

***THIS FINAL RULE IS PENDING PUBLICATION IN THE FEDERAL REGISTER.
PUBLICATION IN THE FEDERAL REGISTER WILL DETERMINE THE EFFECTIVE DATE OF
THIS FINAL RULE.***

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 91, 92, 570, 574, 576, 903

[Docket No. FR 6228-F-01]

RIN 2501-AD95

Preserving Community and Neighborhood Choice

AGENCY: Office of Fair Housing, HUD.

ACTION: Final rule

SUMMARY: HUD grantees are generally required to certify that they will “affirmatively further fair housing” (AFFH) through HUD’s implementation of the 1968 Fair Housing Act and other applicable statutes. For years after this certification was first required, it was merely part of a general commitment to use the funds in good faith and accompanied similar certifications not to violate various civil rights statutes. Over time however, HUD began to use this AFFH certification as a vehicle to force states and localities to change zoning and other land use laws. This was done via a series of regulations and guidance documents culminating with the 2015 AFFH rule. This approach is not required by applicable statutes, which give HUD considerable discretion in determining what “affirmatively furthering fair housing” means, and it is also at odds with both federalism principles and specific statutes protecting local control over housing policy. For example, Congress specifically barred HUD from using funding to force grantees to change any public policy, regulation, or law. HUD has reexamined the 2015 AFFH rule and the definition of AFFH. In the new rule, HUD repeals the 2015 AFFH rule and its related accretions. The new rule returns to the original understanding of what the AFFH certification

was for the first eleven years of its existence: AFFH certifications will be deemed sufficient provided grantees took affirmative steps to further fair housing policy during the relevant period.

DATES: Effective date: [Insert date 30 days from the date of publication in the Federal Register].

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I. BACKGROUND

The 1968 Fair Housing Act requires that agencies administering housing-related programs do so “in a manner affirmatively to further the purposes” of the Act.¹ Similarly, HUD grantees are generally required to certify that they will “affirmatively further fair housing.”²

¹ 42 USC 3608(e)(5).

² Section 104(b)(2) of the Housing and Community Development Act (HCD Act) (42 USC 5304(b)(2)) requires that, to receive a grant, the state or local government must certify that it will affirmatively further fair housing. Section 106(d)(7)(B) of the HCD Act (42 USC 5306(d)(7)(B)) requires a local government that receives a grant from a state to certify that it will affirmatively further fair housing. The Cranston Gonzalez National Affordable Housing Act (NAHA) (42 USC § 12704 et seq.) provides in section 105 (42 USC 12705) that states and local governments that receive certain grants from HUD must develop a comprehensive housing affordability strategy to identify their overall needs for affordable and supportive housing for the ensuing 5 years, including housing for homeless persons, and outline their strategy to address those needs. As part of this comprehensive planning process, section 105(b)(15) of NAHA (42 USC § 12705(b)(15)) requires that these program participants certify that they will affirmatively further fair housing. The Quality Housing and Work Responsibility Act of 1998 (QHWRA), enacted into law on October 21, 1998, substantially modified the United States Housing Act of 1937 (42 USC § 1437 et seq.) (1937 Act), and the 1937 Act was more recently amended by the Housing and Economic Recovery Act of 2008, Public Law 110–289 (HERA). QHWRA introduced formal planning processes for PHAs—a 5-Year Plan and an Annual Plan. The required contents of the Annual Plan included a certification by the PHA that the PHA will, among other things, affirmatively further fair housing.

This phrase is not defined in statute. Until 1994, HUD did not define it by regulation. It was simply among a series of certifications designed to ensure that the funds were generally used as intended and consistent with civil rights law. Since then, the obligations surrounding the certification have expanded significantly.

II. THE EVOLUTION OF THE AFFH OBLIGATION

In 1994, President Clinton signed an Executive Order directing HUD to issue AFFH regulations. Among other things, the regulations were to “describe a method to identify impediments in programs or activities that restrict fair housing choice.”³ The same year, HUD promulgated a rule dictating that a grantee would fulfill its AFFH obligation by conducting an analysis of “impediments to fair housing choice within its jurisdiction” and “taking appropriate actions to overcome the effects of any impediments.”⁴ Recipients were to gather data and keep written records of their analyses. They were encouraged to communicate with the public about the process, but were not required to submit materials to HUD beyond a summary of the Analysis of Impediments (AI).⁵ In 1996, HUD issued a 170-page guidance document to explain further the meaning of the four-word phrase “affirmatively further fair housing.”⁶

³ Executive Order No. 12892, 59 FR 2939 (Jan. 20, 1994).

⁴ See 2014 regulations for CDBG entitlement communities at 24 CFR § 570.601. Regulations for the consolidated plan process are the 2014 versions of 24 CFR § 91.225 (local governments), § 91.325 (state governments), and § 91.425 (consortia applicants).

⁵ Perl, *The Fair Housing Act: HUD Oversight, Programs, and Activities*, Congressional Research Service (Jun. 15, 2018).

⁶ HUD Fair Housing Planning Guide Volume I, 1996, available at https://www.hud.gov/sites/dfiles/FHEO/documents/Fair%20Housing%20Planning%20Guide_508.pdf.

Once in place, the AI process became a vehicle for interest groups and HUD to impose even greater and more controversial obligations on state and local grantees. In 2006, a housing organization sued Westchester County under the Federal False Claims Act on the theory that the AFFH certification the County made to obtain funding was false.⁷ Meritorious False Claims Act cases are typically taken on by the government with the original litigant sharing in any award. In fact of the 4,294 cases filed by the end of 2003, DOJ declined to intervene in 2,653 cases (62%); the United States intervened (or the cases were otherwise pursued) in 750 cases, and the remainder (891 cases) are still under investigation.⁸ After the change in administrations in 2009, however, HUD decided to intervene. HUD negotiated a settlement forcing the County to change its zoning laws and to pass legislation requiring landlords to accept Section 8 tenants, both highly controversial propositions never authorized by law.⁹

Following that expansion of requirements imposed under the guise of the AFFH certification, HUD promulgated an even more aggressive AFFH rule finalized in 2015. The 2015 rule, for the first time, provided a detailed definition of AFFH and provided a new process called an Assessment of Fair Housing (AFH), effectively replacing AI. The regulation specifically required a detailed analysis of the grantee jurisdiction's "zoning and land use" laws.¹⁰ Those were not the only local matters targeted. The regulation noted that fair housing issues "may arise

⁷ *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 712 F.3d 761, 766 (2013).

⁸ *Thomas L. Carson, et. al., Whistle-Blowing for Profit: An Ethical Analysis of the Federal False Claims Act*, *Journal of Business Ethics* (2008) 77: 361-376.

⁹ *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y. v. Westchester County*, 712 F.3d 761, 766 (2013).

¹⁰ 80 FR 42290 (Jul. 16, 2015).

from such factors as . . . public services that may be offered in connection with housing (e.g., water, sanitation), and a host of other issues.¹¹ Its accompanying assessment tool forced Public Housing Authority grantees to analyze and consider data and policies beyond their jurisdictional control and typical subject-matter expertise.¹² For example, the rule required identifying disparities in “access to public transportation, quality schools and jobs . . . [and] environmental health hazards” and “programs, policies, or funding mechanisms that affect disparities” to such access. In some cases, grantees were required to gather data going back to the 1990s.¹³

The process for grantees was also overly burdensome and costly. The number of questions, the open-ended nature of many questions, and the lack of prioritization between questions made the planning process both inflexible and difficult to complete. Unsurprisingly, the rule required significant resources from grantees and its complexity and demands resulted in a high failure rate for jurisdictions to gain approval for their AFH in the first year of AFH submission. Grantees complained that it was extremely resource-intensive and complicated, placing a strain on limited budgets.¹⁴ Pursuant to the 2015 AFFH rule, HUD requested 64 full time staff at a cost of approximately \$9 million merely to implement the new AFH process, with

¹¹ 80 FR 42286 (Jul. 16, 2015).

¹² 85 FR 2041 (Jan. 14, 2020).

¹³ *Id.*, noting that while the assessment tool for PHAs was not finally implemented, this was the case under a published draft.

