inadequate supply of deeply affordable housing and subsequent high housing cost burden for people of color and women, who are also more likely to have low incomes,³⁹ arises from historic disinvestment in communities of color. Redlining created barriers to homeownership and wealth building for people of color, as have other racist and sexist practices in the lending space such as subprime mortgage lending.⁴⁰ The location of employment and child care opportunities are also tied to residential segregation. Today, racial segregation continues to depress property values and contribute to the racial wealth gap,⁴¹ which affects women of color.⁴²

Despite HUD's legal obligation to affirmatively further fair housing, enshrined in law, decades passed without effective, meaningful guidance on how jurisdictions could meet this obligation through taking concrete steps to tackle segregation and address fair housing issues.

³⁶ 42 U.S.C. § 3608(e)(5).

³⁷ 817 F.2d 149, 155 (1st Cir. 1987) (emphasis added).

³⁸ See, e.g., *Gautreaux v. Chicago Hous. Auth.*, 503 F.2d 930 (7th Cir. 1974); *Walker v. HUD*, 734 F. Supp. 1231 (N.D. Tex. 1989); *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005); *Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015).

³⁹ Andrew Aurand et al., Nat'l Low Income Housing Coalition, *The Gap: A Shortage of Affordable Homes* 1, 6 (Mar. 2021), https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2021.pdf; GENDER AND RACIAL JUSTICE, *supra* note 5, at 2.

⁴⁰ GENDER AND RACIAL JUSTICE, *supra* note 5, at 3.

⁴¹ GEORGE LIPSITZ & MELVIN L. OLIVER, *INTEGRATION, SEGREGATION, AND THE RACIAL WEALTH GAP*, in *THE INTEGRATION DEBATE: COMPETING FUTURES FOR AMERICA'S CITIES* 268–94 (C. Hartman and G. Squires, eds., 2010).

⁴² DOMINIQUE DERBIGNY, *CLOSING THE WOMEN'S WEALTH GAP, ON THE MARGINS: ECONOMIC SECURITY FOR WOMEN OF COLOR THROUGH THE CORONAVIRUS CRISIS AND BEYOND* 1, 19–20 (Apr. 2020), https://womenswealthgap.org/wp-content/uploads/2020/04/OnTheMargins_April2020_CWWG.pdf.

During the 27-year period after the FHA was enacted, HUD was sued several times for its failure to implement and enforce the AFFH provision of the FHA.⁴³ In 1995, HUD finalized the first AFFH regulation, which required jurisdictions to perform an Analysis of Impediments (AI) to fair housing, take actions to overcome the identified impediments, and document their analyses and actions taken. HUD did not provide much guidance or oversight of this AI process, and jurisdictions receiving HUD funds rarely took actions to address the impediments. In 2013, the Government Accountability Office reported that it found the AI process to be ineffective,⁴⁴ as did HUD, recipients of HUD funding, and other stakeholders.

In response to the shared conclusion that the 1995 AFFH regulation was ineffective and requests from jurisdictions for better guidance, HUD engaged with numerous stakeholders and the public through field testing and rulemaking, leading to a new AFFH Rule in 2015. The 2015 Rule defined “affirmatively furthering fair housing” as:

Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially or ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant’s activities and programs relating to housing and urban development.⁴⁵

This definition formalizes the central aim of the Fair Housing Act: active, affirmative anti-discrimination. It informs program participants and public housing authorities (PHAs) of the substantive statutory requirements they must meet and sets forth the expectation that grantees must actively redress segregation, discrimination, and further the FHA’s purpose. Each part of the regulatory definition is essential to ensuring that grantees take effective steps toward nondiscrimination and integration, including by disrupting the cycle of poverty, segregation, disinvestment, and housing insecurity that continues to damage many protected classes under the FHA, including women and people of color.

As part of the 2015 Rule, HUD recognized that it is impossible for grantees—and HUD, for that matter—to determine the appropriateness and efficacy of proposed fair housing

⁴³ See, e.g., *N.A.A.C.P., Boston Chapter v. Kemp*, 721 F. Supp. 361 (D. Mass. 1989); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972).

⁴⁴ U.S. GOV’T ACCOUNTABILITY OFF., *HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS 1* (Sep. 2010), <https://www.gao.gov/assets/gao-10-905.pdf> [hereinafter “GAO 2010 HOUSING AND COMMUNITY GRANTS REPORT”].

