

May 2, 2025

Regulations Division
Office of General Counsel
US Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410-0050

RE: Docket No. FR-6519-I-01; RIN: 2529-AB08 Affirmatively Furthering Fair Housing

Dear Office of General Counsel:

Please accept the following comments on the proposed new Affirmatively Furthering Fair Housing (AFFH) regulation, as described in FR-6519-I-01. Regional Housing Legal Services (RHLS) is a non-profit law firm that represents community-based non-profit organizations that develop affordable housing projects throughout Pennsylvania. Since 1973, we have assisted in the completion of nearly 10,822 units of affordable housing. We also engage in policy analysis and advocacy that focuses on critical housing, economic development, neighborhood revitalization and utility issues for the benefit of lower-income Pennsylvanians.

RHLS is strongly opposed to the proposed new AFFH Interim Final Rule (IFR). We see it as an abdication of the Department of Housing and Urban Development's (HUD) statutory duty to affirmatively further the purposes of the Fair Housing Act and to ensure that its grantees do so as well. HUD also risks violating the Administrative Procedure Act by disregarding decades of legal precedent and failing to reasonably consider the substantial evidence and data supporting the necessity of robust AFFH regulations, as required for reasoned agency decision-making. We urge HUD to withdraw the proposed IFR and maintain the 2021 IFR in its current form.

I. Decades of Legislative History and Case Law Require HUD to Actively Address Racial Segregation

From the beginning of our history, racial segregation in America has been a public-private partnership. It was the creation of white property owners with the support and legislative authority of the federal, state, and local governments. The federal government created segregated public housing and standards for redlining communities. State and local governments passed "black codes" and zoning laws and legitimized restrictive covenants to prevent whites and people of color from living together.

When Congress passed the Fair Housing Act in 1968 (Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601–3619), they were well-aware of the history of racial segregation. They hoped that outlawing discrimination would solve the problem but were wise enough to include language in the law directing HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter". (42 U.S.C. 3608(e)(5)).

Congress reiterated the imperative of section 3608(e)(5) when it enacted the Housing and Community Development Act of 1974 (42 U.S.C. ch. 69 § 5301 et seq), the National Affordable Housing Act of 1990 (42 U.S.C. 12704 et seq.), and the Quality Housing and Work Responsibility Act of 1998 (42 U.S.C. 1437 et seq.). Since the enactment of these laws, HUD's authority and obligation to administer its programs in a manner affirmatively to further fair housing has been consistently interpreted by courts to require that HUD and its grantees take active steps to address segregation, not merely avoid discrimination or simply certify compliance. (see *NAACP v. HUD* (1st Cir. 1987) (holding that "affirmatively furthering" imposes an obligation to "do more than simply refrain from discriminating

(and from purposely aiding discrimination by others)"); *Otero v. NYCHA*, (2d Cir. 1973) (AFFH requires action to create integrated housing patterns and prevent increased segregation); *Shannon v. HUD*, (3d Cir. 1970) (HUD must use racial and socioeconomic data to make informed, non-segregative decisions); *Trafficante v. Metro. Life Ins. Co.*, (1972) (Congress intended the FHA to promote integrated living patterns); *Langlois v. Abington Hous. Auth.*, (1st Cir. 2000) (local housing authorities must administer programs consistent with AFFH); *U.S. ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, (S.D.N.Y. Feb. 24, 2009) (grantees cannot falsely certify AFFH compliance while ignoring segregation (demonstrating the ineffectiveness of self-certification)). In response, HUD has issued AFFH regulations to fulfill its statutory obligation under the Fair Housing Act to administer its programs in a manner that affirmatively furthers fair housing. This includes ensuring that recipients of HUD funding comply with their own obligations to promote fair housing, thereby advancing the Act's goals of eliminating discrimination and fostering inclusive communities.

This remains true even after the Supreme Court's recent ruling in *Loper Bright Enterprises v. Raimondo* (603 U.S. 369 (2024)). *Loper Bright* does not say an agency may not give guidance on how to comply with a statute. It says that the court is not required to give deference to the agency's statutory interpretation. There is no conflict between *Loper Bright* and HUD issuing guidance for recipients. HUD's prior AFFH rules simply set a framework for recipients to use in showing that they have, indeed, affirmatively furthered fair housing with federal funds in accordance with the mandate of the Fair Housing Act.

However, HUD's 2025 IFR ignores decades of legislative history and case law, proposing a return to what it calls the "original understanding" of AFFH certification prior to 1994, requiring only that grantees self-certify they are taking "any action rationally related" to promoting fair housing. As shown above, a significant number of pre-1994 cases lay out HUD's obligation in this area. HUD's retreat from providing guidance and accountability not only violates its statutory obligation, but also undermines the framework essential to enforcing that obligation and leaves localities without a clear, consistent structure for planning and compliance.