¹⁴ *Id.*

a total cost estimate to HUD and HUD grantees ranging anywhere from \$15 million to \$51.4 million annually.¹⁵

The vast reach of the 2015 rule was well understood within the housing community. At a livestreamed conference, just weeks before it was unveiled, speakers discussed how AFFH would radically remake American suburbs and localities, even though the rule “sounds very obscure.”¹⁶ One participant remarked: “Perhaps it’s important to keep it sounding obscure, in order to get it through. Sometimes obscurity is the best political strategy.”¹⁷

Critics, including many in Congress, criticized the 2015 AFFH rule as an assault on local decision making. Senators Lee, Rubio and Enzi offered an amendment to block the rule that was supported by 37 Senators: “Every American should be free to choose where to live, and every community should be free to zone its neighborhoods and compete for new residents according to its distinct values.” We “don’t need a National Zoning Board. Washington should let Americans ‘govern local.’”¹⁸ Similar bills passed in the House.¹⁹

Under President Trump, HUD began to change course. In 2018, HUD withdrew the AFH assessment tool after a review of early submissions found it unduly burdensome and unworkable.²⁰ In January 2020, HUD proposed a revised AFFH rule.²¹ That proposed rule took

¹⁵Affirmatively Furthering Fair Housing Final Rule: Regulatory Impact Analysis, July 16, 2015 available at https://www.huduser.gov/portal/sites/default/files/pdf/AFFH_Regulatory_Impact_Analysis_FinalRule.pdf.

¹⁶ Kurtz, *AFFH: Admission of Stealth Caught on Video*, National Review, (Jun 15, 2015).

¹⁷ *Id.*

¹⁸ Press Release, The Hon. Mike Lee, Lee Introduces Bill to Stop HUD Zoning Rule (Jul. 30, 2015).

¹⁹ Local Zoning Decisions Protection Act of 2017, H.R. 482, 115th Cong. (2017).

²⁰ Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments, 83 FR 23923 (May 23, 2018).

²¹ 85 FR 2041 (Jan. 14, 2020).

steps to reduce federal control of local housing decisions and lessen the burden of data requirements imposed on local governments.²² However, when the President reviewed the proposed rule, he expressed concern that the HUD approach did not go far enough on either prong. For example, grantee jurisdictions were still presented with a HUD list of “inherent barriers” to overcome, twelve of which directly interfered with local land development decisions.²³ Grantees were also required to submit a plan detailing how they would overcome at least three obstacles or achieve three fair housing goals which resulted in an estimated annual paperwork burden of \$13 million.²⁴

The President therefore asked HUD to reconsider the rule to see whether HUD could do more, consistent with the AFFH obligation and other legal requirements, to empower local communities and to reduce the regulatory burden of providing unnecessary data to HUD. After review, and based on prior internal discussions, HUD produced the current rule.

III. HUD’S NEW APPROACH

“HUD possesses broad discretionary powers to develop, award, and administer its grants and to decide the degree to which they can be shaped to help achieve Title VIII’s goals.”²⁵

AFFH is a vague, undefined term that could be open to several different plausible meanings.

HUD’s interpretation will be entitled to deference as long as it is reasonable.²⁶

²² *Id.* at 2042.

²³ 85 FR 2041 (Jan. 14, 2020).

²⁴ *Id.* at 2052, 2056.

²⁵ *NAACP v. Sec. of HUD*, 817 F.2d 149, 157 (1st Cir. 1987).

²⁶ *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

The Definition of “Fair Housing”

It is imperative to note that the long-standing debate seeking to define “Fair Housing” has spanned the political spectrum. Senator Mondale, the chief sponsor of the Fair Housing Act (FHA), unambiguously acknowledged the limited scope of the concept of fair housing. He “made absolutely clear that Title VIII's policy to ‘provide . . . for fair housing’ means ‘the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean.’”²⁷ Senator Mondale thus defined fair housing as simply housing that is free of discrimination. In this definition, housing is “fair” if anyone who can afford it faces no discrimination-based barriers to purchasing it. As the court in *NAACP* observed, “the law's supporters saw the ending of discrimination as a means toward truly opening the nation's housing stock to persons of every race and creed.”²⁸ They believed that “[d]iscrimination in the sale and rental of housing has been the root cause of the widespread patterns of de facto segregation.” Thus, by ensuring that housing is free of discrimination, the FHA would establish “a policy of dispersal through open housing” to “the point where the supply of genuinely open housing increases.”²⁹

In 1971, President Richard Nixon stated, “[t]he very fact that so much progress is being made, however, has sharpened the focus on what has come to be called ‘fair housing’ --a term

²⁷ *NAACP* at 154.

²⁸ *Id.* at 55.

²⁹ *Id.* at 154-55.

employed, but not defined, in the Civil Rights Act of 1968, and to which many persons and groups have ascribed their own often widely varied meanings.”³⁰

In 1983, President Ronald Reagan stated, “[f]airness is the foundation of our way of life and reflects the best of our traditional American values. Invidious, discriminatory housing practices undermine the strength and vitality of America and her people.”³¹

The FHA prohibited discrimination based on race, color, religion, national origin or sex, but Congress since expanded it to prohibit discrimination on the basis of handicap and familial status.³² Congress also broadened national housing policy grants administered by HUD, requiring AFFH certifications, to include goals such as a “decent, safe, and sanitary housing for every American” and increasing the supply of “affordable housing.”³³ Accordingly, HUD defines “fair housing” to encompass non-discrimination as well as these goals.

The Definition of “Affirmatively Further”

By statute, grantees must “affirmatively further” fair housing. In interpreting this phrase, HUD is guided by the “Ordinary-Meaning Canon” of statutory interpretation which states that “words are to be understood in their ordinary, everyday meanings - unless the context indicates

³⁰ See President Richard Nixon, Statement About Federal Policies Relative to Equal Housing Opportunity, June 11, 1971 available at <https://www.presidency.ucsb.edu/documents/statement-about-federal-policies-relative-equal-housing-opportunity>.

³¹ See President Ronald Reagan, Proclamation 5329—Fair Housing Month, April 25, 1985 available at <https://www.presidency.ucsb.edu/documents/proclamation-5329-fair-housing-month-1985>.

³² 42 USC 3604.

³³ Cranston-Gonzalez National Affordable Housing Act of 1990, P.L. 101-625 102, 105.

that they bear a technical sense.”³⁴ Given that the context for the phrase “affirmatively further” in the Fair Housing Act does not bear a technical sense, the words are assigned their generally-understood meanings.³⁵ In this context, “further” is used as a verb. According to the Merriam-Webster Dictionary, to “further” is “to help forward.”³⁶ In seeking to further an objective, one acts to help it forward. Accordingly, HUD defines “further” to mean “promote.”

Similarly, Ballentine’s Law Dictionary defines “affirm” verbatim as the following: “[...]to confirm or ratify a statement, belief, opinion, decision or judgement...”³⁷ The term “affirmative” is defined verbatim as the following: “an answer ‘yes’; something beyond passive tolerance or acceptance.”³⁸ In the context of the statute, the threshold to act “affirmatively” is met in undertaking an action that confirms adherence to the statute’s requirements to “further” fair housing. In the housing context, the *quantum* of action required promoting fair housing to meet the requirement of “affirmatively” furthering fair housing is not specified in the statute. HUD interprets the phrase to be flexible and unspecified, but to mean generally that the grantee must take an active role rather than be passive.

Accordingly, in this rule, HUD determines that a grantees’ AFFH certification will be deemed acceptable if the grantee has taken some active step to promote fair housing. HUD recognizes that

³⁴ See Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* section 6 (“Ordinary-Meaning Canon”) (2012) (“Reading Law”); see also, e.g., *United States v. Marrufo*, 661 F.3d 1204, 1207 (10th Cir. 2011) (“When a term is not defined in the Guidelines, we give it its plain meaning”).

³⁵ *Id.* at section 7.

³⁶ “Further.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/further>. Accessed 22 Jul. 2020.

³⁷ “Affirm.” *Ballentine’s Law Dictionary*, (3rd ed. 1969).

³⁸ “Affirmative.” *Ballentine’s Law Dictionary*, (3rd ed. 1969).

jurisdictions may find many ways to advance fair housing that HUD officials cannot predict. This diversity of methods is a good thing that ought to be encouraged. This approach to the definition of “affirmatively furthering fair housing” preserves flexibility for jurisdictions to take action based on the needs, interests, and means of the local community, and respects the proper role and expertise of state and local authorities.

Court Interpretations of AFFH

There is case law that arguably takes a broader view of the obligations surrounding the AFFH requirement. However, the principal precedents were decided pre-1994, in the absence of an administrative interpretation from HUD.³⁹ The statutory phrase AFFH is concededly ambiguous.⁴⁰ Accordingly, under *Chevron vs. NRDC*, HUD retains discretion to formulate a different definition of this ambiguous phrase.⁴¹

The seminal case on the meaning of AFFH is the 1987 First Circuit decision in *NAACP v. Secretary of HUD*.⁴² It held that “affirmatively furthering” imposes an obligation “to do more than simply refrain from discriminating (and from purposely aiding discrimination by others).”⁴³ The question is how much more.