⁴⁵ AFFIRMATIVELY FURTHERING FAIR HOUSING, 80 Fed. Reg. 42,271, 42,353 (July 16, 2015).

measures without having a baseline of comparison and an understanding of underlying conditions, such as segregation and access to opportunity, that they should address. For this reason, HUD required that grantees must conduct some form of fair housing planning. To address this need, HUD created Assessment of Fair Housing (AFH) tools for Local Governments and Public Housing Agencies (PHAs), providing guidance for communities to consider fair housing issues such as segregation, disparities in access to opportunity, and disproportionate housing needs. The tools listed contributing factors, such as loss of affordable housing, which can have a disproportionate impact on households headed by women, and displacement and lack of housing support for survivors of domestic violence.⁴⁶

The 2015 AFFH Rule and its AFH tools created strong pathways to address historic and ongoing discrimination. Unfortunately, HUD suspended the 2015 Rule and then promulgated the 2020 Preserving Community and Neighborhood Choice (PCNC) Rule—actions that halted, and threatened to wipe out, the progress from the 2015 AFFH Rule.

III. The 2020 PCNC Rule is inconsistent with the FHA’s AFFH mandate and was promulgated without notice-and-comment.

The PCNC created a definition of “fair housing” at 24 CFR § 5.150(a): “housing that, among other attributes, is affordable, safe, decent, free of unlawful discrimination, and accessible as required under civil rights laws.”⁴⁷ It then defined “affirmatively further” in 24 CFR § 5.150(b) to be “to take any action rationally related to promoting any attribute or attributes of fair housing as defined in the preceding subsection.”⁴⁸

The Rule also amended 24 CFR § 5.151 AFFH Certifications to state, “A HUD program participant’s certification that it will affirmatively further fair housing is sufficient if the participant takes, in the relevant period, any action that is *rationally related* to promoting *one or more attributes* of fair housing as defined in section 5.150(a).”

These changes, along with the process of promulgating the PCNC Rule, are problematic in several ways.

A. The 2020 PCNC Rule’s definitions were contrary to the AFFH statutory obligation.

⁴⁶ U.S. DEP’T OF HOUSING & URBAN DEV., ASSESSMENT OF FAIR HOUSING TOOL FOR LOCAL GOVERNMENTS (2017), <http://web.mit.edu/afs/athena.mit.edu/org/f/fairhousing/background/Assessment-of-Fair-Housing-Tool-For-Local-Governments-2017-01.pdf> (this tool is currently not mandatory); U.S. DEP’T OF HOUSING & URBAN DEV., ASSESSMENT OF FAIR HOUSING TOOL FOR PUBLIC HOUSING AGENCIES (2017), <http://web.mit.edu/afs/athena.mit.edu/org/f/fairhousing/background/Assessment-of-Fair-Housing-Tool-For-Public-Housing-Agencies-2017-01.pdf> (this tool is currently not mandatory).

⁴⁷ PRESERVING COMMUNITY AND NEIGHBORHOOD CHOICE, 85 Fed. Reg. 47,899, 47,905 (Aug. 7, 2020).

⁴⁸ *Id.*

As mentioned, the FHA imposes an obligation on all federal agencies and their funding recipients to affirmatively further fair housing for all protected classes under the Act.⁴⁹ The 2020 PCNC Rule's changed definitions failed to comport with HUD's statutory obligation, in part, because they make affirmatively furthering fair housing optional.

First, while “safe” and “decent” housing are positive attributes about housing, they are inappropriate components of the definition of “fair housing” in the FHA's AFFH requirement, which was intended to help end discrimination and segregation in housing and overcome other barriers to fair housing for protected classes under the FHA. The 2015 Rule's definition of “affirmatively furthering fair housing” more accurately reflects the components of “fair housing” under the FHA and aligns with AFFH case law.