The need for such guidance was affirmed by the Third Circuit in *Shannon v. United States Dept. of Housing & Urban Dev.*, 436 F. 2d 809 (3d Cir. 1970) shortly after the Act's passage. At issue in *Shannon* was whether an apartment building developed under the federal 221(d)(3) loan guarantee program administered by HUD was sited so as to affirmatively further fair housing. The plaintiffs claimed that it was not and further claimed that "HUD had no procedures for consideration of and in fact did not consider [the location of the building's] effect on racial concentration in that neighborhood or in the City of Philadelphia as a whole". (Id. at 812) The court concurred, holding that "the Agency must utilize some institutionalized method whereby, in considering site selection or type selection, it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts." (Id. at 821).

In 1989, the court in *NAACP, Boston Chapter v. Kemp*, 721 F. Supp. 361 (D. Mass. 1989)(on remand) found HUD to have violated the mandate of section 3608(e)(5) by "[f]ailing to promulgate regulations or guidelines which adequately set forth standards for HUD's administration and recipients' use of funds under HUD programs". (Id. at 366) As stated in *Shannon* and reiterated in *NAACP, Boston Chapter*, guidance to recipients on affirmatively furthering fair housing is not only permissible, it is required.

In 2015, recognizing that the AFFH requirement needed to be adequately enforced, HUD issued a revised AFFH Rule requiring grantees to take meaningful action to address longstanding segregation and effectuate the Fair Housing Act's purposes. That rule established a process to ensure grantees identified local fair housing problems and committed to a plan to correct them, while also respecting the flexibility needed to respond to local conditions.

Since then, the assessments and reporting processes have been a valuable tool to aid local decision-making and enable more targeted and efficient community investment.

Critics have argued that the AFFH rule is little more than a costly, perfunctory, box-checking exercise lacking real impact. That may be true for some, or even many, grantees. But given how frequently the IFR has been revised over the past decade, there has not been sufficient time to evaluate its effectiveness, making it premature to claim it has failed when it has never been given a stable opportunity to succeed.

II. The Interim Final Rule is Arbitrary, Capricious, and Contrary to Law

The Administrative Procedures Act (APA) requires a reviewing court to “hold unlawful and set aside agency action” found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U. S. C. §706(2)(A). The 2025 IFR proposes to return to what it describes as the “original understanding” of the AFFH certification prior to 1994, requiring only that grantees self-certify that they are taking “any action rationally related” to promote fair housing. This “original understanding” both misunderstands and ignores decades of legislative history and case law that insists on guidance from HUD, and substantially weakens the accountability structure that gives meaning to that obligation. The IFR therefore, is not in accordance with law.

Further, the IFR is arbitrary and capricious because HUD is ignoring decades of research, evidence, and public comments, that relying on a grantee’s self-certification to declare that grantee in compliance with AFFH requirements is insufficient, as explained above. As the U.S. Supreme Court recently described, “[o]ur well-worn arbitrary-and-capricious standard ensures that an administrative agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” (*FDA v. Wages & White Lion Invs., LLC*, 604 U.S. ___, ___ (2025) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

III. Grantee Self-Certification Alone is Proven to be Insufficient to Implement AFFH

As stated above, HUD’s authority, and obligation, to administer its programs in a manner affirmatively to further fair housing is firmly rooted in the Fair Housing Act, repeatedly reaffirmed by Congress, and consistently interpreted by courts to require that HUD and its grantees take active steps to address segregation, not merely avoid discrimination or simply certify compliance.

Accordingly, HUD must set forth the rules of the game then ensure that recipients follow them. HUD must continue to give such guidance not only for the benefit of recipients, but so that HUD, as the administering agency, complies with its statutory obligations. Further, as it is HUD’s motivation to root out fraud, waste, and abuse, maintaining AFFH guidance and oversight ensures there are standards against which to determine if the funding is being spent efficiently and without waste. Without standards there is no way to determine waste or abuse. As HUD is aware, recipients in the past have certified compliance when, in fact, they have not taken sufficient steps to affirmatively further fair housing.¹ Reviewing applications for and monitoring the use of federal funding are the primary roles of

¹ See, e. g., *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009)(In 2006, the regulatory compliance framework required of grantees was in fact more robust than what HUD is currently proposing, requiring both self-certification *and* an Analysis of Impediments (AI) report. The court found that the county falsely certified compliance while failing to meaningfully analyze race in its AI. Even then, the system failed due

federal agencies, including HUD. Self-certification of compliance by recipients is simply not sufficient. HUD must monitor recipients' compliance with the law according to clearly articulated standards. Without a clear standard of what activities are compliant, it is impossible to establish fraud, waste, or abuse.

Moreover, strong AFFH rules not only promote more deliberate and effective policymaking at the local level but also protect jurisdictions from legal exposure. When localities certify compliance without a concrete plan or meaningful action, they are more vulnerable to liability under the False Claims Act, as plaintiffs can more easily demonstrate that such certifications were knowingly false.² Robust AFFH requirements can thus help insulate jurisdictions from costly litigation and encourage genuine, proactive efforts to expand opportunity.