³⁹ *Infra*, notes 44-46.

⁴⁰ *See, NAACP v. Harris*, 567 F. Supp. 637, 644 (D. Mass. 1983) (Citing the AFFH and related obligations and observing, “it is extremely difficult to quantify HUD legal obligations under these statutes.”)

⁴¹ *Chevron*, 467 U.S. ([T]he court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.).

⁴² *NAACP, Boston Chapter v. Secretary of Housing and Urban Development*, 817 F. 2d 149 (1st Cir. 1987).

⁴³ *Id.*, 817 F.2d at 154, citing *Shannon v. Department of Housing and Urban Development*, 436 F.2d 809 (3d Cir. 1970); *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973); *Alschuler v. Department of Housing and Urban Development*, 686 F.2d 1236, 1246-47 (6th Cir. 1974); *See also, Nat'l Fair Hous. Alliance v. Carson*, 330 F.Supp. 3d 14, 24-25 (D.C. Dist. 2018).

HUD's rule is consistent with the judicial consensus that AFFH requires more than simply not discriminating. Grantees may not be passive. They must actually promote fair housing for example by fighting overt discrimination. Thus in *NAACP*, HUD failed in its own AFFH obligation because, among other things, it failed to demand actual fair housing enforcement from the City of Boston.⁴⁴

The courts making the broadest claims of the AFFH requirement rely on selective quotations from the legislative history. Those decisions rely on legislative history about the FHA aiming to achieve “truly integrated and balanced living patterns” and ending patterns of segregation.⁴⁵ The problem is that the same legislative history makes clear that these were long-term goals to be achieved through the narrow means of eliminating overt housing discrimination (e.g., restrictive covenants).⁴⁶ As the court in *NAACP* observed, “the law’s supporters saw the ending of discrimination as a means toward truly opening the nation's housing stock to persons of every race and creed.”⁴⁷ They believed that “[d]iscrimination in the sale and rental of housing has been the root cause of the widespread patterns of de facto segregation.”⁴⁸ The FHA was seen by its authors as only a “first step” in achieving a grander vision.⁴⁹ By ensuring that housing is free of discrimination, the FHA would establish “a policy of dispersal through open housing” to

⁴⁴See *NAACP v. Harris*, 567 F. Supp. 637, 644 (D. Mass. 1983).

⁴⁵See, e.g., *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973); *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 821 (3d Cir. 1970).

⁴⁶ See e.g., Cong. Rec. Feb. 7, 1968 p. 2535 (discussing restrictive covenants).

⁴⁷ See *NAACP v. Sec. of HUD* at 155.

⁴⁸ *Id.*

⁴⁹ *NAACP*, 817 F.2d at 155

“the point where the supply of genuinely open housing increases.”⁵⁰ In short, enforcing non-discrimination would produce open housing which in turn would reduce segregated living patterns by ensuring that families regardless of race could live where “where [they] wish . . . and where [they] can afford.”⁵¹ Any broader construction of the AFFH obligation is difficult to square with the sponsor Senator Mondale’s unambiguous pronouncement that the FHA’s policy to “provide . . . for fair housing” means “the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean.”⁵²

HUD does not subscribe to broader interpretations of AFFH to the extent precedent for them may exist. The case law is clear that “HUD maintains discretion in determining how the agency will fulfill its AFFH obligation.”⁵³ Thus *NAACP* and its sister cases were all interpreting an ambiguous phrase that the agency would otherwise have some discretion to define. Indeed, those cases were decided years before HUD had formulated a definition by rule.

IV. JUSTIFICATION FOR THE NEW APPROACH

Upon review, HUD concludes that there are sound policy reasons for abandoning its prior approach and taking a narrower view of the extent of the obligations surrounding the AFFH certification. These reasons are rooted in the principles of federalism.

Federalism & Preserving Local Control

⁵⁰ *Id.* at 154-55.

⁵¹ *Id.* at 155.

⁵² *Supra id.* at 154.

⁵³ *Carson*, 330 F. Supp. 3d at 25.

HUD's revised interpretation better comports both with Congress's explicit intent to protect local decision making. Federal law explicitly prohibits HUD from using grants to interfere in local decision making. 42 USC 12711, under the heading "Protection of State and local authority" provides:

The Secretary shall not establish any criteria for allocating or denying funds made available under programs administered by the Secretary based on the adoption, continuation, or discontinuation by a jurisdiction of any public policy, regulation, or law that is (1) adopted, continued, or discontinued in accordance with the jurisdiction's duly established authority, and (2) not in violation of any Federal law.⁵⁴

Other statutes also cut against interpreting the AFFH certification to require an AI or similar assessment of housing barriers. To obtain Community Development Program (CPD) funding, States and localities are required to submit a housing strategy. That strategy must include an assessment of whether regulatory barriers, including "building codes, fees, growth limits, taxes, and zoning, increase housing costs as well as strategies to overcome any negative effects of these policies."⁵⁵ Yet the law also independently requires an AFFH certification, which would be redundant if the certification inherently required a housing barriers analysis.⁵⁶

It is notable that even as Congress required jurisdictions to analyze housing barriers, it still acted unambiguously to protect local control. The law explicitly prohibits HUD from

⁵⁴ In the *Westchester* litigation, the Second Circuit held this provision did not bar HUD tying funding to the County changing its zoning laws. To reach this conclusion, the court adopted the strained reading that forcing the County to "overcome" its zoning laws was not the same as requiring the County to repeal them. The distinction between overcoming and repealing is very fine and at war with the both the spirit and the letter of the law. HUD declines to read this explicit statute narrowly so that the non-specific AFFH obligation can be read broadly. *See, County of Westchester v. U.S. Department of Housing and Urban Development, et al.*, 802 F.3d 413 (2d Cir. 2015).

⁵⁵ 42 USC 12705(b)(4).

⁵⁶ 42 USC 12705(b)(15).

denying CPD funds based on a jurisdiction's failure to alter any of the regulatory barriers it identified in its housing strategy.⁵⁷

HUD's amended AFFH rule gives local communities maximum flexibility in designing and implementing sound policies responsive to unique local needs, and eliminates overly burdensome, intrusive and inconsistent reporting and monitoring requirements. The amended rule is consistent with relevant legislative enactments. In other instances, Congress has shown that it is perfectly capable of imposing strict reporting and monitoring requirements on grantees when it deems such requirements appropriate.⁵⁸ Yet Congress has not imposed such detailed monitoring and reporting requirements in connection with grantees' AFFH obligations. Therefore, the agency exercises its discretion and declines to impose detailed monitoring or reporting requirements by regulation.⁵⁹

Furthermore, the Supreme Court has specifically held that the Fair Housing Act "is not an instrument to force housing authorities to reorder their priorities."⁶⁰ Indeed, the Fair Housing Act "does not decree a particular vision of urban development."⁶¹ In short, the prescriptive nature of the prior rule was in tension with Congress's intent and the current legal landscape, which

⁵⁷ 42 USC 12705(c)(1).

⁵⁸ See, e.g., 42 USC 7661(a)-(c), 7661(b)-(c) (requiring that an applicant (1) submit a permit application and a compliance plan describing how it will comply with all EPA requirements, (2) certify its compliance annually, and (3) submit to inspection, entry, monitoring and reporting requirements).

⁵⁹ See *Nat'l Fair Hous. Alliance* at 25.

⁶⁰ See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 537.

⁶¹ *Id.* at 537; see also *id.* ("Zoning officials, moreover, must often make decisions based on a mix of factors, both objective [such as cost and traffic patterns] and, at least to some extent, subjective [such as preserving historic architecture]. These factors contribute to a community's quality of life and are legitimate concerns for housing authorities.")

places trust in local jurisdictions to make the best decisions for themselves, within the broad confines of the Fair Housing Act's limitations, including its requirement that HUD grantees AFFH.⁶²

The AFFH Rule, as amended, is the most faithful to the text and purpose of the Fair Housing Act. It must be local governments, not HUD, that exercise control of administering local housing policies, including zoning and development policies that are unique to a particular community.

This does not mean HUD will retreat from its fair housing mission. Grantees' failure to take active steps to address discrimination in the rental and sale of housing would be a violation of the AFFH requirement at the most basic level. Moreover, as discussed above, entirely separate from the AFFH certification, Congress required certain CPD grantees, at a minimum, to evaluate potential barriers to affordable housing such as zoning and local land use laws.⁶³ CPD grantees cover as many as 1200 states, counties, and cities, so HUD retains authority to pursue analysis of housing barriers through these grant instruments.⁶⁴ In all cases, grantees must retain records sufficient to prove that they are properly discharging their obligations.