Second, the 2015 Rule required jurisdictions to certify that they “will take meaningful actions to further the goals of the AFH...and that [they] will take no action that is materially inconsistent with the obligation to affirmatively further fair housing.”⁵⁰ However, the PCNC Rule's revised definition for AFFH certification would permit grantees to be certified if they took a step that is “*rationally related* to promoting *one or more attributes* of fair housing,” as defined in the new Rule. Grantees could easily fulfill this certification requirement through actions already required by other statutes and HUD rules.⁵¹ Even worse, this definition would permit a grantee to promote safe and affordable housing—two attributes in the PCNC definition of “fair housing”—without furthering fair housing for *any* protected classes under the FHA. This removes any requirement for grantees to address segregation, a key fair housing issue,⁵² or otherwise identify and address barriers to fair housing based on sex, race, color, or any other protected class.

The PCNC Rule thus is inconsistent with the statutory requirement to affirmatively further fair housing for protected classes under the FHA and is consequently, arbitrary and capricious. Indeed, the PCNC Rule does nothing to remove barriers to fair housing faced by women of color, survivors of gender-based violence, LGBTQ people, disabled women, and other marginalized groups of people. Because the Rule's definitions are inconsistent with the statutory meaning of AFFH, moreover, the PCNC Rule could also leave jurisdictions susceptible to liability for failure to meet their statutory AFFH obligations.⁵³

B. The 2020 PCNC Rule took the fair housing planning out of the certification process.

⁴⁹ 42 U.S.C. § 3608(e)(5).

⁵⁰ 24 C.F.R. § 5.152 (2019).

⁵¹ Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg. 30,799, 30,783 (Jun. 10, 2021).

⁵² The PCNC rule does not mention the word segregation, except in the preamble description of the 2015 rule. See PRESERVING COMMUNITY AND NEIGHBORHOOD CHOICE, 85 Fed. Reg. 47,899 (Aug. 7, 2020).

⁵³ HUD grantees may be liable for failing to identify and proactively respond to ongoing discrimination or segregation, as required by AFFH. 42 U.S.C. § 3604; see, e.g., *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 52–53 (D. Mass. 2002) (stating that because the AFFH duty is mandatory, courts may enforce noncompliance).

The 2020 PCNC Rule eliminated the AFH, which was intended to provide jurisdictions meaningful guidance about how to meet their AFFH obligations. The elimination of the AFH left grantees with the statutory duty to affirmatively further fair housing without any indicator by which to measure progress. This led to a regulatory framework even less effective at meeting the AFFH statutory mandate than the 1995 AFFH Rule requiring grantees to conduct an AI. The PCNC Rule further allowed grantees to certify compliance with their AFFH duty in such vague terms that the duty could be fulfilled by minimal or nonexistent action.⁵⁴ Consequently, the PCNC Rule does not provide the regulatory framework grantees need to actually meet their AFFH obligation.

C. HUD ignored its own rules about notice-and-comment rulemaking by promulgating the PCNC Rule without notice-and-comment.

The process through which the PCNC Rule was adopted not only ignored thousands of comments and promulgated a different rule without any substantive overlap with the 2020 Proposed Rule and without opportunity for public notice and comment on the specific proposals in the PCNC Rule. Accordingly, the PCNC Rule violated the Administrative Procedure Act (APA) and HUD's own "rule on rules."⁵⁵

HUD initially proposed a Rule that would repeal and replace the 2015 AFFH Rule in January 2020, which generated thousands of comments from the Center and others in opposition. In August 2020, HUD abandoned the January 2020 Proposed Rule and published the PCNC Final Rule. The PCNC Rule went further than the 2020 Proposed Rule, repealing the 2015 AFFH Rule and eliminating "the regulatory framework that preexisted that rule,"⁵⁶ without public notice or opportunity to comment.

To justify circumventing the notice-and-comment process, HUD decided that the PCNC Rule was exempt.⁵⁷ HUD relied upon the Secretary's general regulatory waiver authority, which permits the Secretary to waive any requirement for "good cause," but failed to provide convincing arguments about why HUD had "good cause" in skirting notice-and-comment for a substantively different rule than the 2020 Proposed Rule, which thousands of comments already opposed. In addition, as the PCNC Rule acknowledged, HUD has its own rule on rulemaking, 24 CFR part 10, which generally requires HUD to follow APA notice-and-comment rulemaking.⁵⁸ Thus, waiving notice-and-comment rulemaking was improper under HUD's own rules about rulemaking.