IV. HUD Failed to Consider the Successful Uses of the Assessment Tool and Assessment of Fair Housing Process

HUD's decision to require only that grantees take "any action rationally related" to promoting fair housing runs counter to the evidence before the agency and the practical experience of state and local jurisdictions. HUD failed to reference, let alone discuss, the many jurisdictions that had successfully implemented the AFFH process using the Assessment Tools. The AFFH assessments and reporting processes support local decision-making and enable more targeted and efficient community investment. For example, using the 2015 AFFH rule, Philadelphia's 2017 Assessment of Fair Housing engaged tenants and community organizers, which led to achievements such as increasing legal representation for low-income renters in eviction court. This advocacy resulted in the City Council unanimously passing a right to counsel ordinance in 2019, which took effect in February 2022.

Another example under the 2015 AFFH rule, New Orleans engaged over 100 stakeholder organizations and residents, who raised concerns about unequal access to quality schools and neighborhood integration. This process led the city to make "location of proficient schools and school assignment policies" a high priority in its fair housing goal.³

V. The 2021 AFFH Rule Benefits Local Economies and Creates Access to Opportunity

By their nature, policies to affirmatively further fair housing are intended to provide economic benefit to racial minorities and other protected classes who were formerly excluded from full participation in the economy. Segregated neighborhoods are consistently associated with greater levels of poverty and less access to opportunity for Black and Latino residents, relative to White neighborhoods which tend to be more affluent and have higher levels of education.⁴

These stark disparities not only harm individuals and families but also constrain the broader economic potential of

to lack of oversight and HUD's acceptance of hollow certifications. HUD did not verify whether the AI meaningfully addressed race, which was central to the AFFH obligation. Yet the 2025 IFR proposes an even weaker framework, eliminating even the minimal planning requirement and relying solely on self-certification that they took "any action rationally related" to fair housing. This approach willfully ignores the failures exposed in Westchester and represents a reckless abdication of HUD's fair housing obligations.

² See e.g., *id.*

³ PolicyLink, *Understanding the New AFFH Interim Final Rule*, PolicyLink (Mar. 2025). Available at <https://www.policylink.org/our-work/housing/affh/explainer>.

⁴ Ellen, Ingrid Gould et al., "[The Significance of Segregation in the 21st Century](#)," *City & Community* 15, 1 (March 2016): 8–13 © 2016 American Sociological Association.

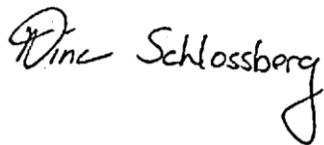
entire regions. Research has shown that desegregation leads to broad-based, area-wide economic growth. The Urban Institute's *The Cost of Segregation* highlights how economic and racial segregation depress regional incomes, limit workforce development, and strain municipal finances by increasing reliance on social services while reducing tax revenue. Segregated communities contribute less to the tax base due to lower wages and property values, forcing municipalities to raise taxes or cut services. The report estimates that if Chicago reduced its economic and Black-White segregation levels to the national median, the region's GDP could increase by approximately \$8 billion, leading to significant growth in tax revenue.⁵ Similarly, a PolicyLink analysis in 2015 found that by expanding housing access and reducing segregation, regional economies could experience significant financial gains.⁶

Implementing AFFH policies fosters economic integration and growth, expanding taxable income pools and reducing government spending on social services and public safety. Lowering segregation not only improves economic mobility but also stabilizes municipal budgets, allowing for greater investment in infrastructure, education, and community development, ultimately strengthening regional economies. Additionally, AFFH-driven investments in high-opportunity neighborhoods have the potential to reduce long-term federal expenditures on social safety net programs, as improved economic conditions lead to lower reliance on housing subsidies, food assistance, and emergency relief programs. To ensure the economic benefits of desegregation, HUD must provide clear guidance to recipients of federal funding along with the data and research local governments need to make informed decisions and create effective policies.

VI. Conclusion

There are many strong reasons for HUD to issue guidance on how recipients should show their compliance with the AFFH requirements, not least of which is that doing so is legally required by statute and case law. Practice and policy also support the need for guidance. Self-certification has failed to motivate recipients to affirmatively further fair housing and, in fact, has left them liable under the False Claims Act. Public policy demands effective actions to remediate past segregation and data analyses of such work shows positive social and economic outcomes. The 2025 IFR fails in all these regards and will do little to affirmatively further fair housing. We urge HUD to withdraw the IFR and leave the 2021 IFR in place.

Sincerely,



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⁵ Acs, G, Pendall, R, Treskon, M, and Khare, A, "[The Cost of Segregation: National Trends and the Case of Chicago, 1990–2010](#)", Urban Institute, 2017, see also, Huiping Li, Harrison Campbell and Steven Fernandez, "[Residential Segregation, Spatial Mismatch and Economic Growth across US Metropolitan Areas](#)", *Urban Studies* 50(13) 2642–2660, October 2013.

⁶ Rose, K and Miller TK, "[Healthy Communities of Opportunity: An Equity Blueprint to Address America's Housing Challenges](#)", PolicyLink and The Kresge Foundation, 2016.