Federalism Considerations

⁶² Press Release, The Hon. Mike Lee, Lee Introduces Bill to Stop HUD Zoning Rule (Jul. 30, 2015).

⁶³ 42 USC 12705(b)(4); CPD programs include (1) the Community Development Block Grant program ("CDBG"); (2) the Emergency Shelter Grant program ("ESG"); and (3) the HOME Investment Partnership program ("HOME").

⁶⁴ Community Development Fund: 2020 Summary of Resources. Department of Housing and Urban Development, available at, <https://www.hud.gov/sites/dfiles/CFO/documents/2020CJ-CDFund.pdf>.

HUD's approach in the new rule is also supported by HUD's determination that federal agencies addressing matters that are traditionally within the authority of the States (such as housing) should take a narrow view of the scope of their power. A growing body of scholarship and judicial precedent is raising the alarm that the ballooning administrative state shifts important policy choices from Congress to comparatively unaccountable administrative agencies.⁶⁵

Recently, discussion of this broad principle has centered on an important concept in Administrative Law known as "the major issues doctrine." Under this doctrine, judges "presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions."⁶⁶ The reason is that a "major policy change should be made by the most democratically accountable process."⁶⁷ If an "agency wants to exercise expansive regulatory authority over some major social or regulatory activity . . . an ambiguous grant of statutory authority is not enough."⁶⁸ As the Supreme Court has put it, when it comes to delegating authority to federal agencies, Congress "does not one might say, hide elephants in mouseholes."⁶⁹ Thus, the Court has held that a regulatory interpretation by an agency is "unreasonable" if it results in "an enormous and transformative expansion in . . . regulatory

⁶⁵ See, Mike Jayne, *As Far as Reasonably Practicable: Reimagining the Role of Congress in Agency Rulemaking*, Fed. Soc. Rev. Vol. 21 (2020); Adam Gustafson, *The Major Questions Doctrine Outside Chevron's Domain*, CSAS Working Paper (Jul. 2019); Joseph Postell, *Taking on the Administrative State*, Heritage.org. (Oct. 9, 2017).

⁶⁶ Eskridge, William N. *Interpreting Law: a Primer on How to Read Statutes and the Constitution*. Foundation Press, 2016.

⁶⁷ *Id.*

⁶⁸ *USTA v. FCC, et al.*, No. 15-1063 (D.C. Cir. 2017) (Kavanaugh, B., dissenting). Retrieved at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-344654A1.pdf

⁶⁹ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

authority without clear congressional authorization.”⁷⁰ Indeed, “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy,” the Supreme Court will “typically greet its announcement with a measure of skepticism.”⁷¹ Rather, the Court expects that Congress will “speak clearly if it wishes to assign an agency decisions of vast economic and political significance.”⁷²

In addition, it is states and local jurisdictions that have traditionally regulated zoning and development policy, not the federal government, and courts have readily acknowledged that “States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.”⁷³ Indeed, the District of Columbia Circuit has held that federal law “may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion.”⁷⁴ Thus, “if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”⁷⁵

The phrase “affirmatively further fair housing” is vague and unclear. The ordinary meaning of the phrase does not invite a fundamental expansion of HUD regulations to include cumbersome policy, monitoring or reporting requirements that will significantly affect the

⁷⁰ *Utility Air Regulatory Group v. Environmental Protection Agency*, 573 U.S. 302, 324 (2014) (citations and internal quotations omitted).

⁷¹ *Id.* (citations and internal quotations omitted).

⁷² *Id.* (citations and internal quotations omitted).

⁷³ *ABA v. FTC*, 430 F.3d 457, 471-472 (D.C.C. 2005).

⁷⁴ *Id.* at 471.

⁷⁵ *Id.* at 471-472.

economy by impacting local zoning and development policies across the nation. Hanging a massively intrusive regulatory structure on such a cryptic, four-word phrase is inconsistent with the bedrock principles of separation of powers.

V. THIS FINAL RULE

The rule repeals the 2015 AFH and 1994 AI requirements where they appear in regulation. Thus, it returns to the original understanding of what the statutory AFFH certification was prior to the 1994 regulation: A general commitment that grantees will use the funds to take active steps to promote fair housing. Thus, grantee AFFH certifications will be deemed sufficient provided they took any action during the relevant period rationally related to promoting fair housing, such as helping eliminate housing discrimination.

VI. NOTICE-AND-COMMENT DOES NOT APPLY

The Administrative Procedure Act exempts from notice-and-comment rulemaking any “matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.”⁷⁶ Because this rule applies only to the AFFH obligation of grantees, it is exempt under the APA.

However, in 1969, the Administrative Conference of the United States (ACUS) urged Congress to amend the APA to remove this exemption. Congress declined. Still, several agencies, including HUD, issued statements of policy that had the effect of voluntarily adopting ACUS’s recommendation.⁷⁷ HUD’s policy still remains in force, and while this policy can no

⁷⁶ 5 USC 553(a)(2).

⁷⁷ 24 CFR 10.1.

longer be repealed, the Secretary retains the authority to waive the requirements of 24 CFR 10.1 in individual cases.⁷⁸

The AFFH rule is particularly well-suited to a waiver from public notice and comment because it has already been the subject of extensive public debate. Over the past several years, HUD has received extensive public feedback about AFFH. Both through the notice-and-comment period in connection with the July 2015 AFFH Rule and the notice-and-comment period that concluded earlier this year, HUD has received tens of thousands of comments covering a wide range of stakeholders, including public housing agencies, other housing providers, organizations representative of housing providers, governmental jurisdictions and agencies, civil rights organizations, tenant and other housing advocacy organizations, and concerned citizens. There has also been a thorough public debate on these issues in print and

⁷⁸ 42 USC 3535(q); 24 CFR 5.110. In 1996, HUD proposed a rule to eliminate part 10 from its regulations entirely. (61 FR 42722). In response, Congress passed an amendment to an appropriations bill, continued in subsequent years, requiring HUD to “maintain all current requirements under part 10.” [P.L. 104-204, Sec. 215] (See Statement of Amendment Sponsor: “this is a prohibition on a HUD rulemaking effort to eliminate HUD public notice and comment”). To maintain is to keep in place. Just as prior to this amendment the waiver provision existed, so too afterward. Thus, although the broader framework may not be altered, the previously permitted waiver remains applicable. Thus, P.L. 104-204 does not abrogate the Secretary’s independent statutory authority under 42 USC 3535(q) to waive regulations in specific circumstances.

online. In light of this public engagement, further notice and comment concerning AFFH is unnecessary and would simply be a legal formality without adding substance to the debate.

Accordingly, HUD has waived its policy that would otherwise voluntarily subject the new AFFH rule to notice-and-comment. As required by law, the waiver will be printed in the Federal Register.

VII. FINDINGS AND CERTIFICATIONS

Executive Orders 12866 and 13563, Regulatory Planning and Review

Pursuant to Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the Executive Order. In light of the waiver executed by Secretary Carson and the status of this regulation as exempt from notice and comment under 5 U.S.C. 553(a)(2), review of this regulation has been waived under Executive Order 12866 section 6(a)(3)(A).

Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. HUD believes that this final rule would provide maximum flexibility and freedom for HUD grantees to AFFH and is consistent with Executive Order 13563.

Executive Order 13771, Regulatory Costs

Executive Order 13771, entitled “Reducing Regulation and Controlling Regulatory Costs,” was issued on January 30, 2017. This final rule is an Executive Order 13771 deregulatory action. The burden for the lengthy Assessment of Fair Housing (AFH), with its separate community engagement and reporting requirements, would be eliminated under this proposal. Jurisdictions would be able to determine their actions to AFFH based on their capacity and needs, allowing jurisdictions to avoid burdensome requirements beyond their abilities.

The previously approved information collections for the AFFH Local Government and PHA and Assessment Tools (2529-0054 and 2529-0055, respectively) had a total, combined 665,862 burden hours for all respondents. This was due to the extensive nature of the tools and the additional public meeting requirements to complete an AFH. HUD has already temporarily withdrawn the Local Government Assessment Tool, and this final rule makes that removal permanent. By removing these requirements, HUD expects that the AFFH process will result in a significant reduction from the previous process requirements.

The final rule significantly reduces the reporting burden for jurisdictions in the formulation of AFFH strategies, reducing costs by an estimated of no less than \$23.7 million per year.