Because of the substantive and procedural deficiencies of the PCNC Rule, HUD is now justified in using an interim rulemaking to repeal the PCNC Rule.⁵⁹

IV. The Interim Final Rule is a positive, but incomplete, administrative action to restore the strength of the 2015 AFFH Rule.

⁵⁴ Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg at 30,783.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 30,783–30,786.

The Interim Final Rule is a positive change that will undo the harmful PCNC Rule and reinstate language that helped AFFH. The Interim Final Rule will thus positively affect the lives of women and families as described above. However, HUD should continue to improve the Interim Final Rule and engage in additional rulemaking to more fully restore the strength of the AFFH regulatory framework that supports the statutory mandate.

A. The Interim Final Rule is a step in the right direction because it repeals the harmful 2020 PCNC Rule and restores some of the definitions and certifications from the 2015 AFFH Rule.

As explained above, the PCNC definition adopted by HUD was inconsistent with the meaning of AFFH, and the Center applauds HUD in repealing it through this Interim Final Rule. The Center also commends HUD for reinstating the AFFH definition from the 2015 Rule.

Reinstating this definition through an Interim Final Rule before grantees' required AFFH certification deadline of August 16 will help grantees avoid potential liability they could face under the 2020 PCNC definitions, as discussed above. It also restores the importance of addressing segregation as part of the AFFH process.

B. HUD should correct the “materially inconsistent” omission from the Interim Final Rule.

However, the Center urges HUD to make several additional changes before finalizing the Interim Final Rule. First, while the Interim Final Rule's restoration of the 2015 Rule's definition of “affirmatively furthering fair housing” will improve the strength of the AFFH certification process, HUD should also restore the requirement that program participants (other than PHAs) certify that they “will take no action that is materially inconsistent with its obligation to affirmatively further fair housing.”⁶⁰ This will ensure that program participants do not attempt to take actions that will increase barriers to fair housing for women, people of color, people with disabilities, and other protected classes, then attempt to certify AFFH compliance by taking other steps to advance fair housing. The FHA and its AFFH mandate were passed because of governmental discrimination (direct discrimination or perpetuating private discrimination) in housing. Recipients of HUD funds should be prohibited from taking any actions that impair goals to further fair housing.

Making this change before the Interim Final Rule goes into effect will improve HUD's ability to exercise effective oversight over grantees, and it would help fair housing groups or other stakeholders when seeking to challenge a grantee's certification after identifying policies or practices that are counter to furthering fair housing in the jurisdiction.

⁶⁰ This was previously codified for states at §91.325, local governments at §91.225, and HOME consortia at §91.425, as well as for housing authorities as in the Interim Final Rule.

C. HUD could improve the Interim Final Rule by updating outdated definitions.

Second, HUD should change the definition of “racially or ethnically concentrated area of poverty” to replace “minority populations” with “people of color.” Using the term “minority populations” as a synonym for “people of color” indicates that white people will always constitute a majority of the population, which will likely not always be the case across the United States and is certainly not the case in certain geographic areas. The term is also vague and could refer to minorities such as disabled people.

D. HUD should require jurisdictions to perform more robust fair housing planning.

In addition, HUD must take additional steps to ensure that grantees—all of them—take the steps necessary to fulfill their fair housing obligations. This should start with mandating fair housing planning in the Interim Final Rule.

Rather than reinstate the AFH eliminated by the PCNC Rule, the Interim Final Rule states, “HUD anticipates that many program participants may wish to engage in voluntary fair housing planning processes that support their AFFH certifications.”⁶¹

This undefined, voluntary system threatens to return grantees to the unsatisfactory state of affairs that preceded the 2015 Rule. The system in place before the 2015 Rule was a vague AFFH mandate that did not specify the timing, content, or structure of fair housing plans.⁶² The result was unnecessary chaos and confusion. Some jurisdictions failed to do any planning at all, some jurisdictions created outdated plans, and some jurisdictions created idealistic, but impossible to complete plans.⁶³

In addition, stating that fair housing planning is strictly voluntary sends a message to grantees that it is not necessary at this time. With no penalty for postponement, nor reward for action, grantees are most likely to put fair housing planning on the back burner.