Executive Order 12612, Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law,

unless the agency meets the consultation and funding requirements of Section 6 of the Executive Order. This rule would not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Environmental Impact

This final rule is a policy document that sets out fair housing and nondiscrimination standards. Accordingly, under 24 CFR 50.19(c)(3), this final rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Because HUD has determined that good cause exists to issue this rule without prior public comment, this rule is not subject to the requirement to publish an initial or final regulatory flexibility analysis under the RFA as part of such action.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid Office of Management and Budget (OMB) control number. The information collection requirements for Affirmatively Furthering

Fair Housing collected have previously been approved by OMB under the Paperwork Reduction Act and assigned OMB control number 2506–0117 (Consolidated Plan, Annual Action Plan & Annual Performance Report). In accordance with the Paperwork Reduction Act of 1995, HUD has requested from the Office of Management and Budget (OMB) emergency approval of the altered burden contained in this final rule.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4; approved March 22, 1995) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any Federal mandates on any state, local, or tribal government, or on the private sector, within the meaning of the UMRA.

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs-housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs-housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 91

Aged; Grant programs-housing and community development; Homeless; Individuals with disabilities; Low and moderate income housing; Reporting and recordkeeping requirements.

24 CFR Part 92

Administrative practice and procedure; Low and moderate income housing; Manufactured homes; Rent subsidies; Reporting and recordkeeping requirements.

24 CFR Part 570

Administrative practice and procedure; American Samoa; Community development block grants; Grant programs-education; Grant programs-housing and community development; Guam; Indians; Loan programs-housing and community development; Low and moderate income housing; Northern Mariana Islands; Pacific Islands Trust Territory; Puerto Rico; Reporting and recordkeeping requirements; Student aid; Virgin Islands.

24 CFR Part 574

Community facilities; Grant programs-housing and community development; Grant programs-social programs; HIV/AIDS; Low- and moderate-income housing; Reporting and recordkeeping requirements.

24 CFR Part 576

Community facilities; Grant programs-housing and community development; Grant programs-social programs; Homeless; Reporting and recordkeeping requirements.

24 CFR Part 903

Administrative practice and procedure; Public housing; Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, HUD amends 24 CFR Parts 5, 91, 92, 570, 574, 576, and 903 as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

1. The authority citation for part 5, subpart A, continues to read as follows:

Authority: 29 USC 794, 42 USC 1437a, 1437c, 1437c-1(d), 1437d, 1437f, 1437n, 3535(d), and Sec. 327, Pub. L. 109-115, 119 Stat. 2936; 42 USC 3600-3620; 42 USC 5304(b); 42 USC 12101 et seq.; 42 USC 12704-12708; Executive Order 11063, 27 FR 11527, 3 CFR, 1958-1963 Comp., p. 652; Executive Order 12892, 59 FR 2939, 3 CFR, 1994 Comp., p. 849.

2. Revise § 5.150 to read as follows:

§ 5.150 Affirmatively Further Fair Housing: Definition.

(a) The phrase “fair housing” in 42 USC 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), and 1437c-1(d)(16) means housing that, among other attributes, is affordable, safe, decent, free of unlawful discrimination, and accessible as required under civil rights laws.

(b) The phrase “affirmatively further” in 42 USC 5304(b)(2), 5306(d)(7)(B), 12705(b)(15), and 1437c-1(d)(16) means to take any action rationally related to promoting any attribute or attributes of fair housing as defined in the preceding subsection.

3. Revise § 5.151 as follows:

§ 5.151 AFFH Certifications.

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). Nothing in this paragraph relieves jurisdictions of their other obligations under civil rights and fair housing statutes and regulations.

§5.152 through § 5.168 [Removed and Reserved]

4. Remove § 5.152 through § 5.168.

**PART 91—CONSOLIDATED SUBMISSIONS FOR COMMUNITY PLANNING AND
DEVELOPMENT PROGRAMS**

5. The authority citation for part 91 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3601-19, 5301-5315, 11331-11388, 12701-12711, 12741-12756, and 12901-12912.

6. Revise the undesignated introductory matter in § 91.5 to read as follows.

§ 91.5 Definitions.

The terms Affirmatively Furthering Fair Housing, elderly person, and HUD are defined in 24 CFR part 5.

* * * * *

7. Amend § 91.100 to revise paragraphs (a)(1), (c)(1), and remove (e) to read as follows:

§ 91.100 Consultation; local governments.

(a) *General.* (1) When preparing the consolidated plan, the jurisdiction shall consult with other public and private agencies that provide assisted housing, health services, and social services (including those focusing on services to children, elderly persons, persons with disabilities, persons with HIV/AIDS and their families, homeless persons), community-based and regionally-based organizations that represent protected class members, and organizations that enforce fair housing laws. When preparing the consolidated plan, the jurisdiction shall also consult with public and private organizations. Commencing with consolidated plans submitted on or after January 1, 2018, such consultations shall include broadband internet service providers, organizations engaged in narrowing the digital divide, agencies whose primary responsibilities include the management of flood prone areas, public land or water resources, and emergency management agencies.

* * * * *

(c) *Public housing agencies (PHAs).* (1) The jurisdiction shall consult with local PHAs operating in the jurisdiction regarding consideration of public housing needs, planned programs and activities, strategies for affirmatively furthering fair housing, and proposed actions to affirmatively further fair housing in the consolidated plan. This consultation will help provide a better basis for the certification by the authorized official that the PHA Plan is consistent with the consolidated plan and the local government's description of its strategy for affirmatively furthering fair housing and the manner in which it will address the needs of public housing and, where necessary, the manner in which it will provide financial or other assistance to a troubled PHA to improve the PHA's operations and remove the designation of troubled, as well as

obtaining PHA input on addressing fair housing issues in the Public Housing and Housing Choice Voucher programs.

* * * * *

8. Amend § 91.105 by:

- a. Revising paragraphs (a)(2) and (a)(2)(i) – (a)(2)(iii);
- b. Revising heading and introductory text of paragraph (b);
- c. Revising paragraph (b)(1)(i);
- d. Revising paragraphs (b)(2) – (5);
- e. Revising paragraph (c);
- f. Revising paragraph (e)(1)(i);
- g. Removing paragraph (e)(1)(iii);
- h. Revising paragraphs (g) – (j); and
- i. Removing paragraph (l),

All to read as follows:

§ 91.105 Citizen participation plan; local governments.

(a) * * *

(2) *Encouragement of citizen participation.* (i) The citizen participation plan must provide for and encourage citizens to participate in the development of the consolidated plan, any substantial amendment to the consolidated plan, and the performance report. These requirements are designed especially to encourage participation by low- and moderate-income

persons, particularly those persons living in areas designated by the jurisdiction as a revitalization area or in a slum and blighted area and in areas where CDBG funds are proposed to be used, and by residents of predominantly low- and moderate-income neighborhoods, as defined by the jurisdiction. A jurisdiction must take appropriate actions to encourage the participation of all its citizens, including minorities and non-English speaking persons, as provided in paragraph (a)(4) of this section, as well as persons with disabilities.

(ii) The jurisdiction shall encourage the participation of local and regional institutions, Continuums of Care, and other organizations (including businesses, developers, nonprofit organizations, philanthropic organizations, and community-based and faith-based organizations) in the process of developing and implementing the consolidated plan.

(iii) The jurisdiction shall encourage, in conjunction with consultation with public housing agencies, the participation of residents of public and assisted housing developments (including any resident advisory boards, resident councils, and resident management corporations) in the process of developing and implementing the consolidated plan, along with other low-income residents of targeted revitalization areas in which the developments are located. The jurisdictions shall make an effort to provide information to the PHA about affirmatively furthering fair housing strategy, and consolidated plan activities related to its developments and surrounding communities so that the PHA can make this information available at the annual public hearing(s) required for the PHA Plan.

(iv) * * *

* * * * *

(b) *Development of the consolidated plan.* The citizen participation plan must include the following minimum requirements for the development of the consolidated plan:

(1)(i) The citizen participation plan must require that at or as soon as feasible after the start of the public participation process the jurisdiction will make the HUD-provided data and any other supplemental information the jurisdiction plans to incorporate into its consolidated plan available to its residents, public agencies, and other interested parties. The jurisdiction may make the HUD-provided data available to the public by cross-referencing to the data on HUD's website.

(ii) * * *

(iii) * * *

(2) The citizen participation plan must require the jurisdiction to publish the proposed consolidated plan in a manner that affords its residents, public agencies, and other interested parties a reasonable opportunity to examine its content and to submit comments. The citizen participation plan must set forth how the jurisdiction will publish the proposed consolidated plan and give reasonable opportunity to examine each document's content. The requirement for publishing may be met by publishing a summary of each document in one or more newspapers of general circulation, and by making copies of each document available on the Internet, on the jurisdiction's official government website, and as well at libraries, government offices, and public places. The summary must describe the content and purpose of the consolidated plan and must include a list of the locations where copies of the entire proposed document may be

examined. In addition, the jurisdiction must provide a reasonable number of free copies of the plan to residents and groups that request it.

(3) The citizen participation plan must provide for at least one public hearing during the development of the consolidated plan. See paragraph (e) of this section for public hearing requirements, generally.

(4) The citizen participation plan must provide a period, not less than 30 calendar days, to receive comments from residents of the community on the consolidated plan.

(5) The citizen participation plan shall require the jurisdiction to consider any comments or views of residents of the community received in writing, or orally at the public hearings, in preparing the final consolidated plan. A summary of these comments or views, and a summary of any comments or views not accepted and the reasons why, shall be attached to the final consolidated plan.

(c) *Consolidated plan amendments.* (1) The citizen participation plan must specify the criteria the jurisdiction will use for determining what changes in the jurisdiction's planned or actual activities constitute a substantial amendment to the consolidated plan. (See § 91.505.) The citizen participation plan must include, among the criteria for a substantial amendment, changes in the use of CDBG funds from one eligible activity to another.

(2) The citizen participation plan must provide community residents with reasonable notice and an opportunity to comment on substantial amendments to the consolidated plan. The citizen participation plan must state how reasonable notice and an opportunity to comment will be given. The citizen participation plan must provide a period, of not less than 30 calendar days,

to receive comments on the consolidated plan substantial amendment before the consolidated plan substantial amendment is implemented is submitted to HUD for review.

(3) The citizen participation plan shall require the jurisdiction to consider any comments or views of residents of the community received in writing, or orally at public hearings, if any, in preparing the substantial amendment of the consolidated plan. A summary of these comments or views, and a summary of any comments or views not accepted and the reasons why, shall be attached to the substantial amendment of the consolidated plan.

* * * * *

(e) *Public hearings*—(1)(i). *Consolidated plan*. The citizen participation plan must provide for at least two public hearings per year to obtain residents' views and to respond to proposals and questions, to be conducted at a minimum of two different stages of the program year. Together, the hearings must address housing and community development needs, development of proposed activities, proposed strategies and actions for affirmatively furthering fair housing, and a review of program performance.

(ii) * * *

* * * * *

(g) *Availability to the public*. The citizen participation plan must provide that the consolidated plan as adopted, consolidated plan substantial amendments, and the performance report will be available to the public, including the availability of materials in a form accessible to persons with disabilities, upon request. The citizen participation plan must state how these documents will be available to the public.

(h) *Access to records.* The citizen participation plan must require the jurisdiction to provide residents of the community, public agencies, and other interested parties with reasonable and timely access to information and records relating to the jurisdiction's consolidated plan and use of assistance under the programs covered by this part during the preceding 5 years.

(i) *Technical assistance.* The citizen participation plan must provide for technical assistance to groups representative of persons of low- and moderate-income that request such assistance in developing proposals for funding assistance under any of the programs covered by the consolidated plan, with the level and type of assistance determined by the jurisdiction. The assistance need not include the provision of funds to the groups.

(j) *Complaints.* The citizen participation plan shall describe the jurisdiction's appropriate and practicable procedures to handle complaints from its residents related to the consolidated plan, amendments, revisions, and the performance report. At a minimum, the citizen participation plan shall require that the jurisdiction must provide a timely, substantive written response to every written resident complaint, within an established period of time (within 15 working days, where practicable, if the jurisdiction is a CDBG grant recipient).

* * * * *

9. Revise § 91.110 to read as follows:

§ 91.110 Consultation; States.

(a) When preparing the consolidated plan, the State shall consult with other public and private agencies that provide assisted housing (including any state housing agency administering

public housing), health services, and social and fair housing services (including those focusing on services to children, elderly persons, persons with disabilities, persons with HIV/AIDS and their families, and homeless persons) during preparation of the consolidated plan.

(b) When preparing the portions of the consolidated plan describing the State's homeless strategy and the resources available to address the needs of homeless persons (particularly chronically homeless individuals and families, families with children, veterans and their families, and unaccompanied youth) and persons at risk of homelessness, the State must consult with:

(1) Each Continuum of Care within the state;

(2) Public and private agencies that address housing, health, social services, victim services, employment, or education needs of low-income individuals and families; of homeless individuals and families, including homeless veterans; youth; and/or of other persons with special needs;

(3) Publicly funded institutions and systems of care that may discharge persons into homelessness (such as health-care facilities, mental health facilities, foster care and other youth facilities, and corrections programs and institutions); and

(4) Business and civic leaders.

(c) When preparing the portion of its consolidated plan concerning lead-based paint hazards, the State shall consult with state or local health and child welfare agencies and examine existing data related to lead-based paint hazards and poisonings, including health department data on the addresses of housing units in which children have been identified as lead-poisoned.

(d) When preparing its method of distribution of assistance under the CDBG program, a State must consult with local governments in nonentitlement areas of the state.

(e) The State must also consult with each Continuum of Care within the state in determining how to allocate its ESG grant for eligible activities; developing the performance standards for, and evaluating the outcomes of, projects and activities assisted by ESG funds; and developing funding, policies, and procedures for the operation and administration of the HMIS.

10. Amend § 91.115 by:

- a. Revising paragraph (a)(2)(i) and (ii);
- b. Revising the heading and introductory text of paragraph (b);
- c. Revising paragraph (b);
- d. Redesignating paragraph (c)(1)(i) as paragraph (c)(1) and removing paragraph (c)(1)(ii);
- e. Revising paragraphs (c)(2) and (c)(3); and
- f. Revising paragraphs (f) – (h),

all to read as follows:

§ 91.115 Citizen participation plan; States.

(a) * * *

(2) *Encouragement of citizen participation.* (i) The citizen participation plan must provide for and encourage citizens to participate in the development of the consolidated plan, any substantial amendments to the consolidated plan, and the performance report. These

requirements are designed especially to encourage participation by low- and moderate-income persons, particularly those living in slum and blighted areas and in areas where CDBG funds are proposed to be used and by residents of predominantly low- and moderate-income neighborhoods. A State must take appropriate actions to encourage the participation of all its residents, including minorities and non-English speaking persons, as provided in paragraph (a)(4) of this section, as well as persons with disabilities.

(ii) The State shall encourage the participation of Statewide and regional institutions, Continuums of Care, and other organizations (including businesses, developers, nonprofit organizations, philanthropic organizations, and community-based and faith-based organizations) that are involved with or affected by the programs or activities covered by the consolidated plan in the process of developing and implementing the consolidated plan. Commencing with consolidated plans submitted in or after January 1, 2018, the State shall also encourage the participation of public and private organizations, including broadband internet service providers, organizations engaged in narrowing the digital divide, agencies whose primary responsibilities include the management of flood prone areas, public land or water resources, and emergency management agencies in the process of developing the consolidated plan.

(iii) * * *

* * * * *

(b) Development of the consolidated plan. The citizen participation plan must include the following minimum requirements for the development of the consolidated plan:

(1) The citizen participation plan must require that, before the State adopts a consolidated plan, the State will make available to its residents, public agencies, and other interested parties information that includes the amount of assistance the State expects to receive and the range of activities that may be undertaken, including the estimated amount that will benefit persons of low- and moderate-income and the plans to minimize displacement of persons and to assist any persons displaced. The citizen participation plan must state when and how the State will make this information available.

(2) The citizen participation plan must require the State to publish the proposed consolidated plan in a manner that affords residents, units of general local governments, public agencies, and other interested parties a reasonable opportunity to examine the document's content and to submit comments. The citizen participation plan must set forth how the State will make publicly available the proposed consolidated plan and give reasonable opportunity to examine each document's content. To ensure that the consolidated plan and the PHA plan are informed by meaningful community participation, program participants should employ communications means designed to reach the broadest audience. Such communications may be met by publishing a summary of each document in one or more newspapers of general circulation, and by making copies of each document available on the Internet, on the grantee's official government Web site, and as well at libraries, government offices, and public places. The summary must describe the content and purpose of the consolidated plan, and must include a list of the locations where copies of the entire proposed document(s) may be examined. In addition, the State must provide

a reasonable number of free copies of the plan to its residents and groups that request a copy of the plan.

(3) The citizen participation plan must provide for at least one public hearing on housing and community development needs before the proposed consolidated plan is published for comment.

(i) The citizen participation plan must state how and when adequate advance notice of the hearing will be given to residents, with sufficient information published about the subject of the hearing to permit informed comment. (Publishing small print notices in the newspaper a few days before the hearing does not constitute adequate notice. Although HUD is not specifying the length of notice required, HUD would consider 2 weeks adequate.)

(ii) The citizen participation plan must provide that the hearing be held at a time and accessible location convenient to potential and actual beneficiaries, and with accommodation for persons with disabilities. The citizen participation plan must specify how it will meet these requirements.