HUD should revise the Interim Final Rule to shift the proposed voluntary planning scheme to mandatory planning. Mandatory planning will be most effective when it includes strategic analysis of HUD-provided race/ethnicity and gender data (as well as data on other protected classes, if feasible); a planning tool that has flexibility for different jurisdiction sizes; and robust community engagement. HUD should create a stop-gap mandatory planning scheme in the revised Interim Final Rule while working on a more robust rulemaking.

Further, in the revised Interim Final Rule or soon thereafter, HUD should issue guidance to grantees about fair housing planning best practices, based upon the core principles laid out in the planning process established by the 2015 Rule (e.g., strategic data

⁶¹ Restoring Affirmatively Furthering Fair Housing Definitions and Certifications, 86 Fed. Reg at 30,788.

⁶² GAO 2010 HOUSING AND COMMUNITY GRANTS REPORT, *supra* note 44, at 2.

⁶³ GAO 2010 HOUSING AND COMMUNITY GRANTS REPORT, *supra* note 44, at 2.

analysis, robust community engagement, and establishing meaningful goals and strategies to address high priority fair housing barriers).

In addition, HUD should quickly fulfill the commitment outlined in this Interim Final Rule to provide timely, relevant training and technical assistance on AFFH and fair housing planning to grantees. Finally, HUD should review and provide feedback on grantees' draft fair housing plans, to ensure that HUD and grantees are meeting statutory AFFH obligations. This means removing the intention stated in this Interim Final Rule that review will only happen in "rare" cases when an outside party flags a potential problem—such minimal review fails to prioritize AFFH compliance.

These are only interim measures. HUD must expedite the proposed rulemaking to restore a full, standardized fair housing planning process and review framework. HUD should follow through on its intention to publish a Notice of Proposed Rulemaking⁶⁴ soon and focus that rulemaking that will create a strong framework for planning and analysis that translates to concrete, measurable actions.

E. HUD should improve community engagement in the AFFH process.

As HUD considers the AFFH mandate in future rulemaking, it should continue to pursue progressive improvements. One area that HUD can improve is in facilitating community engagement to hold grantees accountable. Women, children, and families benefit when they are empowered to serve as a check on the decisionmakers regulating their community.

To facilitate community engagement, HUD should require grantees to solicit input from the community both before they draft their fair housing plans, in order to ensure that the drafts reflect community views, and after the draft is complete, in order to provide for revisions based on public comments. Soliciting input should include community meetings and direct outreach to fair housing and other advocacy groups. Far too many advocates have had the experience of providing input in a planning process, only to find that the entity had already made up its mind about the outcome.

HUD should additionally incorporate a complaint process to enable community members and advocates the opportunity to bring AFFH compliance problems to HUD's attention. At present, there is no formal, established mechanism for doing so. If HUD will not be doing regular compliance checks itself, advocates must have the opportunity to redress harms in their communities.

In all forms, it is absolutely essential that community engagement opportunities be accessible to persons with disabilities, individuals with limited English proficiency, caregivers, low-paid workers who lack paid leave, and members of protected classes more broadly. HUD should direct grantees to consider the times of day at which public meetings are held, whether meeting venues are transit-accessible and accessible by

⁶⁴ OFF. OF INFO. AND REG. AFFAIRS, OFF. OF MGMT. AND BUDGET, AFFIRMATIVELY FURTHERING FAIR HOUSING PROPOSED RULE (FR-6250), (Spring 2021), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=2529-AB05>.

people with disabilities, and whether food and child care are available, among other issues. HUD should also instruct grantees to strive to strike an effective technology balance so people with and without internet access can participate. Community engagement enables jurisdictions and HUD to achieve the mandate of affirmatively furthering fair housing and should be prioritized in any future rulemaking.

V. The Center supports the Interim Final Rule with improvements and a commitment to engage in a proposed rulemaking to strengthen AFFH accountability.

HUD's Interim Final Rule is a positive step toward fair housing for women, families with children, and other members of protected classes. The Interim Final Rule realigns HUD with its statutory duty to affirmatively further fair housing and prevent discrimination against women, people of color, and members of other protected classes. The Center supports the Interim Final Rule, with the improvements listed above, and calls upon HUD to continue advancing housing policies that proactively address segregation and promote housing access for all.

Thank you for the opportunity to submit comments on the Interim Final Rule. Please do not hesitate to contact Sarah Hassmer at shassmer@nwlc.org to provide further information.

Sincerely,



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