(iii) The citizen participation plan must identify how the needs of non-English speaking residents will be met in the case of a public hearing where a significant number of non-English speaking residents can be reasonably expected to participate. (4) The citizen participation plan must provide a period, of not less than 30 calendar days, to receive comments from residents and units of general local government on the consolidated plan.

(5) The citizen participation plan shall require the State to consider any comments or views of its residents and units of general local government received in writing, or orally at the

public hearings, in preparing the final consolidated plan. A summary of these comments or views, and a summary of any comments or views not accepted and the reasons therefore, shall be attached to the final consolidated plan (as applicable).

(c) *Amendments*—(1) *Criteria for amendment to consolidated plan.* The citizen participation plan must specify the criteria the State will use for determining what changes in the State’s planned or actual activities constitute a substantial amendment to the consolidated plan. (See §91.505.) The citizen participation plan must include, among the criteria for a consolidated plan, substantial amendment changes in the method of distribution of such funds.

(2) The citizen participation plan must provide residents and units of general local government with reasonable notice and an opportunity to comment on consolidated plan substantial amendments. The citizen participation plan must state how reasonable notice and an opportunity to comment will be given. The citizen participation plan must provide a period, of not less than 30 calendar days, to receive comments on the consolidated plan substantial amendment before the consolidated plan substantial amendment is implemented.

(3) The citizen participation plan shall require the State to consider any comments or views of its residents and units of general local government received in writing, or orally at public hearings, if any, in preparing the substantial amendment of the consolidated plan. A summary of these comments or views, and a summary of any comments or views not accepted and the reasons why, shall be attached to the substantial amendment of the consolidated plan.

* * * * *

(f) *Availability to the public.* The citizen participation plan must provide that the consolidated plan as adopted, consolidated plan substantial amendments and the performance report will be available to the public, including the availability of materials in a form accessible to persons with disabilities, upon request. The citizen participation plan must state how these documents will be available to the public.

(g) *Access to records.* The citizen participation plan must require the State to provide its residents, public agencies, and other interested parties with reasonable and timely access to information and records relating to the State's consolidated plan and use of assistance under the programs covered by this part during the preceding 5 years.

(h) *Complaints.* The citizen participation plan shall describe the State's appropriate and practicable procedures to handle complaints from its residents related to the consolidated plan, consolidated plan amendments, and the performance report. At a minimum, the citizen participation plan shall require that the State must provide a timely, substantive written response to every written resident complaint, within an established period of time (within 15 working days, where practicable, if the State is a CDBG grant recipient).

* * * * *

11. Revise § 91.205(b)(2) to read as follows:

§ 91.205 Housing and homeless needs assessment.

* * * * *

(b) * * *

(2) For any of the income categories enumerated in paragraph (b)(1) of this section, to the extent that any racial or ethnic group has disproportionately greater need in comparison to the needs of that category as a whole, assessment of that specific need shall be included. For this purpose, disproportionately greater need exists when the percentage of persons in a category of need who are members of a particular racial or ethnic group in a category of need is at least 10 percentage points higher than the percentage of persons in the category as a whole.

* * * * *

§ 91.215 [Amended]

12. Amend § 91.215 by removing paragraph (a)(5).

§ 91.220 [Amended]

13. Amend § 91.220 by removing paragraph (k)(1) and redesignating paragraph (k)(2) as paragraph (k).

14. Revise § 91.225(a)(1) to read as follows:

§ 91.225 Certifications.

(a) * * *

(1) *Affirmatively furthering fair housing.* Each jurisdiction is required to submit a certification that it will affirmatively further fair housing. This includes certification that the grantee will affirmatively further fair housing, consistent with §§ 5.150 and 5.151 of this title.

* * * * *

15. Revise § 91.230 to read as follows:

§ 91.230 Monitoring.

The plan must describe the standards and procedures that the jurisdiction will use to monitor activities carried out in furtherance of the plan and will use to ensure long-term compliance with requirements of the programs involved, including civil rights related program requirements, minority business outreach, and the comprehensive planning requirements.

16. Amend § 91.235(c), by revising paragraphs (c)(1) and (c)(4) to read as follows:

§ 91.235 Special case; abbreviated consolidated plan.

* * * * *

(c) *What is an abbreviated plan?—(1) Assessment of needs, resources, and planned activities.* An abbreviated plan must contain sufficient information about needs, resources, and planned activities to address the needs to cover the type and amount of assistance anticipated to be funded by HUD.

(2) * * *

(3) * * *

(4) *Submissions, certifications, amendments, and performance reports.* An Insular Area grantee that submits an abbreviated consolidated plan under this section must comply with the submission, certification, amendment, and performance report requirements of 24 CFR 570.440.

This includes certification that the grantee will affirmatively further fair housing, consistent with §§ 5.150 and 5.151 of this title.

* * * * *

17. Revise § 91.305(b)(2) to read as follows:

§ 91.305 Housing and homeless needs assessment.

* * * * *

(b) * * *

(1) * * *

(2) For any of the income categories enumerated in paragraph (b)(1) of this section, to the extent that any racial or ethnic group has disproportionately greater need in comparison to the needs of that category as a whole, assessment of that specific need shall be included. For this purpose, disproportionately greater need exists when the percentage of persons in a category of need who are members of a particular racial or ethnic group in a category of need is at least 10 percentage points higher than the percentage of persons in the category as a whole.

* * * * *

[§ 91.315 Amended]

18. Amend § 91.315 by removing paragraph (a)(5).

[§ 91.320 Amended]

19. Amend § 91.320(j) by removing paragraph (j)(1) and redesignating paragraph (j)(2) as (j).

20. Revise § 91.325(a)(1) to read as follows:

§ 91.325 Certifications.

(a) * * *

(1) Affirmatively furthering fair housing. Each State is required to submit a certification that the grantee will affirmatively further fair housing, consistent with §§ 5.150 and 5.151 of this title.

* * * * *

21. Revise § 91.415 to read as follows:

§ 91.415 Strategic plan.

Strategies and priority needs must be described in the consolidated plan, in accordance with the provisions of § 91.215, for the entire consortium. The consortium is not required to submit a nonhousing Community Development Plan; however, if the consortium includes CDBG entitlement communities, the consolidated plan must include the nonhousing Community Development Plans of the CDBG entitlement community members of the consortium. The consortium must set forth its priorities for allocating housing (including CDBG and ESG, where applicable) resources geographically within the consortium, describing how the consolidated plan will address the needs identified (in accordance with § 91.405), describing the reasons for

the consortium's allocation priorities, and identifying any obstacles there are to addressing underserved needs.

22. Revise § 91.420(b) to read as follows:

§ 91.420 Action plan.

* * * * *

(b) Description of resources and activities. The action plan must describe the resources to be used and activities to be undertaken to pursue its strategic plan. The consolidated plan must provide this description for all resources and activities within the entire consortium as a whole, as well as a description for each individual community that is a member of the consortium.

23. Revise § 91.425(a)(1)(i) to read as follows:

§ 91.425 Certifications.

(a) * * *

(1) General—(i) Affirmatively furthering fair housing. Each consortium must submit a certification that it will affirmatively further fair housing, consistent with §§ 5.150 and 5.151 of this title.

* * * * *

§ 91.505 [Amended].

24. Amend § 91.505 by removing paragraph (d).

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

25. The authority citation for part 92 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 12 U.S.C. 1701x and 4568.

26. Revise § 92.104 to read as follows:

§ 92.104 Submission of a consolidated plan.

A jurisdiction that has not submitted a consolidated plan to HUD must submit to HUD, not later than 90 calendar days after providing notification under § 92.103, a consolidated plan in accordance with 24 CFR part 91.

27. Amend § 92.508 by revising paragraph (a)(7)(i)(C) to read as follows:

§ 92.508 Recordkeeping.

(a) * * *

(7) * * *

(i) * * *

(C) Documentation that the participating jurisdiction submitted a certification that it will affirmatively further fair housing, consistent with §§ 5.150 and 5.151 of this title.

* * * * *

PART 570—COMMUNITY DEVELOPMENT BLOCK GRANTS

28. The authority citation for part 570 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x-1; 42 U.S.C. 3535(d) and 5301-5320.

29. Amend § 570.3 to revise the introductory text to read as follows:

§ 570.3 Definitions.

The terms Affirmatively Furthering Fair Housing, HUD, and Secretary are defined in 24 CFR part 5. All of the following definitions in this section that rely on data from the United States Bureau of the Census shall rely upon the data available from the latest decennial census or the American Community Survey.

* * * * *

30. Amend § 570.205(a)(4) by:

- a. Removing paragraph (vii); and,
- b. Redesignating paragraph (viii) as (vii);

to read as follows:

§ 570.205 Eligible planning, urban environmental design and policy-planning-management-capacity building activities.

(a) * * *

(4) * * *

(vii) Developing an inventory of properties with known or suspected environmental contamination.

* * * * *

31. Amend § 570.44 by:

- a. revising the introductory text in paragraph (b);
- b. revising the heading for paragraph (c);
- c. revising paragraph (b)(2);
- d. revising paragraph (b)(3);
- e. revising paragraph (c)(1);
- f. revising paragraph (d); and,
- g. revising paragraph (e);

all to read as follows:

§ 570.441 Citizen participation—insular areas.

* * * * *

(b) Citizen participation plan. The insular area jurisdiction must develop and follow a detailed citizen participation plan and must make the plan public. The plan must be completed and available before the statement for assistance is submitted to HUD, and the jurisdiction must certify that it is following the plan. The plan must set forth the jurisdiction's policies and procedures for:

* * * * *

(2) Providing technical assistance to groups that are representative of persons of low- and moderate-income that request assistance in developing proposals. The level and type of assistance to be provided is at the discretion of the jurisdiction. The assistance need not include the provision of funds to the groups;

(3) Holding a minimum of two public hearings for the purpose of obtaining residents' views and formulating or responding to proposals and questions. Each public hearing must be conducted at a different stage of the CDBG program year. Together, the hearings must address, community development and housing needs, development of proposed activities, and a review of program performance. There must be reasonable notice of the hearings, and the hearings must be held at times and accessible locations convenient to potential or actual beneficiaries, with reasonable accommodations, including materials in accessible formats, for persons with disabilities. The jurisdiction must specify in its citizen participation plan how it will meet the requirement for hearings at times and accessible locations convenient to potential or actual beneficiaries;

* * * * *

(c) Publication of proposed statement.

(1) The insular area jurisdiction shall publish a proposed statement consisting of the proposed community development activities and community development objectives (as applicable) in order to afford affected residents an opportunity to:

* * * * *

(d) Preparation of the final statement. An insular area jurisdiction must prepare a final statement. In the preparation of the final statement, the jurisdiction shall consider comments and views received relating to the proposed document and may, if appropriate, modify the final document. The final statement shall be made available to the public. The final statement shall include the community development objectives, projected use of funds, and the community development activities.

(e) Program amendments. To assure citizen participation on program amendments to final statements, the insular area grantee shall:

(1) Furnish its residents with information concerning the amendment to the consolidated plan;

(2) Hold one or more public hearings to obtain the views of residents on the proposed amendment to the consolidated plan;

(3) Develop and publish the proposed amendment to the consolidated plan in such a manner as to afford affected residents an opportunity to examine the contents, and to submit comments on the proposed amendment to the consolidated plan;

(4) Consider any comments and views expressed by residents on the proposed amendment to the consolidated plan, and, if the grantee finds it appropriate, make modifications accordingly; and

(5) Make the final amendment to the community development program available to the public before its submission to HUD.

* * * * *

32. Revise § 570.487(b) to read as follows:

§ 570.487 Other applicable laws and related program requirements.

* * * * *

(b) Affirmatively furthering fair housing. Each State is required to submit a certification that it will affirmatively further fair housing, consistent with §§ 5.150 and 5.151 of this title.

Each unit of general local government is required to submit a certification that it will affirmatively further fair housing, consistent with §§ 5.150 and 5.151 of this title.

* * * * *

33. Amend § 570.490 by revising paragraphs (a)(1) and (b) to read as follows:

§ 570.490 Recordkeeping requirements.

(a) * * *

(1) The State shall establish and maintain such records as may be necessary to facilitate review and audit by HUD of the State's administration of CDBG funds under § 570.493. The content of records maintained by the State shall be as jointly agreed upon by HUD and the States and sufficient to enable HUD to make the determinations described at § 570.493. For fair housing and equal opportunity purposes, whereas such data is already being collected and where applicable, such records shall include data on the racial, ethnic, and gender characteristics of persons who are applicants for, participants in, or beneficiaries of the program. The records shall also permit audit of the States in accordance with 24 CFR part 85.

* * *

(b) Unit of general local government's record. The State shall establish recordkeeping requirements for units of general local government receiving CDBG funds that are sufficient to facilitate reviews and audits of such units of general local government under §§ 570.492 and 570.493. For fair housing and equal opportunity purposes, whereas such data is already being collected and where applicable, such records shall include data on the racial, ethnic, and gender characteristics of persons who are applicants for, participants in, or beneficiaries of the program.

* * * * *

34. In § 570.506, revise paragraph (g)(1) to read as follows:

§ 570.506 Records to be maintained.

* * * * *

(g) ***

(1) Documentation that the recipient submitted a certification that it will affirmatively further fair housing, consistent with §§ 5.150 and 5.151 of this title.

35. Revise § 570.601(a)(2) to read as follows:

§ 570.601 Public Law 88-352 and Public Law 90-284; affirmatively furthering fair housing;

Executive Order 11063.

(a) * * *

(2) Public Law 90-284, which is the Fair Housing Act (42 U.S.C. 3601-3620). In accordance with the Fair Housing Act, the Secretary requires that grantees administer all programs and activities related to housing and urban development in a manner to affirmatively further the policies of the Fair Housing Act. Each community receiving a grant under subpart D of this part, shall submit a certification that it will affirmatively further fair housing, consistent with §§ 5.150 and 5.151 of this title.

* * * * *

PART 574—HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS

36. The authority citation for part 574 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x-1; 42 U.S.C. 3535(d) and 5301-5320.

37. In § 574.530. revise paragraph (b) to read as follows:

§ 574.530 Recordkeeping.

* * * * *

(b) Documentation that the grantee submitted a certification that it will affirmatively further fair housing, consistent with §§ 5.150 and 5.151 of this title.

* * * * *

PART 576—EMERGENCY SOLUTIONS GRANTS PROGRAM

38. The authority citation for part 576 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701 x-1; 42 U.S.C. 11371 *et seq.*, 42 U.S.C. 3535(d).

39. Amend § 576.500 by revising paragraph (s)(1)(ii) to read as follows:

§ 576.500 Recordkeeping and reporting requirements.

* * * * *

(s) * * *

(1) ***

(ii) Documentation that the recipient submitted a certification that it will affirmatively further fair housing, consistent with §§ 5.150 and 5.151 of this title.

* * * * *

PART 903—PUBLIC HOUSING AGENCY PLANS

40. The authority citation for part 903 continues to read as follows:

Authority: 42 U.S.C. 1437c; 42 U.S.C. 1437c-1; Pub. L. 110-289; 42 U.S.C. 3535d.

41. Amend § 903.7 by revising paragraphs (a)(1)(iii) and (o) to read as follows:

§ 903.7 What information must a PHA provide in the Annual Plan?

(a) * * *

(1) * * *

(iii) Households with individuals with disabilities and households of various races and ethnic groups residing in the jurisdiction or on the waiting list.

* * * * *

(o) Civil rights certification.

(1) The PHA must certify that it will carry out its plan in conformity with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-2000d-4), the Fair Housing Act (42 U.S.C. 3601-19), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), and other applicable Federal civil right laws, and that it will affirmatively further fair housing, consistent with §§ 5.150 and 5.151 of this title.

(2) The certification is applicable to both the 5-Year Plan and the Annual Plan, including any plan incorporated therein.

* * * * *

42. Revise § 903.15 to read as follows:

§ 903.15 What is the relationship of the public housing agency plans to the Consolidated Plan and a PHA's Fair Housing Requirements?

(a) The PHA must ensure that the Annual Plan is consistent with any applicable Consolidated Plan for the jurisdiction in which the PHA is located.

(1) The PHA must submit a certification by the appropriate State or local officials that the Annual Plan is consistent with the Consolidated Plan and include a description of the manner in which the applicable plan contents are consistent with the Consolidated Plans.

(2) For State agencies that are PHAs, the applicable Consolidated Plan is the State Consolidated Plan.

(b) A PHA may request to change its fiscal year to better coordinate its planning with the planning done under the Consolidated Plan process, by the State or local officials, as applicable.

43. Amend § 903.23 by revising paragraph (f) to read as follows:

§ 903.23 What is the process by which HUD reviews, approves, or disapproves an Annual Plan?

* * * * *

(f) Recordkeeping. PHAs must maintain records reflecting a certification that the PHA will affirmatively further fair housing, consistent with §§ 5.150 and 5.151 of this title.

Date: July 23, 2020

/s/
Benjamin S. Carson, Sr.,
Secretary.

[BILLING CODE 4210-67]